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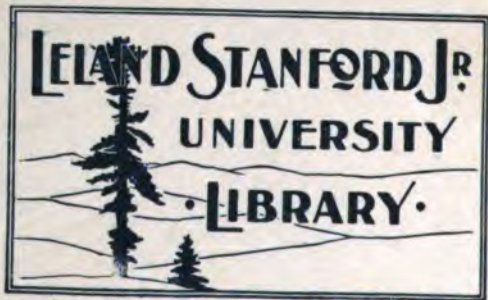
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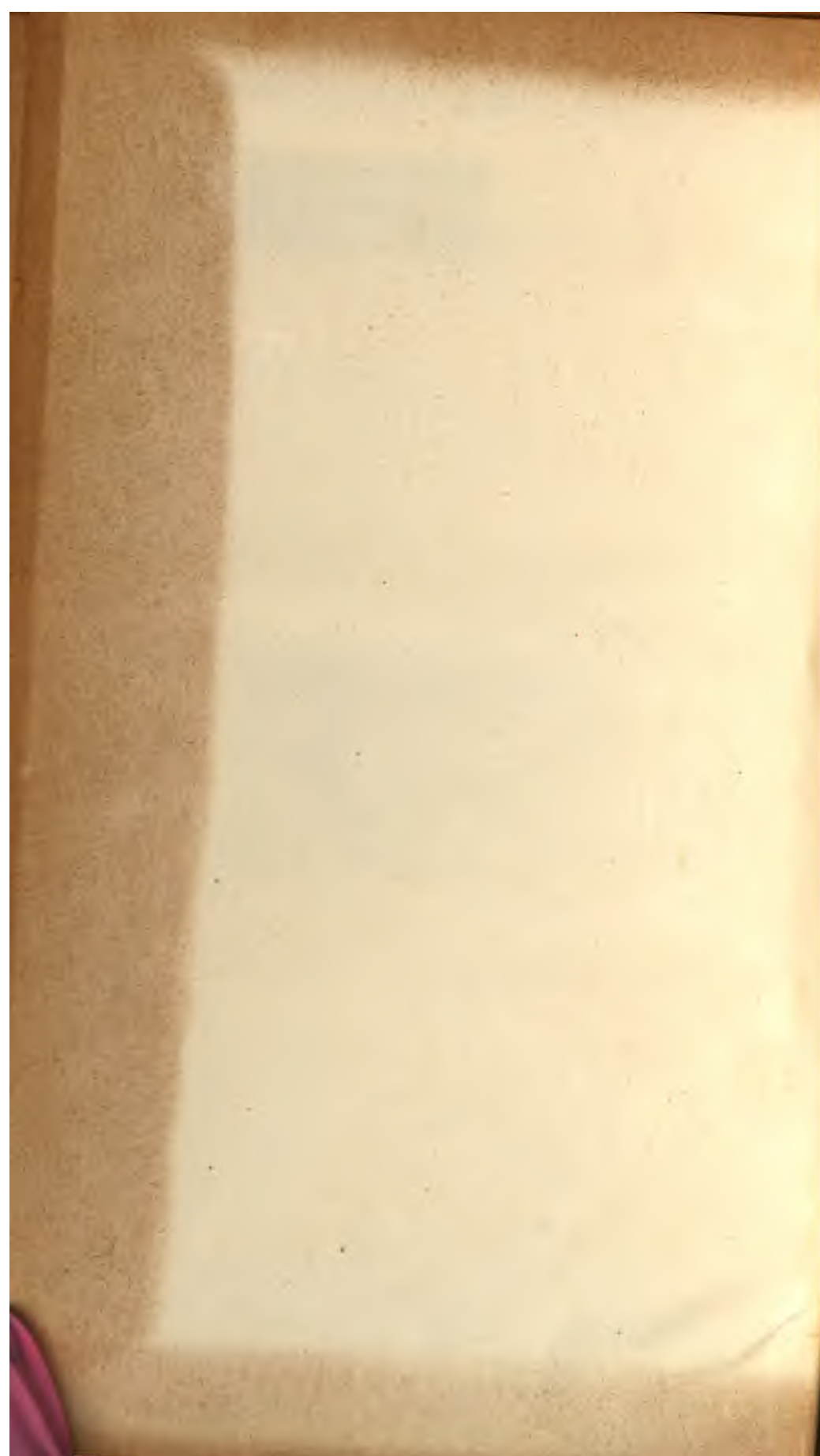
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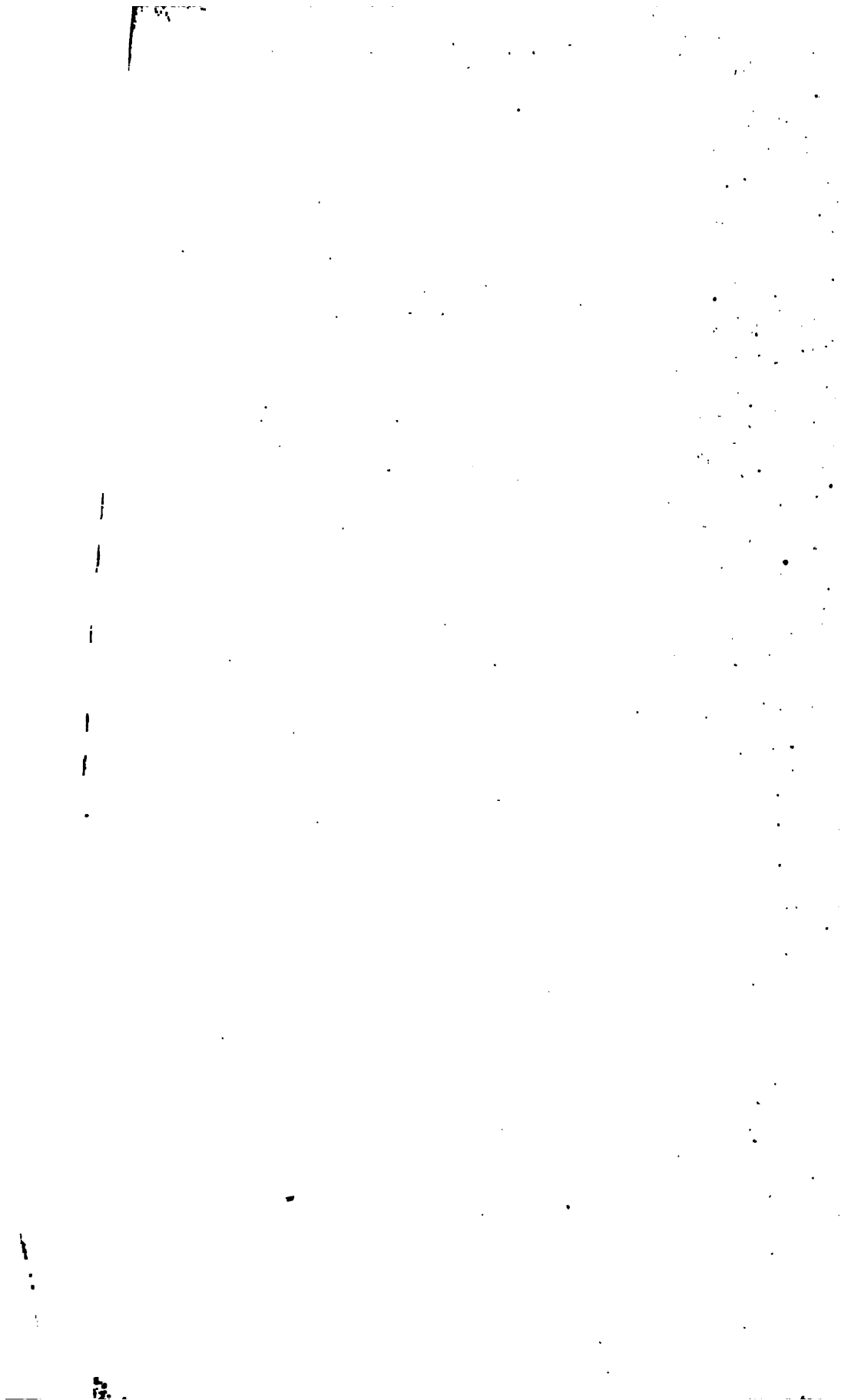


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AND UNRENDING INTEGRITY,

PLACE HIM AMONG THE MOST HONORABLE AND DISTINGUISHED OF OUR PROFESSION,

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ON THE

PRACTICE, PLEADING AND EVIDENCE IN CRIMINAL CASES

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# PREFACE

TO THE

AMERICAN EDITION.

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CRIMINAL jurisprudence, though less metaphysical than commercial law, presents an extensive, diversified and interesting field of inquiry. Every lawyer should be thoroughly acquainted, theoretically at least, if not practically, with the machinery of public prosecutions, the structure of indictments, the rules of criminal pleading and evidence, and the legal principles which are involved in all state trials.

Public attention throughout the christian world, has, of late years, been greatly aroused upon the subject of crime. The inquiry has been stimulated partly by the fearful prevalence of public offences, and partly by the philanthropic spirit of a highly civilized age. The causes of the increase of crime, the means of its suppression, and the reformation of offenders, have been thoroughly investigated and discussed. One of the consequences of this awakened public interest has been a great diminution in the number of capital punishments, compared with those of former times. Dr. Johnson, in the middle of the last century, alludes in one of his *Ramblers* to stated days, "when the prisons of the metropolis were emptied into the grave." And the fact is notorious, that there were formerly more criminals yearly executed in London alone—though it did not contain then, one half of its present population—than are now doomed to suffer throughout England. Pickpockets, shoplifters, and sheepstealers, along with more atrocious criminals, were indiscriminately carted off, by dozens and scores from Newgate to Tyburn; and the horrid procession was attended by thousands of the multitude, who from long habit, viewed, either with apathy or with mere feelings of curiosity, the legal massacre. But very few years



have elapsed since spectacles scarcely less revolting were common in the United States—when, upon occasion of every public execution, thousands of sober citizens left their quiet pursuits, and flocked, from many miles around, to witness and enjoy the last mortal agony of a poor fellow creature, doomed to suffer the extreme penalty of the law. These things are happily changed, capital punishment is now visited only upon the highest offences. The accused is no longer incarcerated for months in a noisome dungeon, deprived of the most ordinary comforts of life. He is entitled to a speedy trial, wherein every aid which eminent counsel can render him, is vouchsafed. And the final doom of the convicted, in place of the barbarous orgies which formerly disgraced it, has thrown around it the solemn and sacred guard of privacy, and the unostentatious ministrations of religion—those last consolations proffered by the attendant clergyman, breathing pardon and peace to the repentant sinner.

In the United States, the accused has no reason to complain of the rules of practice in criminal cases; for they are so narrow and artificial, as to afford many avenues of escape to the guilty. “Juries look astonished at finding a prisoner acquitted, whom they consider to be clearly guilty, merely on account of some technical subtlety which, to their unlearned judgments, must, no doubt, have appeared an absurdity. Prosecutors are discouraged from seeking to punish offenders, imagining that after expending their time and money in the endeavor, they will have the mortification of seeing the party acquitted from some cause entirely irrespective of the merits. And the offender himself, the hardened offender, acquitted on account of some ‘flaw in the indictment,’ as it is technically termed, exults in his success, laughs at his judges, his jury, his prosecutor, and quits the court more determined than ever to continue his trade of iniquity.” Nothing contributes more to restrain crime than the prospect of certain and speedy punishment. And on the other hand, where the chances of escape are numerous, and the penalty of the law contingent and problematical, good order is boldly defied. Hence it is, that the inherent defects in the routine of our public prosecutions, while they operate as great and serious obstructions to the course of justice, also foster and give impunity to crime.

In England, these matters are beginning to be better understood. The criminal practice of that country, has, of late, undergone extensive and beneficial modifications. The pleadings, once so full of verbiage and useless repetition, have been pruned of their technicalities, and made concise and brief. Amendments are liberally allowed; the whole mass of little points and legal subtleties in indictable cases, has been swept away; and hereafter criminal trials will be upon the merits, and the merits alone.

In these respects, the English criminal practice is greatly in advance of our own. We seem thus far, to have rested satisfied with the obsolete and artificial system which our forefathers have transmitted to us, preferring to repose in its deficiencies, rather than incur the perils of innovation. The tendency of popular legislation is radical, rather than conservative, we admit; and hence the importance of extreme caution in the framing of laws which are to affect the administration of justice. Frequent changes, also beget uncertainty, and a spirit of vacillation. But so impressed have we been with these dangers, that we have hitherto gone to the other extreme; and, in law reform especially (with the recent partial exception of the state of New York) we have uniformly been content to follow rather than take the lead.

The immense tide of emigration from Europe, which for several years past has set towards our shores, has flooded our large cities with the needy of both sexes, and crime has increased among us in a fearful ratio. The existing state of things imperatively demands that we should not only have laws fully adequate to the protection of life and property, but that those laws should be so effectually administered, as to bring upon the guilty, certain and speedy punishment. To this end, there must be a healthy public opinion. No maudling sentimentality must pervert it into the drivelling apologist of crime. Our legislatures must be made to comprehend the wants of our ever changing, and in many respects, peculiar society. It is to be hoped that then our cumbersome criminal practice will be simplified, and stripped of the legal quibbles, the false issues and the sham defences which have so long obscured and deformed it.

The most recent change in England seems to have been the most sweeping and salutary. It originated with Lord Campbell, who framed

the bill, and brought it before the British Parliament in 1850. It became a law in 1851, and is known as Lord Campbell's Act, 14 & 15 Vict. ch. 100. The general scope and purpose of this act is to do away with the quibbles by which the administration of criminal law was impeded. Mr. Archbold characterizes it, as "one of the greatest and best reforms, in the English criminal law which has ever been made," and he further says that "it is not only calculated to afford great and extraordinary facilities in the administration of criminal justice, but must, in its consequences have a serious and most beneficial effect upon the state of crime in the country." After a very thorough examination of it, I am inclined to think that it deserves this high encomium, and that it is worthy the careful study of the American Bar, and the early attention of American legislators.

Lord Campbell's act does not so alter the former English practice, as to impair, in the least, the utility of Mr. Archbold's work in this country. The changes, as will be presently shown, all relate to minor points; while the leading features of the English system remain as before.

For the better understanding the late reform in England, it will be my endeavor briefly to point out the changes that have been effected in that country, and to accompany what I have to say with explanations and references to the existing American practice.

The English reform consists: 1st, in simplifying the indictment; 2d, in giving to the court extensive powers of amendment; and 3d, (as a consequence of the other two,) in narrowing the issue and the evidence.

In order to appreciate the improvement recently made in England in the frame of the indictment, the defect of the same instrument in the United States, must be constantly borne in mind. That it is verbose, prolix and full of mistification, every criminal pleader among us very well knows. The only general requisite of it is, that it shall identify the offence. In effecting this, little or no regard is paid to truth of detail, or brevity of statement. Great particularity being required, the occurrence is stated in many contradictory ways in each of several counts, resulting in much repetition, and what is more, in *down right falsehood*. As the indictment is the basis of the prosecution, it

should be plain, direct and unequivocal. It should be so, no less in justice to the accused, than for the public good. The innocent require no subterfuges, neither does the State promote any of her interests by such a sacrifice of her dignity. It should state with clearness and certainty the facts and circumstances *according to the truth*. But instead of this, it is an artificial and complex instrument which in its practical operation is often made the means of defeating justice upon a mere quibble, or of artfully and adroitly concealing from the defendant the nature of the charge against him.

For the purpose of illustration we will take the crime of murder :

The time and place, as well of the wound as of the death must be specifically alleged. The indictment must set forth particularly the manner of the death and the means by which it was effected. When therefore the manner of death is doubtful, it is laid differently in different counts, in order to meet the evidence and come as near the truth as possible. It is usual to specify in *which hand* the instrument which occasions the death is held, or whether it is held in both hands. The *value* of the instrument is generally stated, or whether it is of no value. Where the death is occasioned by a wound or bruise, or by external violence, the *stroke* must be expressly laid. The particular part of the body in which the deceased was struck or wounded, and the *length* and *depth* of the wound must be alleged. If the wound be said to be on the arm, hand or side, without saying either right or left; or if it be only said to be *about* the breast, instead of on the breast; this is bad for uncertainty. So where any of the wounds are laid with uncertainty the laying of others with sufficient certainty will not help the indictment, if there be a general conclusion that the party died "of the wounds above-mentioned." It is necessary that *the death* by the means stated, should be positively alleged. This cannot be taken by implication. Therefore, where the killing is alleged to be by any stroke, the indictment must proceed to aver that the prisoner thereby gave to the deceased a mortal wound whereof he died.

The following form of an indictment for murder will give some idea of this instrument in the United States :—

City and County of New York, ss. :

The jurors of the people of the State of New York, in and for the



body of the city and county of New York, upon their oath present, that John Smith, late of the first ward of the city of New York, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the first day of May in the year of our Lord one thousand eight hundred and fifty-three with force and arms, at the ward, city and county aforesaid, in and upon one Henry Brown in the peace of God, and of the said people, then and there being, feloniously, wilfully and of his malice aforethought, did make an assault; and that the said John Smith then and there holding in his right hand a certain knife of the value of half a dollar, did then and there, feloniously, wilfully and of his malice aforethought strike and thrust the said knife in and upon the left side of the neck of him the said Henry Brown, giving to the said Henry Brown then and there, with the knife aforesaid, in and upon the said left side of the neck of him the said Henry Brown one mortal wound, one inch long and six inches deep, of which said mortal wound the said Henry Brown, from the first day of May in the year aforesaid until the fifteenth day of the same month of August, in the year aforesaid, at the ward, city and county aforesaid, did languish and languishing did live; on which said fifteenth day of May, in the year aforesaid, the said Henry Brown, at the ward, city and county aforesaid, died.

And so the jurors aforesaid, do say that the said John Smith him the said Henry Brown, in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, against the peace of the people of the State of New York and their dignity.

The foregoing, is but one count. If there is a possibility of any other mode of killing or means of death, appearing upon the trial a number of counts must be inserted adapted to every possible difference in the proof, so as to obviate the danger of a variance between the evidence and the indictment.

So much for the verbiage and repetition of an indictment under our present system. In England, the prolixity of this instrument is happily abrogated.

The Statute 14 & 15 Vict. c. 100, provides that in an indictment for murder or manslaughter "it shall not be necessary to set forth *the*

*manner in which, or the means by which the death of the deceased was caused; but it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, wilfully and of malice aforethought, kill and murder the deceased; and it shall be sufficient in every indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased."*

The form of the indictment given *ante*, under the English Statute 14 & 15 Vict. would be as follows :—

City and County of New York, ss :

The jurors of the people of the state of New York, in and for the body of the city and county of New York, upon their oaths present, that John Smith on the first day of May one thousand eight hundred and fifty three, at the city of New York, feloniously, wilfully and of his malice aforethought did kill and murder one Henry Brown, against the peace of the people of the state of New York, and their dignity.

The common law rule which prevails in the United States, requiring that where written instruments enter into the gist of the offence, as in forgery, passing counterfeit money, selling lottery tickets, sending threatening letters, &c. they shall be set out in words and figures, has been a fruitful source of variance. In an early case in Massachusetts, (*Com. v. Houghton*, 8 Mass. Rep. 107,) in which this doctrine was sustained—a case which has constantly been cited and acted upon as authority since—the court, from the manifest failure of justice to which its decision would lead, was provoked to remark that "*it would be difficult, if not impossible, to discover any good or satisfactory reason in support of many of the niceties which are established in criminal proceedings, and which may not be relaxed.*"

The objection to the great particularity required at common law, is, that while it serves no useful purpose, it requires exactness of proof upon matters of mere phraseology. It is said that a particular description of the instrument is necessary to enable the party charged, more effectually to prepare for his defence, and to enable the court to see whether the instrument violates the law. But a description of the instrument by the name or designation by which it is usually known,

answers every practical purpose. If by preparation of the defence is meant the taking advantage of the misspelling of a word, or the omission of a figure, then a technical recital of the instrument is indeed all important to the defendant; for the ignorance or carelessness of the officer who draws the indictment will in that case often be of service to him. If, however, the defendant proposes to meet the issue of innocent or guilty fairly, such quibbles will neither inform nor aid him. There is still less reason for minuteness of statement, on the ground of giving information to the court. The name and nature of the instrument, will enable the court to see at a glance whether it comes within any of the prohibitions of the law; and as the instrument itself must always be produced, and its identity with that mentioned in the indictment be fully established, everything material is known.

Some idea of the practical working of the common law system may be derived from an enumeration of a few of the more recent cases decided in the United States.

In *Stephens v. The State*, Wright's Ohio Rep. 70, the indictment charged the defendant with having two hundred counterfeit notes in his possession, not filled up, with intention to fill them up, in imitation of genuine notes of the Bank of the United States. The defendant was convicted in the court of common pleas and sent to prison. But the supreme court reversed the judgment, and ordered the prisoner to be discharged from the penitentiary, because it appeared that *the notes were not set out in the indictment*.

In *Com. v. Wright*, 1 Cushing, 46, the defendant had been convicted in the court of common pleas upon an indictment for a libel. The indictment professed to set out the libel according to its purport and effect; but really set it out verbatim, placing it within marks of quotation; and it was admitted that the words of publication were recited correctly. The supreme court arrested the judgment because the indictment did not employ the technical words "of the tenor following," or some kindred expressions, importing an exact copy. The court, feeling no doubt chagrined that justice should be so trifled with, through arbitrary rules of pleading, remarked: "The strictness required in criminal pleading has been occasionally the subject of criti-

cism and complaint. With this, the court has nothing to do. They are bound to administer the law as they find it. *If this strictness has a tendency to impede, or to thwart the course of justice in criminal proceedings it is the province of the legislature, and not of the court, to amend the law.*"

In *Com. v. Tarbox*, 1 Cushing's Rep. 66, the same objections were made to the form of the indictment, as in the case of *Com. v. Wright*. The defendant had been convicted for publishing an obscene libel. The prosecuting attorney in place of inserting a copy of the libel, attached the original printed libel to the indictment. The supreme court held that this was not a sufficient indication that the paper was set out in words importing an exact transcript, and arrested the judgment.

In England, all these difficulties are removed by stat. 14 & 15 Vict. c. 100, which provides that in all cases "wherever it shall be necessary to make any averment in any indictment as to any instrument whether the same consists wholly, or in part, of writing, print, or figures, it shall be sufficient to describe such instrument *by any name or designation by which the same may be usually known or by the purport thereof*, without setting out any copy or *fac simile* of the whole or any part thereof."

Under the former English practice, it was necessary to allege the time on which each material fact stated in the indictment took place with great precision; and such exactness did the law require in this respect, that any uncertainty or incongruity, in the description of time vitiated the indictment. As, if the indictment stated a fact to have occurred on a day subsequent to the filing of the bill, or an impossible day, or a day that never happened, it was bad. So if it laid the offence to have been committed on divers days, between such a day and such a day, it would be bad.

The technicality of the old system, was, in no sense, beneficial. It helped to retard and embarrass the prosecution, and to evade the trial on the merits. It was a part of the web of intricacies which had hitherto enveloped this important branch of the law.

The 14 & 15 Vict., ch. 100, sec. 24, enacts, that no indictment for any

offence, shall be holden insufficient "for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence—nor for stating the time imperfectly—nor for stating the offence to have been committed on a day subsequent to the finding of the indictment—or on an impossible day—or on a day that never happened."\*

In the United States, the utmost precision in stating time, in the indictment, is still required. Some idea of the existing practice, may be derived from the following decisions taken at random from the reports of the different states:

Every material fact to constitute the crime, must be laid in the indictment with time. *State v. Bacon*, 7 Verm. Rep. 219; *State v. Beckwith*, 1 Stewart, 818; *U. S. v. Bowman*, 2 Wash. C. C. Rep. 328. If the date be laid in blank, so that it does not appear if the offence was barred by limitation or not, the judgment will be arrested. *State v. Beckwith*, 1 Stewart, 818; *State v. Roach*, 2 Haywood, 552; *Tom v. State*, 8 Missouri, 45.

In Indiana, an indictment not containing the year, but referring to the caption which did contain the year, in this manner, "*in the year of our Lord aforesaid*," was held to be bad, as the caption was no part of the indictment. *State v. Hopkins*, 7 Blackf. 494. To aver that the defendant "on divers days" committed the offence, is bad, *State v. Brown*, 2 Murphy, 224; *State v. Walker*, Ib. 229; *State v. Hendricks*, Cameron & Norwood Rep. 369. And it has ever been held, that the omission of the phrase, "the year of the Lord" is fatal. *Whitesides v. The People*, 1 Breese's Rep. 41.

If the fact be stated as to the time with uncertainty or repugnancy, the indictment will be bad. *Jane v. State*, 8 Missouri Rep. 45. If two times have been previously mentioned, in the indictment and afterwards a part only is laid "*then and there*," the indictment is defective, because it is uncertain to which it refers. *Storrs v. State*, 8 Missouri Rep. 45. An indictment alleging the offence to have been committed on a future

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\* The like defects were cured after verdict by St. 7 Geo. 4, c. 64, s. 21.

or impossible day, is defective. *Markley v. State*, 10 Missouri, 291. An allegation that the offence therein charged was committed on a certain specified "day of September *now passed*," is not stated with sufficient certainty. *Com. v. Griffin*, 3 Cush. Rep. 523. An indictment charging the offence to have been committed in Nov. 1801, and in the twenty-fifth year of American Independence, was held defective, and the judgment arrested, because the offence was charged to have been committed in two different years. *State v. Hendricks*, N. C. Conf. Rep. 349. In *Serpentine v. State*, 1 How. Miss. Rep. 260, where the crime was alleged to have been committed in the year of our Lord 1030, and it did not appear whether the mistake occurred in the indictment, or was made by the transcribing clerk, the court held that the allegation was bad as "*pre-supposing the life of the accused to have endured for upwards of eight hundred years!*"

It is needless to multiply cases. More than thirty years ago, Judge Gibson of Pennsylvania, (in *Jacobs v. Com.* 5 Serg. & Rawle Rep. 315,) remarked, that, "although certainty of time be material in a legal point of view, it cannot be pretended that it is of much practical consequence to the prisoner, either in giving notice of the specific charge alleged against him, or in aiding him to defend himself against it: for the prosecutor may give evidence of an offence committed on any other day previous to the finding of the indictment; and on the plea of *autre fois acquit*, the defendant is usually under the necessity of proving the identity of the offence charged in each indictment by evidence *dehors* the record. I am therefore disposed to get over an objection of this sort, whenever I can!"

The concluding words of the indictment are certain stereotyped expressions, the omission of which is fatal.

It was formerly usual to introduce mere moral inferences as, "to the great displeasure of Almighty God," "to the evil example of all others," &c.

The words "with force and arms" were at one time used in all indictments for offences with force, and indeed for all felonies; for a felony was deemed to include a trespass. The practice still exist in many

of the United States of introducing in indictments for forcible injuries the technical words "*vi et armis*." They are clearly superfluous.

The constitutions of nearly all the states contain a provision that indictments shall conclude against the peace and dignity of the state ; and many questions have been started, and gravely discussed in the courts, as to whether certain forms of statement are sufficient. Mr. Barbour, (Cr. Law pp. 335, 336,) says :—"The words 'against the peace of the people,' seem to be essential in all cases, excepting in indictments for nonfeasance, and even in these, they are uniformly used 'against the peace,' without saying 'of the people,' would be insufficient." In Virginia, the omission of the conclusion "against the peace," &c. is fatal. *Com. v. Carnby*, 4 Grattan, 546. The proper conclusion of an indictment in Pennsylvania, is "against the peace and dignity of the commonwealth of Pennsylvania." *Com. v. Rogers*, 5. Serg. & Rawle Rep. 463. In New Hampshire, an indictment concluding "against the peace and dignity of our said state" is sufficient. *State v. Kean*, 10 New Hamp. Rep. 347. In South Carolina, an indictment stating an offence against the state, and concluding with the words "against the peace and dignity of the same," is good within the terms of the constitution of 1790. *State v. Washington*, 1 Bay, 120. Where an indictment commenced "South Carolina," and not the "State of South Carolina" and concluded "against the peace and dignity of the said state," and not "against the peace and dignity of the same," the termination was held good. *State v. Anthony*, 1 M'Cord, 285. And an indictment was held good though it concluded "against the peace and dignity of this state," instead of concluding "against the peace and dignity of the same state." *State v. Yancey*, 1 Const. Rep. 237. An indictment in Kentucky commencing with the name of the commonwealth of Kentucky, and professing to proceed by the authority of the commonwealth of Kentucky, and concluding "against the peace and dignity of the commonwealth," without adding "of Kentucky," is good. *Com. v. Young*, 7 B. Mon. Rep. 1. In Mississippi, an indictment commencing with the words "the state of Mississippi," and concluding "against the peace and dignity of the same," is sufficient. *State v. Johnson*, 1 Walker, 392.

The books are full of cases like the foregoing, in which purely technical averments, in the concluding words of the indictment, are elabo-

rately discussed. It is painful to think that the time of our courts must be thus consumed, and prosecutions be embarrassed in the web of technical and unmeaning forms, no way essential to the ends of justice or the security of the accused, in a fair and impartial trial upon the merits.

In England the stat. 14 & 15 Vict. c. 100, provides, that "no indictment shall be held insufficient, for want of a proper or formal conclusion."

At common law, as the indictment is the finding of a jury upon oath, it cannot be amended without the concurrence of the grand inquest by whom it is presented. In the United States, there seems, as yet, an entire absence of statutory provision on this subject; so that the common law rule still governs here.

I have already alluded to the particularity required in setting out written instruments. Variance between the setting out of written instruments, and the proof at the trial, where so much exactness is required, is of very common occurrence. A few cases will illustrate the rigor of the rule, and its evil consequences.

A draft signed Jos. Johnson, is not admissible under a count stating it to be signed Joseph Johnson, president. *U. S. v. Keen*, 1 McLean, Rep. 429.

Where an indictment alleged that a forged certificate was signed by Bowling Starke, but the instrument was signed B. Starke, and the signer's true name was Bolling Starke, the variance was held fatal. *Com. v. Hearn*, 1 Virg. Cas. 109.

The defendant was indicted for counterfeiting a bill of a bank incorporated by the name of "The President and Directors of the Bank of South Carolina." The bill produced was "The Bank of South Carolina." A new trial was granted on the ground that the evidence did not support the indictment. *State v. Waters*, 2 Const. Rep. 669.

In an indictment for forgery, the instrument alleged to be forged, was set forth as an acquittance or discharge for the sum of forty-eight



dollars. The paper forged was, on its face, an order for the sum of forty-eight dollars; but on its back was an order for the further sum of one dollar. It was held that there was a variance between the allegation and the proof. *State v. Handy*, 20 Maine Rep. 81.

An indictment which charges a larceny or embezzlement of the printed sheets of a certain publication, is not supported by evidence that those sheets were delivered to the defendant by the owner to be bound, and that the defendant after he had folded, stitched, bound and trimmed them, embezzled and fraudulently converted them to his own use. In such case, the indictment should charge a larceny or embezzlement of books. *Com. v. Merrifield*, 4 Metc. 468.

If the court, in either of the foregoing cases, had possessed the power of amending the record, how simple and easy would it have been for it to rectify the error in the indictment, if error it could be called, and thus preserve the trial, instead of abruptly terminating it. The objections raised were not to the merits. And although the proceedings were quashed, and the defendant discharged from custody, it cannot be pretended that any of his substantial rights would have been infringed, had justice not been thus baffled.

Similar abuses are guarded against in England, by statutes which provide that "the court may cause the record on which any trial may be pending before any such court, in any indictment or information for any misdemeanor, (or for any offence whatever,) when any variance shall appear between any matter in writing or in print produced in evidence and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular, by some officer of the court, on payment of such costs (if any) to the other party as such court shall think reasonable; and thereupon the trial shall proceed, as if no such variance had appeared." 9 Geo. 4, c. 15; 11 & 12 Vict. c. 45, s. 4; 12 & 13 Vict. c. 45, s. 10.

By stat. 14 & 15 Vict. c. 100, s. 1, whenever on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof,—in the name of any county, riding, division,

city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, the court may amend the indictment.

The cases where local description is necessary, as above mentioned, are such as indictments for burglary, arson, house-breaking, stealing in a dwelling house, and the like, where the indictment must state the town, and county by way of local description; or indictment for not repairing highways which must state the highway to be within the town, &c; and in these cases, the matter of local description must be proved as laid. As to a variance between the statement and proof, in this respect, the indictment in England may now be amended by St. 14 & 15 Vict. c. 100, s. 1. In the United States, the old rule still prevails in all its rigor, that where a place is stated as matter of local description, the slightest variance between the description of it in the indictment and the evidence will be fatal. Thus, in New York, where in an indictment for arson, the tenement was averred to be in the sixth ward, whereas, it was in the fifth, the indictment was held bad. *People v. Slater*, 5 Hill's Rep. 401. And the same particularity is required in cases of stealing in a dwelling house, of burglary, and of forcible entry and detainer and the like, where the situation of the premises is specially laid, in which case the description must be strictly proved.

The St. 14 & 15 c. 100, s. 1, provides, that when on the trial of any indictment there appears to be any variance "in the name or description of any person or persons or body politic or corporate therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein,—or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence,—or in the christian name or surname, or both christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described,—or in the name or description of any matter or thing whatsoever therein named or described,—or in the ownership of any property named or described therein,—it shall and may be lawful for the court, before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the de-

defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs, and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment, the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred."

The utility of the foregoing statute may be gathered from a brief allusion to the particularity required in setting out the names of parties, and the consequent danger of variance.

The indictment must be certain as to the name of the person indicted. It seems formerly to have been supposed that an error in the surname was not pleadable in abatement. But it is now the settled law, that a mistake in the latter, is equally fatal with one in the former. In Massachusetts it was held a misnomer when T. H. P. was indicted by the name of T. P. *Com. v. Perkins*, 1 Pick. Rep. 388. In New York, it was said that if a man be known by the addition of "junior," to his name, an indictment against him without that addition is not conclusive that he was the person indicted. 2 Caines, 165.

A variance or an omission in the name of the person aggrieved, is much more serious than a mistake in the name or addition of the defendant: the latter can only be taken advantage of by plea in abatement; while the former will be ground for arresting the judgment, when the error appears on the record, or for acquittal, when a variance arises on the trial. Where it appears that the party injured is misnamed, or that the owner of the goods, or house, &c., is not the person named as such in the indictment, the variance is fatal. Thus, if a burglary be alleged to have been committed in the dwelling-house of A. B., and the fact is that it is the dwelling-house of C. D., the defendant must be acquitted for the variance. So, if a larceny be alleged to have been committed in the house of A. B., and it turn out in evidence, to be the dwelling-house of C. D., the defendant must be acquitted of the stealing in the

dwelling-house. So in all other cases, a material variance between the indictment and evidence in the name of the party injured will be fatal, and the defendant must be acquitted. This is the existing practice in the United States, and it only needs comparison with the recent English statutes of amendment, to show the superior advantages of the latter.

Again, in the United States, if the indictment describe the defendant as a person to the jurors unknown, and if it afterwards turn out that at the time of finding the bill, his name was known, this will be a fatal variance, and the defendant will be acquitted. See 3 Camp. 264; 2 Leach, 925; Barb. Cr. Law, pp. 288, 397. In England, by the 14 & 15 Vict. c. 100, s. 1, the court may order the indictment to be amended according to the fact.

In Massachusetts, in *Com. v. Simpson*, 9 Metc. Rep. 138, it was held that evidence of embezzlement would not support an indictment for larceny, although the Rev. St. of Mass. ch. 126, declares that a party who embezzles money or goods, shall be deemed, by so doing, to have committed the crime of larceny. At the trial in the municipal court the defendant contended that there was a variance between the indictment and proof; that larceny was charged, and the proof tended to establish embezzlement which was a distinct crime. The court ruled that the statute had so made embezzlement larceny, that it was competent and sufficient to prove embezzlement under an indictment for larceny, which did not set forth the fiduciary relation of the defendant to the property. But Judge Dewey, in pronouncing the opinion of the supreme court, held that "the two offences of larceny and embezzlement, were so far distinct in their character that, notwithstanding the statute, under an indictment charging merely larceny, evidence of embezzlement was not sufficient to authorize a conviction."

The English Statute 14 & 15 Vict. c. 100, enacts that variances between the indictment and proof where the proof is of a kindred though different offence to that charged, shall not be regarded, but the defendant shall be convicted of the offence proved. Therefore, upon an indictment for larceny, if upon the evidence, it appear to be embezzlement, the jury may acquit of the larceny, and find the party guilty of the embezzlement. Or, upon an indictment for embezzlement, if the

offence, upon the evidence, appear to be larceny, the jury may acquit the prisoner of the embezzlement and find him guilty of simple larceny—or of larceny as clerk or servant. And so of obtaining money or goods by false pretences, the defendant may be convicted either of the false pretences, or of larceny.

At common law the conviction of some one who has committed the crime, must *precede* that of one guilty only as accessory; and if the accessory plead to the indictment and suffer trial without demanding the previous trial and conviction of the principal, it is not a waiver of this right. No assent can be implied from his submission to the course directed by the prosecuting attorney, or the court.

In North Carolina, it has been held that the accessory is not liable to be tried while the principal is amenable to the laws of the state and is still unconvicted. *State v. Graff*, 1 Murphey's Rep. 270; see *State v. Goode*, 1 Hawks, 463.

In Massachusetts, in an early case, (*Com. v. Andrews*, 3 Mass. Rep. 126,) it was held that an indictment against one for feloniously receiving stolen goods could not be maintained, unless there was evidence that the principal had been convicted. And judgment was arrested accordingly, notwithstanding the accessory had been convicted, it not appearing that the principal had ever been tried. In the same state, Judge Phillips was indicted in the Supreme Judicial Court in the county of Middlesex, as an accessory to a burglary, in which one Thomas Daniels was alleged to have been the principal felon. The death of Daniels (who had committed suicide in the prison after his commitment for trial) was alleged in the indictment; and the question was whether the prisoner Phillips could lawfully be put upon his trial. The court were unanimously of opinion, that, by the common law an accessory cannot be put on his trial, but by his own consent, until the conviction of the principal. "Our only doubt," says the Chief Justice, "arose from the peculiar circumstances in this case, that the person charged as principal is dead. If he were alive and on trial, it is possible he might establish his innocence, strong as the evidence has appeared in support

of his guilt. In such case the prisoner could not be found guilty."—  
16 M. R. 425.\*

In the state of New York, the common law doctrine still prevails. Mr. Barbour in his excellent treatise for the guidance of criminal magistrates, states it as law, (p. 291, 2d ed.) that if the principal die before conviction, the accessory *never can be convicted*. And again (p. 292) he says: "if it appear, beyond all doubt, that the principal is dead, without having been convicted, the accessory should perhaps (?) be discharged."

The extent to which the New York statute goes, is to permit the accessory to be indicted, tried, convicted, and punished, notwithstanding the principal felon may have been pardoned, or otherwise discharged, after conviction, (2 R. S. 4th ed. pt. 4, ch. 2, sec. 49.)† And further, in an indictment against a person for receiving or buying stolen goods, it is not necessary to aver, nor on the trial to prove, that the principal who stole the goods has been convicted. (Ib. tit. 3, art. 5, sec. 71, 72.)

The reasoning of the common law, on this subject, may be stated in brief as follows:—

As the fact, as well as the degree, of guilt which is incurred by counselling or commanding the commission of the crime, depends upon the actual perpetration of that crime, the guilt of the principal must be established before the accessory can be assailed. This can only be done in a prosecution against the principal; for the law supposes a man more capable of defending his own conduct than any other person, and will not tolerate that the guilt of A. shall be established in a prosecution against B. Consequently, if the guilt of B. depends upon the guilt of A., A. must be convicted before B. can be tried.

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\*But by a statute of Massachusetts passed Feb. 19, 1831, accessories before, and accessories after the fact, in cases of felony, may be indicted and convicted, though the principal felon may not have previously been convicted, is not amenable to justice.

† Where reference is made in this work, to the New York Revised Statutes, the 4th edition of the Statutes "BANKS, GOULD & Co. 1852" is meant. It will be found a most accurate and convenient compilation, omitting all the repealed acts, and giving, with great faithfulness, the New York law in force down to, and including the year 1852.

It is evident that the above doctrine, though plausible, is specious and sophistical. It is based upon the supposition that "*the accessory follows the nature of his principal.*" In other words, that the former is subordinate to the latter. In treason and misdemeanors, all are principals, why not in felonies in general? The law of New York makes the punishment of principals in the first and second degree and accessories before the fact in *any felony*, the same; thus placing them all practically upon the same footing. Yet it keeps up the common law distinctions, and the common law inconsistency. If the law in inflicting the same punishment upon both, does not recognize any difference in their guilt, why is not one as much a principal as the other? The man who is prompted by another to commit crime, is often the dupe and victim of evil counsel—the mere tool of him who plots, instigates, and in reality executes. There is not therefore necessarily, or even generally, the subordination on the part of the accessory which the common law contemplates.

But does the fact, or the degree of guilt, which is incurred by counselling or commanding the commission of crime, depend upon the actual commission of that crime? The law makes a distinction, but certainly the moral turpitude is equally great, whether the advice be followed, or not. If B. uses all his influence to incite A. to murder C. is B. the less culpable because the virtue or the timidity of A. prevents him from committing the crime? There is murder in B.'s heart, and he endeavors to infuse the poison of it into the breast of A. That the ill consequences to society are not so great as those B. has plotted is due, not to B. but to the resistance which A. interposes to B.'s wicked counsels. It may be said that unless the crime is actually committed, there is nothing for the law to take cognizance of. But this is not so. A mere solicitation to commit a felony is an indictable offence, whether it be committed or not. Thus to solicit a servant to steal his master's goods, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done, except the soliciting and inciting. 2 East R. 5. In Connecticut the mere solicitation of another to commit adultery has been held to be a high crime cognizable by the superior court. 7 Conn. Rep. 267. In New York, on the trial of an indictment for an attempt to commit arson, it was shown that the prisoner solicited one K. to set fire to a barn, and gave him materials

for that purpose; he was convicted, although it appeared he did not mean to be present at the commission of the offence, and K. never intended to commit it. 4 Hill, 183. In Vermont the soliciting a witness, not to attend a public prosecution, whether successful, or not, has been held to be an indictable offence. 8 Verm. Rep. 57. In England, an attempt to suborn a person to commit perjury, upon a reference to the judges, was unanimously holden by them to be indictable. And it is laid down generally, that if a party offers a bribe to a judge, meaning to corrupt him in the cause depending before him, although the judge does not take it, yet this is an offence punishable by law in the party that offers it. 3 Inst. 147. Whatever, therefore, may be the relative culpability of the accused, the accessory has committed a substantive wrong, and there is no good reason why his trial and conviction should depend upon that of the principal. If B. is guilty, the well being of society demands that he should be punished,—with A. if A. is charged with the offence and is amenable to justice, or without him if A. cannot be found, or if B. is alone the transgressor.

That the common law doctrine is highly dangerous in practice, the history of criminal trials in England and the United States, too well attests. The chief mischief consists in the delay of justice, and the chances with are thus afforded the accessory of avoiding the trial altogether. The principal may die or escape; or the testimony may be lost by the death or absence of the witnesses. And what is also much to be deplored, society loses the moral effect of criminals being brought to speedy justice.

It may then well be asked, why should not these distinctions be done away with? And why should not the systems of criminal law contain a general provision for prosecuting and punishing all who aid, abet, procure, or participate in the commission of an offence, in the same manner, as those who actually perpetrate it, and without reference to the trial or conviction of the latter, or to their being found or not? This has been recently done in England. The stat. 11 & 12 Vict. c. 46, s. 1, after reciting that it was expedient that an accessory before the fact to felony should be liable to be indicted, tried, convicted and punished, in all respects like the principal, as was then the case in treason and in all misdemeanors,—it is enacted, that “if any person



shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any statute or statutes made or to be made, such person may be indicted, tried, convicted, and punished in all respects as if he were a principal felon."

In all cases of felony, therefore, the accessory in England is punishable in the same manner precisely as the principal felon; and he may now be indicted either as a principal, that is, he may be charged in the indictment with having actually committed the offence as principal in the first degree, or he may be indicted as accessory as for a substantive felony, or he may be indicted as accessory with the principal, at the option of the prosecutor.

The English statute further enacts that "if any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by statute, he may be indicted and convicted either as an accessory after the fact to the principal felony together with the principal felon, or after the conviction of the principal felon,—or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished; and the offence of such person, howsoever indicted, may be inquired of, tried, determined, and punished, by any court which shall have jurisdiction to try the principal felon, in the same manner as if the act by reason of which such person shall have become an accessory had been committed at the same place as the principal felony."

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The following work is a comprehensive summary of the law and practice in criminal cases. In furnishing the profession with a complete *criminal practice*, it has left nothing more in this department to be desired. Books of *evidence*, and of *pleading*, already abounded. The learning of the common law, and of the reports, had been exhausted in treating of the *various crimes*. We were possessed of the admirable work of Mr. Chitty which is rich in useful *practical details*. But still,

an author was needed who at the same time that he was profound, should also be elementary—who besides recondite learning, would give information upon all those numerous minor points of criminal proceeding, which though simple, and presumed to be a part of the knowledge of every tyro of the profession, cannot be known intuitively, and should therefore be contained in some book easily accessible to the student. The recent issue of Mr. Archbold has supplied this very want: and I repeat that it has left nothing more in this branch of the law to be desired.

Mr. Archbold's first work on criminal law, was published in 1813—just forty years ago. His writings have therefore been before the public for nearly half a century—ample proof in itself were other evidence wanting, of the high favor with which they have been received. They have been preserved, and have risen in public regard, while a thousand and one ephemeral productions have been swept into oblivion. Indeed, after being exposed to the ordeal of professional criticism for a period of two score years, they are at this day more highly esteemed than they ever were before.

This edition of Archbold is much more comprehensive than any of its predecessors. The former editions were confined to pleading and evidence. The present, in addition to what was contained in any of the others, treats very fully of the different crimes, and of every branch of criminal practice. The first part treats successively of the accusation and complaint, process, arrest, examination, commitment, bail, indictment, trial, conviction, judgment, appeal, and execution. The second part is devoted to the discussion of the several crimes, the indictment for each offence, and the requisite evidence. This is the natural order. Every step in the progress of a public prosecution, is thus traced, from the commencement to its conclusion. And so faithfully has the author performed his task that the most minute circumstance has not been omitted.

Next to their accuracy, the great merit of Mr. Archbold's writings consists in the simplicity of their arrangement, and their general adaptation to the practical purposes for which they are chiefly designed. His

points are stated with great clearness, and they are well supported by authorities. His illustrations are pertinent and happy. His style is concise and lucid, and his language pointed and forcible. He is brief without being obscure, and learned without being prolix. The incorporation of forms into the text as they are from time to time required, by the subject under discussion, renders his explanations much more intelligible to the student than they could be were the forms placed by themselves in an appendix, and it is a source of great convenience to the practitioner.

The present work made its appearance in England much sooner than would have been the case, except for recent changes in the criminal practice of that country; and I should also add, that for the early publication of this American edition, the profession is indebted to the zealous circumspection of the enterprising American publishers. The re-print of English works, in every department of knowledge, has become with us, a species of necessity. The demand in our market for the books of England, is scarcely less than for her fabrics. And certainly, a knowledge of her discoveries in the sciences, and in the arts of life, is quite as valuable, as anything she can contribute to our material comfort. Our commercial relations with her, have become so intimate and extensive, as to render everything connected with her administration of justice of great practical importance to us. And when to this is added the consideration, that not only the leading and fundamental principles of our law, have been taken from English sources, but that very many of our statutes are literal transcripts of English enactments, the utility of works like the present, which keep the profession informed of the progress and condition of English jurisprudence, becomes strikingly manifest.

This American edition comprises the original work first prepared by Mr. Archbold in 1813 and brought down to the present time by Messrs. Jervis and Welsby; and also the "NEW SYSTEM OF CRIMINAL PROCEDURE, PLEADING AND EVIDENCE IN INDICTABLE CASES," recently edited by the venerable and distinguished author himself. Although both works treat of the same subjects in substantially the same manner, yet they naturally vary somewhat. Each, in its turn, has been carefully examined; and where either could throw additional light upon

the subject matter, it has been freely used. The late work of the author has however been the basis of the present Treatise, and preference has been given to it throughout; as well because it seemed due to him as author, and to his eminent talents and learning as a jurist, as because after a most critical examination of the respective merits of both works, the recent issue of Mr. Archbold was thought to be superior to the other.

In the classification and arrangement of the subjects, it seemed desirable to divide the work into a number of additional chapters, in order to furnish a more correct and complete analysis, and also to facilitate reference. At the head of each chapter is also given a synopsis of its contents, so that every chapter has its own index.

Great pains have been taken with the notes. I have endeavored to make them a most full and thorough exposition of the author, and an accurate and faithful reflex of the criminal law of the United States. The decisions of the courts of thirty-one states, each with a separate and distinct judicial organization, present very ample opportunity for useful comment and illustration; and I have striven not to omit a single reported case which seemed at all material. The law and practice of the most remote and opposite sections of our common country, have thus been brought together—at once embodying much curious information and greatly enhancing the practical value of the work. The notes, when long, have been divided into divisions and subdivisions, and they have also been supplied with a very full index. A number of offences not treated by the author, have been discussed in the notes;\* and it is believed that the text and notes now cover the entire field of criminal law.

THOMAS W. WATERMAN.

*New York, No. 77 Nassau Street, June 30th, 1858.*

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\* Among the heads independently treated in the notes, may be enumerated the following: VIOLATION OF THE NEUTRALITY LAWS; FORCEIBLE ENTRY AND DETAINER; OFFICIAL MISCONDUCT AND EXTORTION; FRAUDULENT INSOLVENCY; ILLEGAL VOTING; GAMBLING; LOTTERIES; BRIBERY; EMBRACERY; BASTARDY; BARRATRY; CHAMPERTY; MAINTENANCE; USURY; COMPOUNDING FELONY; ADULTERY; FORNICATION; SEDUCTION; INCEST; MASQUERADE; HAWKERS AND PEDLARS; VAGRANTS; TIPPING HOUSES; SABBATH BREAKING; EXTRADITION; NEGROES; BREACH OF PRISON; ESCAPE.

The subject of NEW TRIALS IN CRIMINAL CASES which is only spoken of, in general terms in the text, will be found discussed in the notes with great fulness of detail.



## PREFACE

TO THE ENGLISH EDITION.



To Lord CAMPBELL the country are indebted for one of the greatest and best reforms in our Criminal Law, which has ever been made ; and which is not only calculated to afford great and extraordinary facilities in the administration of criminal justice, but must, in its consequences, have a serious and most beneficial effect upon the state of crime in the country. Whoever is conversant with our old reports and our ancient text books on the Pleas of the Crown, must often have felt that both the Bench and the Bar were exercising all their ingenuity in devising little points and subtle distinctions, to enable the accused party to escape conviction. And it was so. But it was done from the purest, the most praiseworthy of motives : by the Bar, from a sense of duty to their clients ; by the bench, from a feeling of humanity towards the accused. At a time when our criminal code was the most sanguinary of any in Europe, when every felony was punished with death, no wonder that the judges, *in favorem vite*, listened favorably to objections and nice distinctions, which, if now introduced for the first time, would not be entertained for a moment. And even when our criminal code by degrees was ameliorated, softened down, the practice, fortified by the authority of former decisions, decisions often by the whole of the judges or a great majority of them, continued and even increased, until a mass of little points was accumulated, which operated as a great and serious obstruction to the course of justice. However pure and praiseworthy the motives from which this state of our criminal code originated, it was attended with most mischievous consequences. Juries looked astonished at finding a prisoner acquitted whom they considered to be clearly guilty, merely on account of some technical subtlety, which to their unlearned judgments must, no doubt, have appeared an absurdity. Prosecutors were discouraged from seeking to punish offenders, imagining that after expending their time and money in the endeavor, they would have the mortification of seeing the party acquitted from some cause entirely irrespective of the merits. And the offender himself, the hardened offender, acquitted on account of some "flaw in the indictment," as it was technically termed, exulted in his success, laughed at his judges, his jury, his prosecutor, and quitted the

dock more determined than ever to continue his trade of crime ; speculating on this state of the law for impunity, he grew more audacious in his exploits, until at last, after a course of crime for years, he was perhaps convicted, and punished.

This was not a healthy or sound state of our criminal law ; and the only wonder is, that the state of crime in the country was not very much worse than it is. The judges of themselves could effect nothing to remedy the evil ; they could not emancipate themselves from the authorities by which they were fettered, and which originated and perpetuated the mass of little subtleties by which the administration of the criminal law was impeded. Nothing but an act of parliament could effect it. And this Lord CAMPBELL framed, and introduced, and caused to be passed,—a task well worthy of the first Judge of the first Criminal Court in the country. By the statute 14 & 15 Vict. c. 100, the whole mass of little points and legal subtleties in indictable cases has been swept away, and hereafter criminal trials will be upon the merits, and the merits alone. Nor can or ought the accused to complain of this : if guilty, he has no right to be acquitted ; if innocent, his best defence will be upon the merits. And in both cases, he will experience the same mild, patient, unimpassioned mode of trial, the same indulgence, the same facilities of bringing his case before the jury in the best, the most advantageous manner, that has hitherto prevailed. And if there be a fair and reasonable doubt upon the merits, he will still find the jury inclined, and directed by the judge, to give him the benefit of the doubt.

We are now, therefore, entering upon a new era in the administration of our Criminal Law ; and Lord Campbell's Act, together with other statutes recently passed, create a new system of procedure, pleading, and, I may add, evidence, very different from that hitherto in practice. I have undertaken to develope this new system in the following work ; and in doing so, I have encountered the usual difficulty, in engrafting the new matter on the old, so as to form of the whole one uniform, consistent system. Whether I have succeeded or not, it would not become me to assert ; but I can with great sincerity say, that I have used every endeavor within my limited ability to do so. Nor is this so recent an undertaking as some persons may imagine. Lord Campbell first brought in his Bill in 1850 ; and I then foreseeing the immense consequences of the measure, and the new system of administering our Criminal Law which it would introduce, determined on developing it, and reducing the whole to a practical form. I then arranged the plan of my intended work, collected and arranged my materials, and actually wrote a portion of it, when Lord Campbell's Bill,

owing to his Lordship being on circuit at the time, was relinquished by Ministers in the Commons. In 1851, his Lordship again brought it forward; it passed the House of Lords, and by the aid of a good select committee, with the Right Honorable the President of the Poor Law Commission as Chairman, it passed the House of Commons, and after some slight difficulty in the Lords relating to some amendments of the Commons, the Bill was passed. I then renewed my labors, the result of which I now offer to the Profession for their approval, trusting that it will be received with the same favor and indulgence which they have shown to my former works.

This work will be found to comprise the whole of the Criminal Law in indictable cases, from the apprehension of the offender, to his conviction and sentence. The apprehension of the prisoner, without warrant, is given from the common law authorities; his apprehension by warrant, the examination of the witnesses against him, and his commitment or bail, is given from the first of Jervis's Acts, stat. 11 & 12 Vict. c. 42. The indictment has assumed a new and more concise form: no addition is given to the defendant, because it is, and has long been useless, and the indictment is now good without it; time is stated, not that it is now required, but in order to conform to the prejudices of Grand Juries, who might possibly otherwise throw out the Bill; place or special venue in the body of the indictment is omitted, in all cases where it is not of the essence of the offence and the statement of the offence, instead of being in that inverted style hitherto used, and seemingly borrowed from literal translations of our old Latin Entries, is according to the usual and ordinary English collocation of the words,—which has often the effect of rendering averments unnecessary, which the inverted style required. Upon this new principle, I have given a whole body of forms, comprising indictments in nearly all the cases which occur in practice; and as the new system in many cases created an alteration in the evidence, I have thought it right and convenient, after each indictment, to state the evidence necessary to support it. I have little else to add, except that I have endeavored to be correct; I have endeavored to use language so plain and precise, that it cannot be misunderstood or misinterpreted; I have endeavored to arrange the matter of the work in a manner to render it easily intelligible; and I have labored to give an index, from which any matter contained in the work may be found with great facility. I do not say that I have succeeded in all this; but if I have, I trust the reader will agree with me in thinking that the work will be useful, which is the only commendation I expect or wish for it.

J. F. A.

9, *King's Bench Walk, Temple*, 1852.





# INTRODUCTION.

BY THE AMERICAN EDITOR.

## OF CRIMES AND PUNISHMENTS.

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1. *The General Nature of Crimes.*
  2. *The Power, End, and Measure of Human Punishment.*
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### 1. *The General Nature of Crimes.*

§ 1. The idea conveyed by the word *crime*, is often vague and indefinite. This word is derived from the Greek word *ῥῆμα* which signifies judgment and condemnation. It may, therefore, be defined a transgression of law for which the offender may be brought to judgment. There was a distinction among the Romans between the words *crimen* and *delictum*. By the first, they understood public and capital offences; by the latter, private and expiable injuries. They likewise made a very marked distinction between *peccatum* and *delictum*. By the former, they expressed acts of commission against prohibitory laws; by the latter, acts of omission against mandatory laws. The Romans however, often used these and other words of the like import, indiscriminately; and we find *crimen*, *peccatum*, *delictum*, *noxæ*, *culpa*, &c. synonymously applied. The Greeks, in this respect, were much more precise; for they most frequently used the word *ἀμάρτημα* to signify *peccatum*, while the other words *ἔγκλημα*, *ἀστία*, &c. are applied indiscriminately.

§ 2. Crimes may be considered either as they regard ourselves, or as they concern others. There are duties relative to ourselves, as well as others; and every breach of duty is a crime. Man, having by nature, the liberty of using his faculties conformably to right reason, it follows that every abuse of his faculties in committing, or omitting any act, against the dictates of right reason, is, in some degree, a crime. Consequently, inebriety, where it is wilful, and not accidental, and all acts of intemperance, though their consequences may terminate only in our-

selves, may be ranked among the lesser species of crimes, as being contrary to the law of nature. Such offences Aristotle calls mixed crimes; as being partly voluntary, and partly involuntary. But though these crimes immediately affect ourselves, yet, consequentially and remotely, they may concern others; not only as the bad example may influence others to similar transgressions, but as inebriety, lust, and other acts of intemperance, dispose and provoke us to do things to the prejudice of others. Hence, the municipal laws of most countries, have provided penalties against acts of intemperance; not so much as they immediately concern the individual, as that they consequentially endanger the order and safety of society, the preservation of which ought to be the object of all human laws. It would indeed be well, if human laws were more attentive to prevent and restrain all acts of excess and intemperance, and all those slighter offences *contra bonos mores*, which certainly lead to the commission of enormous and capital crimes, Slight penalties, properly enforced for the breach of these lesser duties, might obviate the necessity of severe and sanguinary punishments. Punishments which remove a member out of the community weaken the whole body; whereas, wise regulations, and moderate penalties, *a priori* strengthen society, by obliging every individual to the practice of moral duties. The sources of crimes are pride, envy, ambition, lust, avarice, hatred, revenge, and every other selfish affection indulged to excess. Though it is impossible wholly to eradicate these sources of offence, we may yet weaken their influence, and obviate their effects. The seeds of pride, envy, ambition, &c. though inherent in our nature, may be checked in their growth. The force of education, will contribute greatly to restrain their progress. And what education is to individuals, good laws are to the whole community. (See Dagge's Cr. Law, vol. 1.)

§ 8. Puffendorf reckons those crimes the most heinous which directly tend to the dishonor of the Supreme Being. In the next class, he ranks those which are offensive to human society in general; then such as disturb the public peace. After these, he places crimes which regard individuals; and these he subdivides into crimes affecting either life or member. In the next rank, he classes crimes tending to disturb or defile private families, of which matrimony is the support. In the next degree he considers crimes which prejudice or destroy those things which are subservient to the necessities or conveniences of life; and lastly those which injure the fame or reputation of the citizen. Montesquieu who agrees substantially with Puffendorf, reckons four degrees of crime. Those of the first class, he says, shock religion; those of the second, morals; of the third, peace; and of the fourth, the security of society. These several degrees of offence correspond in a great mea-

sure, with the arrangement in the Decalogue, in which the crimes respecting religion and morals, are placed before those which concern property or the political welfare of society.

§ 4. Offences are of two kinds:—private offences, and public offences; the former being an infringement or privation of the civil rights which belong to individuals; while the latter are a breach and violation of the public rights and duties due to the whole community in its social aggregate capacity. (4. Blk. Com. 5.) By offences of a private nature, we mean those offences which affect individuals, in their persons—in their habitations—in their property generally—in their reputation—in their profession or trade—in their civil, religious, or political rights. By offences of a public nature, we mean those offences which affect those institutions or authorities, having a relation to the public:—as the sovereignty of the state—the Executive power—the Legislative power—judges and jurors in their official capacity—officers of justice—public justice—public peace—public trade—public health—public decency—and public morals.

§ 5. Private offences are denominated *civil injuries*; public offences, *crimes*. This distinction is purely artificial, and referable only to civil institutions. For crime in all cases, includes a civil injury; every public offence being also a private wrong. So, every violation of a moral law or natural obligation, is a crime as well as an injury. Consequently, when the word *crime* is used with reference to moral law, it implies every deviation from moral rectitude. Hence we say it is a *crime* to refuse the payment of a just debt; it is a *crime*, wilfully to do an injury to another's person or property. When, however, it has reference to positive law, it comprehends those acts only which subject the offender to punishment; while those acts for which the legislature has provided compensation in damages, are denominated injuries merely. (See 4 Blk. Com.)

§ 6. A crime, in its more limited sense, is an act committed or omitted in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors, which properly speaking are mere synonymous terms; though in common usage, the word "crime" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of "misdemeanors" only. (4 Blk. Com. 5.) But the act done or omitted in order to be criminal, must be wilful. The consent of the will is that which renders human actions either commendable or culpable; and where there is no will to commit an offence, there can be no transgression.

## 2. *The Power, End, and Measure of Human Punishment.*

§ 7. It is clear that the right of punishing crimes against the law of nature, is, in a state of mere nature, vested in every individual. For it must be vested in somebody ; otherwise, the laws of nature would be vain and fruitless if none were empowered to put them in execution : and if that power is vested in any *one*, it must also be vested in *all* mankind ; since all, are by nature, equal. Of this, the first murderer Cain was so sensible, that we find him expressing his apprehensions that *whoever* should find him, would slay him. (Gen. iv. 14.)

§ 8. In a state of society, this right is transferred from individuals, to the sovereign power ; whereby men are prevented from being judges in their cause, which is one of the evils that civil government was intended to remedy. Whatever power therefore individuals had of punishing offences against the law of nature, that is now vested in the magistrate alone, who bears the sword of justice by the consent of the whole community. And to this precedent natural power of individuals, must be referred that right which some have argued to belong to every state (though in fact never exercised by any,) of punishing not only their own subjects, but also foreign ambassadors, even with death itself, in case they have offended, not indeed against the municipal laws of the country, but against the divine law of nature, and become liable thereby to forfeit their lives for their guilt. (4 Blk. Com. 8.)

§ 9. As to offences merely against the laws of society, which are only *mala prohibita* and not *mala in se*, the temporal magistrate is also empowered to inflict coercive penalties for such transgression ; and this, by the consent of individuals, who, in forming societies did either tacitly, or expressly invest the sovereign power with the right of making laws, and of enforcing obedience to them when made, by exercising, upon their non-observance severities adequate to the evil. The lawfulness therefore, of punishing such criminals, is founded upon this principle, that the law by which they suffer, was made by their own consent ; it is a part of the original contract into which they entered, when first they engaged in society ; it was calculated for, and has long contributed to, their own security. (4 Blk. Com. 8.)

§ 10. This right therefore being thus conferred by universal consent, gives to the state exactly the same power, and no more, over all its members, as each individual member has naturally over himself or others. Hence, some have doubted how far a human legislature ought to inflict capital punishments for *positive* offences—offences against the municipal laws only, and not against the law of nature ; since no in-

dividual has, naturally, a power of inflicting death upon himself, or others, for actions in themselves indifferent. With regard to offences *mala in se*, capital punishments are, in some instances, inflicted by the immediate *command* of God himself, to all mankind; as in the case of murder, by the precept delivered to Noah, their common ancestor and representative, "whoso sheddeth man's blood, by man shall his blood be shed." (Gen. ix, 6.) In other instances, they are inflicted after the *example* of the Creator in his positive code of laws for the regulation of the Jewish republic: as in the case of the crime against nature. (4 Blk. Com. 9.)

§ 11. Experience shows that in countries remarkable for the lenity of their laws, the spirit of the inhabitants is as much affected by slight penalties, as in other countries, by severer punishments. If an inconvenience, or abuse, arises in the state, a violent punishment endeavors suddenly to redress it; and instead of putting the old laws in execution it establishes some cruel punishment which instantly puts a stop to the evil. But the spring of government hereby loses its elasticity; the imagination becomes accustomed to the severe as well as to the milder punishment; and as the fear of the latter diminishes, they are soon obliged, in every case, to have recourse to the former. Robberies on the highway had grown common in some countries. In order to remedy this evil, they invented the punishment of breaking upon the wheel, the terror of which put a stop, for a while, to this mischievous practice; but soon after, robberies on the highway, became as common as ever. Mankind must not be governed with too much severity. We ought to make a prudent use of the means which nature has given us to conduct them. If we inquire into the cause of all human corruptions, we shall find that they proceed from the impunity of criminals, and not from the moderation of punishments. Let us follow nature which has given shame to man; and let the heaviest part of the punishment be the infamy attending it. If there be some countries where shame is not a consequence of punishment, this must be owing to tyranny which has inflicted the same penalties on villians and honest men. And if there are others where men are deterred only by cruel punishments, we may be sure that this must, in a great measure, arise from the violence of the government which has employed such penalties for slight transgressions. It often happens that a legislator desirous of remedying an abuse, thinks of nothing else. His eyes are open only to this object, and shut to its inconveniences. When the abuse is redressed you see only the severity of the legislator; yet there remains an evil in the state that has sprung from this severity. The minds of the people are corrupted and habituated to despotism. (Montesq. Sp. of L. book 6, ch. 12.)

cannot be any regular or determinate method of rating the quantity of punishment for crime, by any one uniform rule but it must be referred to the will and discretion of the legislative power; yet there are some general principles, drawn from the nature and the circumstances of the crime, that may be of some assistance in allotting it an adequate punishment. And first, with regard to the object of it: for the greater and more exalted the object of an injury is, the more care should be taken to prevent that injury; and of course, under this aggravation, the punishment should be more severe. Therefore treason in conspiring against the state, is punished with equal severity, as actually killing any private citizen. And yet, generally, a design to transgress is not so flagrant an enormity, as the actual completion of that design. For evil, the nearer we approach it, is the more disagreeable and shocking. So that it requires more obstinacy in wickedness to perpetrate an unlawful action, than barely to entertain the thought of it. And it is an encouragement to repentance and remorse, even until the last stage of any crime, that it is never too late to retract; and that if a man stops, even here, it is better for him than if he proceeds. Hence an attempt to rob, to ravish, or to kill, is far less penal than the actual robbery, rape, or murder. Again, the violence of passion or temptation may sometimes alleviate a crime. Theft in case of hunger, is far more worthy of compassion, than when committed through avarice, or to supply one in luxurious excesses. To kill a man upon sudden or violent resentment, is less penal, than upon cool, deliberate malice. The age, education, and character of the offender, the repetition (or otherwise) of the offence, the time, the place, the company wherein it was committed; all these, and a thousand other incidents, may aggravate or extenuate the crime. Farther, as punishments are chiefly intended for the prevention of future crimes, it is but reasonable that among crimes of different natures, those should be most severely punished which are the most destructive of the public safety and happiness. And among crimes of an equal malignity, those which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others, and which therefore the offender has the strongest inducement to commit—according to what Cicero observes, “*ea sunt animadvertenda peccata maxime quæ difficillime præcaventur.*”

§ 17. Lastly, as a conclusion to the whole, we may observe, that punishments of unreasonable severity, especially when indiscriminately applied, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity. It is the sentiment of an ingenious writer who seems to have well studied the springs of

human action, that crimes are more effectually prevented by the *certainty* than by the *severity* of punishment. (Beccaria, c. 7.) Excess in severity of laws, hinders their execution. When the punishment surpasses all measure, the public will frequently prefer impunity to it. We may further observe, that sanguinary laws are a bad symptom of the distemper of any government, or at least, of its weak state. The laws of the Roman kings, and the twelve tables of the *Decemviri*, were full of cruel punishments. The Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period, the republic flourished. Under the emperors, severe punishments were revived ; and then the empire fell.





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### PROCEEDINGS FOR INDICTABLE OFFENCES.

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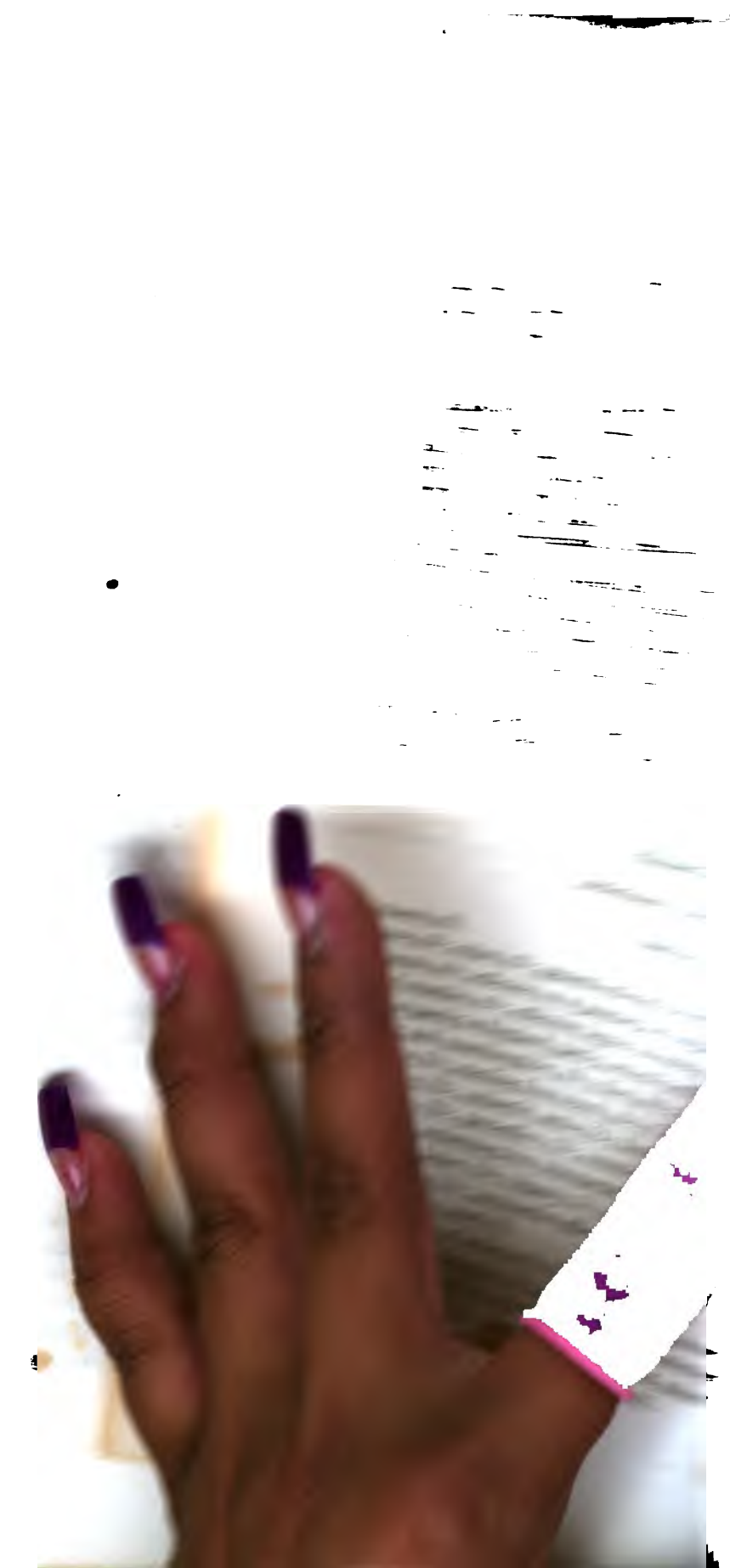
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THE NEW SYSTEM  
OF  
PROCEDURE AND PLEADING IN CRIMINAL CASES  
FOR  
INDICTABLE OFFENCES.

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INDICTABLE offences comprise every species of treason, all felonies at common law or by statute, all misdemeanors of a public nature at common law, and all misdemeanors created by statute for which the remedy by indictment is appointed expressly or by necessary implication.[1]

[1] At common law there were two kinds of treason : *high treason*, under which were collected the compassing of the king's death, the comforting of the king's enemies, the counterfeiting of the privy seal, the forging of the king's coin, and the slaying of the king's justices; secondly, *petit treason*, comprising similar offences arising in private life, such as the slaying by a wife of her husband, and by an ecclesiastic of his ordinary.

In the United States, petit treason, as a distinct class of offences, is no longer recognized; and high treason, under the constitutions both of the federal union and the several states, is limited to the levying war against the supreme authority, or adhering to its enemies, giving aid and comfort.

The term felony appears to have been long used to signify the degree or class of crime committed, rather than the penal consequences of the forfeiture occasioned by the crime, according to its original signification. Capital punishment does by no means enter into the true definition of felony : but the idea of felony is so generally connected with that of capital punishment, that it is hard to separate them ; and to this usage the interpretations of the law have long conformed. With regard to felonies enacted by statute, it seems clear that not only those crimes which are made felonies by express words, but also all those which are decreed to have or undergo judgment of life or member, by any statute, become felonies thereby, whether the word "felony" be mentioned or omitted. And where a statute declares that an offender shall, under the particular circumstances, be deemed to have feloniously committed the act, it makes the offence a felony, and imposes all the common and ordinary consequences attending a felony. 1 Russel on Crim. Law, 43.

In this country, by the statutes of most of the states, felony is construed to mean an offence for which the offender, on conviction, is liable to be punished with death, or imprisonment in the state prison or penitentiary. In Virginia, it comprehends all offences below treason, which occasioned a forfeiture of property at common law, all offences so denominated by statute, and all to which statutes have annexed capital punishment or imprisonment in the penitentiary, excepting those which, though subjected to the latter punishment, are or may be declared misdemeanors by statute.

If a statute prohibit a matter of public grievance to the liberties and security of the subject, or command a matter of public convenience, such as the repairing of the common streets of a town, or the like,—an offender against such a statute is punishable, not only by any party aggrieved, but by indictment for his contempt of the statute, unless that mode of proceeding appear manifestly to be excluded by the statute.(a) But if a statute extend only to private persons,—or if it extend to all persons in general, but chiefly concern disputes of a private nature, such as distresses by lords on their tenants, or the like,—there an indictment will not lie.(b) If a statute enjoin an act to be done, without assigning any punishment for the not doing of it, there an indictment will lie for disobeying the injunctions of the statute;(c) and this mode of proceeding by indictment will not be taken away by a subsequent statute, assigning a particular punishment for the disobedience,(d) unless by express negative words, or by necessary implication. So, if the statute forbid the doing of a thing, without assigning any punishment for it, the doing of it wilfully is an indictable offence, and punishable as a common law misdemeanor.(e) Even if a statute, creating a new offence, which was not prohibited by the common law, assign a particular punishment and mode of proceeding for it, but not in the same [\*2] clause which created the offence, an indictment will lie, as \*for a common law misdemeanor; per *Dennison, J.*;(g) and *a fortiori* is it

(a) 2 Hawk. c. 25, s. 4.

831; *R. v. Balme*, Cowp. 648.(b) *Id.*(e) *R. v. Sainsbury*, 4 T. R. 451.(c) *R. v. Davis*, Sayer, 133.

(g) 1 Burr. 545.

(d) Doug. 441, 446; *R. v. Boyal*, 2 Burr.

Misdemeanors include all offences lower than felonies, which may be the subjects of indictment. They are divided into such as are *male in se*, or penal at common law, and such as are *male prohibita* or penal by statute. Whatever, under the first class, mischievously affects the person or property of another, or openly outrages decency, or disturbs public order, or is injurious to public morals, or is a breach of official duty, when done corruptly, is the subject of indictment. Black. Com. 65, w.; 1 Hawk. P. C. c. 5, s. 1; 1 East P. C. c. 1, s. 1; 1 Russel on Crimes, 46.

Misdemeanors which become penal by statute, are of two kinds:—first, those which consist in the commission or omission of an act enjoined or forbidden by statute, though by such statute such omission or commission is not made the subject of indictment; and secondly, those which consist of omission or commission of any act which, by itself, is made specially indictable.

In England, when a misdemeanor at common law is created a felony by statute, the misdemeanor is merged, and cannot be prosecuted as such. *Reg. v. Cross*, 1 Ld. Raym. 711; 3 Salk. 193. And this doctrine is also held in Pennsylvania. *Com. v. Gable*, 7 Serg. & Rawle, 423, per Tilghman, C. J. But in New York, Massachusetts and Ohio, it is said, that as the reason for the English rule does not there apply, the rule itself does not hold; and it is accordingly held that if the evidence, in an indictment in such case, does not make good the felony, the word feloniously may be rejected, and judgment had for the constituent misdemeanor. *People v. Jackson*, 3 Hill, 92; *People v. White*, 22 Wend. Rep. 175; *Com. v. Squire*, 1 Metc. 258; *People v. Hess*, 5 Ohio, 1.

so, where the punishment is assigned or the mode of proceeding is directed by a subsequent statute.(a) But if the mode of proceeding or punishment be directed by the same section or clause creating the offence, that punishment alone must be inflicted, or that mode of proceeding adopted, which the statute directs;(b) yet even in such a case, if the statute direct that the prosecutor shall proceed in a certain way, "or otherwise," an indictment will lie.(c) [1] Or, if an offence at common law have a further or additional punishment assigned to it by statute, the prosecutor may still indict as for the common law offence; and his concluding his indictment *contra formam statuti*, will not prevent him from maintaining it as an indictment at common law.(d)[2] So, if the law cast a public duty upon a person, and he refuse or neglect to perform it,—as if a man be appointed to a public office, and he refuse to undertake or perform the duties of it, he may be indicted and punished as for a common law misdemeanor.(e) So, if he refuse to obey the order of a magistrate or court of quarter sessions, he may be indicted.[3]

(a) Doug. 441, 446.

(d) 2 Hawk. c. 25, s. 4.

(b) 2 Hawk. c. 25, s. 4.

(e) See *R. v. George*, Cowp. 13.

(c) Id.

[1] The New York Revised Statutes contain a provision that when the performance of an act is prohibited by any statute, and no penalty for the violation of such statute is imposed, either in the same section containing the prohibition, or in any other section or statute, the doing such act shall be deemed a misdemeanor. 2 N. Y. Rev. Stat. 696, sec. 39. Hence, it follows, that if in the same section, or in any other section or statute, a penalty is imposed for the violation of such statute, an action at law for such penalty is the exclusive remedy for such violation, and no indictment will lie.

[2] *State v. Moore*, 9 Yerg. 353; *Turnpike Road v. People*, 15 Wend. Rep. 267. But in Pennsylvania, the law is different. It is there provided, that "In all cases where a remedy is provided, or a duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect." Act of 21st March, 1806, sec. xiii.; 4 Smith's Laws, p. 332. It has been held by the courts, in conformity with this act, that wherever a mode of procedure is attached to a specific offence by any act of assembly, the common law remedy is abrogated, and the indictment and sentence must pursue the act. 3 Serg. & Rawle, 273; 1 Rawle, 290; 3 Pen. Rep. 180; 3 Watts, 330; 5 Rawle, 64; Wharton, 357. It was even held, that where an act of assembly gave a penalty to the party injured by the extorsive and corrupt conduct of a magistrate, which penalty was to be recovered in a civil suit, the offence ceased to be indictable at common law. *Com. v. Evans*, 13 Serg. & Rawle, 326. But it seems that the act in question only applies when a specific method of procedure is directed by act of assembly; for when a new penalty is attached to a common law offence, then the indictment may still be at common law, though in case of conviction, no other than the statutory punishment can be inflicted. Thus, where an act of assembly provided a new punishment for murder, it was held, that though by so doing, the act of 21st March, 1806, prevented any other than the statutory punishment from being imposed, yet the indictment would still lie at common law, and that it was not necessary for it to conclude contrary to the act. *Com. v. White*, 6 Binney, 179; See Whart. Crim. Law, p. 7 and 8.

[3] It has been held indictable to destroy a horse, (*Resp. v. Teischer*, 1 Dallas, 335; *State*

Having thus stated, shortly and generally, what offences are indictable, I shall now proceed to state the mode of proceeding against per-

v. *Council*, 1 Tenn. 305,) or a cow, (*Com. v. Leach*, 1 Mass. 59; *People v. Smith*, 5 Cow. 218,) or any beast whatever, which may be property of another; (*Loomis v. Edgerton*, 19 Wend. 420; *State v. Wheeler*, 3 Verm. 344;) to be guilty of wanton cruelty to animals in general, (*State v. Briggs*, 1 Aik. 226;) to cast the carcass of an animal in a well in daily use, (*State v. Buckman*, 8 New Hamp. 203;) to poison chickens; tear up fraudulently a promissory note, or maliciously break windows, (*Resp. v. Teischer*, 1 Dallas, 335;) to mischievously set fire to a number of barrels of tar, belonging to another, (*State v. Simpson*, 2 Hawkes, 460;) to girdle, or otherwise maliciously injure trees kept either for use or ornament, (*Com. v. Eckert*, 2 Browne, 251; *Loomis v. Edgerton*, 19 Wend. 420; per contra, *Brown's case*, 3 Greenl. 177;) to discharge a gun, with the intention of annoying and injuring a sick person in the immediate vicinity, (*Com. v. Wing*, 9 Pick. 1;) and to break into a room with violence for the same purpose, (*Com. v. Taylor*, 5 Binney, 277;) though it is not an indictable offence to remove a stone from the boundary-line between the premises of A. & B., with intent to injure B. *State v. Burroughs*, 2 Halst. Rep. 220. It has been held indictable to drive a carriage through a crowded street, in such a way as to endanger the lives of the passers by, (*United States v. Hart*, 1 Peters' C. C. Rep. 390;) to disturb a congregation when at religious worship; to go about armed with dangerous and unusual weapons, to the terror of citizens, (*State v. Huntley*, 3 Ired. N. C. R. 418; though see per contra, *State v. Simpson*, 5 Yerger's Tenn. Rep. 356, Peck, J., dissenting;) to raise a liberty pole, in the year 1794, as a notorious and riotous expression of ill-will to the government, (*Penn. v. Morrisson*, Addison's Pa. Rep. 274;) to tear down, forcibly and contemptuously, an advertisement set up by the commissioners, of a sale of land for county taxes, (*Penn. v. Gillespie*, Addison's Pa. Rep. 267;) to agree to fight, though no fight takes place, (*State v. Hitchins*, 2 Harrington's Del. Rep. 527;) to challenge another to fight with dangerous weapons, (*State v. Taylor*, 3 Brevard's S. C. Rep. 243;) to break into a house in the day-time, and disturb its inhabitants, (*Com. v. Taylor*, 5 Binney, 281;) to violently disturb a town-meeting, though the parties engaged were not sufficient in number to amount to riot, (*Com. v. Hoxey*, 16 Mass. 385;) to kidnap another, (*State v. Rollins*, 8 N. Hamp. Rep. 550;) to cast a dead body into a river without the rites of Christian sepulture, (*Kanavan's case*, 1 Greenl. 226;) to be guilty of eaves-dropping, (*State v. Williams*, 2 Tenn. 108;) to sell unwholesome provisions, (*State v. Smith*, 3 Hawkes, 378; 1 Ired. 40;) to disinter a dead body, (*Com. v. Cooley*, 10 Pick. 37;) to give more than a single vote at an election, (*Com. v. Salebee*, 9 Mass. 417;) to be guilty of individual offensive drunkenness, (*Smith v. State*, 1 Hum. Tenn. Rep. 396;) to indulge publicly in profane swearing, (*State v. Kirby*, 1 Murphy, 254; *State v. Ellow*, 1 Dev. 267;) to publicly and blasphemously revile the Christian religion, which is part of the common law of the land, (*People v. Ruggles*, 8 Johns. 290; *Com. v. Kneeland*, 20 Pick. 206; Thacher, C. C. 346; *Com. v. Updegraph*, 11 Serg. & Rawle, 394; *State v. Chandler*, 2 Harring. 553;) to commit any act which, from its nature, must prejudicially affect the morals and health of the community, (*Com. v. Sharpless*, 2 Serg. & Rawle, 91; *Resp. v. Teischer*, 1 Dallas, 335; *People v. Smith*, 7 Cow. 258;) to lie in wait near a jail, by agreement with a prisoner, and to carry him away, (*People v. Washburn*, 10 Johns. Rep. 160;) to send threatening letters, (*U. S. v. Ravara*, 2 Dallas, 299;) to challenge another to fight with fists, (*Com. v. Whitehead*, 2 Boston Law Rep. 148;) to challenge another to fight under any circumstances, though not in such a way as to constitute the statutory offence, (*State v. Farrier*, 1 Hawkes, 487; *State v. Taylor*, 3 Brevard, 243;) to even intimate to another a desire to fight with deadly weapons, (*Com. v. Tibbs*, 1 Dana, 524;) fornication has been held indictable, (*State v. Cox*, N. C. Term Rep. 165;) and adultery, (*Com. v. Call*, 21 Pick. 509; *State v. Wallace*, 9 N. Hamp. 518; though see *Aderson v. Com.*, 6 Rand. 627, and *State v. Brownson*, 2 Bailey, 149;) and it has been held a misdemeanor, to solicit another to commit adultery, (*State v. Avery*, 7 Conn. 267;) and to notoriously haunt houses of ill-fame. *Brooks v. State*, 2 Yerg. 482.

sons charged with or suspected of having committed them, as regulated by the recent statutes. And I propose to do so under the following heads:—

Part I. PROCEEDINGS FOR INDICTABLE OFFENCES.

II. INDICTMENT AND EVIDENCE IN PARTICULAR CASES.

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## PART I.

### PROCEEDINGS FOR INDICTABLE OFFENCES.

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I propose to treat of this part of the work, under the following heads:—

CHAPTER 1. PERSONS CAPABLE OF COMMITTING INDICTABLE OFFENCES, AND THE DEGREE IN WHICH THEY MAY BE GUILTY.

2. APPREHENSION OF THE OFFENDERS.
3. THE INDICTMENT AND PLEADINGS.
4. EVIDENCE.
5. THE TRIAL, &c.



[\*3]

## \*CHAPTER I.

PERSONS CAPABLE OF COMMITTING INDICTABLE OFFENCES, AND THE DEGREE IN WHICH THEY MAY BE GUILTY.

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## SECTION I.

WHAT PERSONS ARE PUNISHABLE OR EXCUSABLE FOR CRIME.

### (a) *Infants.*

AN infant, according to the legal acceptation of the term, is a person under twenty-one years of age.[1] At and above the age of fourteen,

[1] The full age of man or woman, by the law, is twenty-one years, under which a person is termed an infant. 1 Blk. Com. 463; 1 Russ. on Cr. 2. It is completed on the day preceding the anniversary of the person's birth. Infants under the age of discretion, (that is, when too young to distinguish between right and wrong,) ought not to be punished by any criminal prosecution whatever. 4 Blk. Com. 23. With regard to all crimes and offences, it is considered in law, that the capacity of doing ill or contracting guilt, is not so much measured by years or days, as by the strength of the delinquent's understanding and judgment.

an infant may be convicted of any offence, except those which consist of a non-feasance merely, such as the not apprehending persons committing felonies, or the like.(a)[1]

Under seven years of age, he cannot be convicted of felony;(b)[2] and under fourteen he cannot be convicted of rape,(c) or of carnally knowing a girl under the age of ten, or between the age of ten and twelve, although he may have arrived at the age of puberty, and be capable of committing the offence;(d) but he may be convicted as for an indecent assault. Between the ages of seven and fourteen, however, although presumed by law not to be *doli capax*, yet that presumption may be rebutted by evidence of circumstances, showing clearly that the infant was, at the time of committing the offence, capable of discerning between good and evil; and in such a case, he is as amenable for offences (excepting rape and offences of that description, and also offences of omission as above mentioned) as if he were of full age.[3]

(a) 1 Hale, 21, 22, 25; 3 Bac. Abr. 581, 591.

(c) 1 Hale, 630.

(d) *R. v. Jordan*, 9 Car. & P. 366.

(b) 1 Hale, 27, 28.

[1] As intimated in the text, an infant in some misdemeanors is privileged by reason of his non-age, even though he be over fourteen; for instance, if the offence charged be a mere non-feasance, as not repairing a bridge or a highway, and other similar offences. In these cases, not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires, and his laches shall not be imputed to him. 4 Blk. Com. 22. But where there is a notorious breach of the peace, a riot, a battery, or the like, for these an infant is equally liable to suffer as a person of the full age of twenty-one.

[2] An infant under the age of seven years, cannot commit a crime, for within that age the law regards him as *doli incapax*, (incompetent to discern evil,) and as not being endowed with any sort of discretion. No evidence is admissible to contradict this legal presumption; and all persons under seven years of age, are absolutely exempted from criminal prosecutions, without regard to their mental capacity. 4 Blk. Com. 23; 1 Russ. on Cr. 2.

[3] Infants above seven years of age, and under fourteen, are said to be within the age of *possible discretion*; during which time they may or may not be guilty of crime, according to their natural capacity or incapacity. The presumption, where the offender is under the age of fourteen, is, that he has not a sufficient sense of right and wrong to be capable of committing crime. But this presumption, like most others, may be overcome by counter evidence, and by circumstances. For the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding. One lad, eleven years old, may have as much cunning as another of fourteen; and in these cases the maxim is, that *malice supplies age*. 4 Black. Com. 23; 4 Car. & P. 236. And see 1 Wheel. Crim. Rec. 230, 231, and note. The intellectual capacity of the child may be proved by the testimony of witnesses. Per Southard, J., 1 South. Rep. 231. Thus, it is said that an infant of seven (1 Ashm. Rep. 248,) or eight years of age may be indicted for murder, and shall be hanged for it. Dalt. Just. ch. 147; Arch. Cr. Pl. 11; 1 Russ. on Cr. 3. And an infant between the ages of eight and nine years has been executed for arson—it appearing that he was actuated by malice and revenge, and had perpetrated the offence with craft and cunning. 1 Hale's P. C. 25; Arch. Cr. Pl. 11; 1 Russ. on Cr. 3; 4 Black. Com. 24. So a girl of thirteen was burnt for killing her mistress. 1 Hale's P. C. 26. With regard to the maxim that *malice supplies age*, it seems agreed among all the writers on criminal law, that before an infant under fourteen is presumed capable of committing a crime, the

Thus, a girl of thirteen was executed for killing her mistress.<sup>(a)</sup> A boy of ten, and another of nine, who had killed their companion, have been sentenced to death, and he of ten years actually hanged; because, upon their trials, it appeared that the one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil.<sup>(b)</sup>

And there was an instance in the seventeenth century, where a boy of eight years old was tried at Abingdon, for firing two barns, and it appearing that he had malice, revenge and cunning, he was found guilty and hanged.<sup>(c)</sup>

And in 1748, a boy of ten years old, indicted for the murder of a girl of five, was found guilty and sentenced to be hanged: the girl was found buried in a dung-heap, cut and mangled in a most barbarous and horrid manner; and as the boy and girl were companions and slept together, he was charged with the offence, but he denied it; afterwards, <sup>[\*4]</sup> however, he confessed it, and, according to his confession, it appeared that he had carried the girl from the bed to the dung-heap, and there killed her, cutting and mangling her in the manner above mentioned, then dug a pit for the body in the heap, and having placed the dung and straw which was bloody under the body, he covered it up with what was clean, and having done so, he got water and washed himself as clean as he could. As the judge who tried him did not wish to leave him actually for execution, before he had consulted the other judges on the subject, he reprieved him; and a report of the facts being afterwards laid before all the judges, they were unanimously of opinion that there were so many circumstances stated in the report, which were undoubted tokens of what Lord Hale <sup>(d)</sup> called a "mischievous discretion;" that the prisoner was certainly a proper object for capital punishment, and ought to suffer, "for it would be of very dangerous consequence to have it thought that children may commit such atrocious crimes with impunity; there are many crimes of the most heinous nature, such as the murder of young children, poisoning parents or masters, burning houses, or the like, which children are very capable of committing, and which they in some circumstances may be under strong temptations to commit; and, therefore, although taking away the life of a boy ten years old may savour of cruelty, yet, as the example of this boy's punishment may be the means of deterring other children from the like offences, and as the sparing this boy merely on

(a) 1 Hale, 26.

(b) 1 Hale, 26, 27; 4 Bl. Com. 23.

(c) Evelyn on 1 Hale, 25; 4 Bl. Com. 24.

(d) 1 Hale, 630.

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evidence of mischievous discretion should be strong and clear, beyond all doubt and contradiction. 1 Russ. on Cr. 3; 1 Black. Com. 24; Arch. Cr. Pl. 11; 4 Car. & P. 236; 1 Wheel. Crim. Rec. 230, 231, and note; 1 Ash. 248.

account of his age, will probably have a quite contrary tendency, in justice to the public, the law ought to take its course."(a) [1]

(a) *York's case*, Fost. 70.

[1] By the civil law, the period of entire majority was twenty-five. As to matters of crimes and criminal punishment, especially that of death, the civil law distinguishes the age of minors into three periods—*INFANTIA*, from the birth until seven years of age; *PUERITIA*, from seven to fourteen years of age; and *PUBERTAS*, from fourteen years and upwards. Indeed, *pubertas plena* is eighteen years. Dig. lib. 1, tit. 7, de Adoptionibus, c. 40, sec. 1, Inst. eod. tit. sec. 4. The period of *pueritia* is again sub-divided into two equal parts. From seven years to ten and a half is *ætas infantie proxima*. From ten years and a half until fourteen is *ætas pubertatis proxima*. Fourteen years is the age of *pubertas* in relation to crimes and punishments. With respect to the first age, *infantia* or infancy, which lasts to the period of seven years within that age and the next period of *ætas infantie proxima*, that is, to ten years and a half, there could be no guilt of a capital offence, and therefore the infant could not be punished, infants of that age being considered *doli incapaces*. Dig. lib. 47, tit. 12, de Sepulchro violato, lib. 3, sec. 1. The next period of *pueritia* was from ten years and a half until fourteen, being the age *pubertatis proxima*. Within this period the infant was *prima facie* considered *doli capax*, and so might be punished for a capital offence, but with a power in the judge to mitigate the rigor of the sentence on account of the youth of the offender. Dig. lib. 4, tit. 4, de Minoribus, c. 37, sec. 1, in Delictis. Fourteen years was full age as to responsibility in relation to crimes and punishment. Dig. lib. 29, tit. 5, de Senatus-Consulto Silianiano, sec. 32.

The English common law fixes the majority for both sexes, at twenty-one; and that age is completed on the beginning of the day preceding the anniversary of the person's birth. The age of twenty-one is the period of absolute majority throughout the United States, though female infants, in some of them, are deemed of age at eighteen. 2 Kent, 233. The Revised Statutes of Ohio declare that all female persons of the age of eighteen years and upwards, "shall be, to all intents and purposes, held and considered to be of full age, any law or custom to the contrary notwithstanding. R. S. ch. 59. In Vermont, that section of the bill of rights in the constitution of the state, which declares involuntary servitude illegal, and not allowable after males arrive at the age of twenty-one, and females at the age of eighteen years, has always been considered as fixing the age of majority of females at eighteen years. 9 Verm. Rep. 179.

Infants under the age of discretion are not punishable for criminal offences. What the age of discretion is, in various nations, is a matter of some variety.

By the ancient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open; and from thence till the offender was fourteen he might or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion: but under twelve, it was held that he could not be guilty in will, neither after fourteen could he be supposed innocent of any capital crime which he in fact committed. Ib. 23.

By the law, as it now stands, the capacity of doing ill, or contracting guilt, is not so much measured by years and days as by the strength of the delinquent's understanding. Until, however, an infant arrives at the age of seven years, he cannot be guilty of a crime. From seven to fourteen, he is within the age of *possible discretion*, and may or may not be capable, according to circumstances; the presumption of want of discretion diminishing with the advance of the offender's years, and depending also somewhat upon the particular facts and circumstances of his case. The evidence of malice, which is to supply age, should be strong and clear; and then, if it appear that the offender could discern between good and evil, he may be found guilty. 1 Hale, 19, 20, 25, 27; 1 Hawk. c. 1, sec. 1; Arch. Cr. Law, 13; 4 Black. 23; 1 Wheeler's Cr. Cas. 231.

With regard to felonies, the rule is definite and uniform. All the authorities concur that

See as to the summary conviction of juvenile offenders, *post*, ch. 2, sec. 4.

under the age of seven years, an infant cannot be punished, for any felony committed by him; for the law presumes that in such case, a felonious discretion cannot exist, and against this presumption, no averment shall be admitted. 1 Hale's P. C. 27, 28; 4 Bl. Com. 23. But on attaining the age of fourteen, the criminal acts of infants are subject to the same construction and punishment as are those of persons of full age, being then presumed to be capable of distinguishing between right and wrong. In the interval between the ages of seven and fourteen years, they are deemed incapable of contracting guilt. If, however, it clearly appear that they could discriminate between good and evil, they may be convicted and punished. The maxim in such cases is, "*malice supplies age*;" but the evidence of malice which is to supply age, must be clear beyond all contradiction.

In England, an infant of the age of nine years, having killed an infant of the like age, confessed the felony: and, upon examination, it was found that he had hid the blood and the body. The justices held that he ought to be hanged, but they respited the execution that he might have a pardon. Another infant, of the age of ten years, who had killed his companion and hid himself, was, however, actually hanged, upon the ground that it appeared by his hiding, that he could discern between good and evil; and *malitia supplet aetatem*. *Spigurnal's case*, 1 Hale, 26; Fitz. Rep. *Corone*, 118. And a girl of thirteen was burnt for killing her mistress. *Alice de Waldborough's case*, 1 Hale, 26. Whenever a person under the age of fourteen is charged with committing a felony, the proper course is to leave the case to the jury to say whether, at the time of committing the offence, such person had guilty knowledge that he was doing wrong. *Rex v. Owen*, 4 C. & P. 236, Little-dale, J.

In the case of *rape*, the law presumes that an infant under the age of fourteen years, is unable to commit the crime; and therefore he cannot be guilty of it; (*Rex v. Groombridge*, 7 C. & P. 582, Gaselee, J., after consulting Lord Abinger, C. B., as to whether the words "every person" in the 9 Geo. 4, ch. 31, sec. 16, altered the former law. So an infant cannot be guilty of an assault with intent to commit a rape. *Rex v. Eldershaw*, 3 C. & P. 396, Vaughan, J.) but this is upon the ground of impotency rather than the want of discretion; for he may be a principal in the second degree, as aiding and assisting in this offence as well as in other felonies, if it appear by sufficient circumstances that he had a mischievous discretion. And the legal presumption that an infant under the age of fourteen years, is incapable of committing the crime of rape, may be rebutted by proof that he has arrived at the age of puberty. *Williams v. The State*, 14 Ohio Rep. 222.

The following is an important case as to the capability of an infant of ten years old being guilty of the crime of murder; and as to the expediency of visiting such an offender with capital punishment.

At Bury summer assizes, 1748, William York, a boy of ten years of age was convicted, before Lord Chief Justice Willes, for the murder of a girl about five years of age, and received sentence of death; but the Chief Justice, out of regard to the tender years of the prisoner, respited execution till he should have an opportunity of taking the opinion of the rest of the judges, whether it was proper to execute him or not, upon the special circumstances of the case, which he reported to the judges at Serjeant's Inn.

The boy and girl were parish children, put under the care of a parishioner, at whose house they were lodged and maintained. On the day the murder happened, the man of the house and his wife went out to their work early in the morning, and left the children in bed together. When they returned from work, the girl was missing; and the boy, being asked what had become of her, answered that he had helped her up and put on her clothes, and she had gone he knew not whither. Upon this, strict search was made in the ditches and pools of water near the house, from an apprehension that the child might have fallen into the water. During this search, the man, under whose care the children were, observed that a heap of dung near the house had been newly turned up; and, upon removing the upper part of the heap, he found the body of the child about a foot's depth under the sur-

(b) *Idiots and Lunatics.*

Idiots are persons who have been permanently of non-sane memory from their birth; lunatics, persons who labor at times under temporary

face, cut and mangled in a most barbarous and horrid manner. Upon this discovery, the boy, who was the only person capable of committing the fact, that was left at home with the child, was charged with the fact, which he stiffly denied. When the coroner's jury met, the boy was again charged, but persisted still to deny the fact. At length, being closely interrogated, he fell to crying, and said he would tell the whole truth. He then said that the child had been used to foul herself in bed; that she did so that morning, (which was not true, for the bed was searched and found to be clean,) that thereupon he took her out of the bed and carried her to the dung heap, and with a large knife, which he found about the house, cut her in the manner the body appeared to be mangled, and buried her in the dung-heap; placing the dung and straw that was bloody under the body, and covering it up with what was clean; and having so done, he got water and washed himself as clean as he could. The boy was the next morning carried before a neighboring justice of the peace, before whom he repeated his confession, with all the circumstances he had related to the coroner and his jury. The justice of the peace very prudently deferred proceeding to a commitment, until the boy should have an opportunity of recollecting himself. Accordingly he warned him of the danger he was in if he should be thought guilty of the fact he stood charged with, and admonished him not to wrong himself: and then ordered him into a room where none of the crowd that attended should have access to him. When the boy had been some hours in this room, where victuals and drink were provided for him, he was brought a second time before the justice, and then he repeated his former confession:—upon which he was committed to jail.

On the trial, evidence was given of the declarations before mentioned to have been made before the coroner and his jury, and before the justice of the peace; and of many declarations to the same purpose which the boy made to other people after he came to jail, and even down to the day of his trial; for he constantly told the same story in substance, commonly adding that the devil put him upon committing the fact. Upon this evidence, with some other circumstances tending to corroborate the confessions, he was convicted.

Upon this report of the chief justice, the judges, having taken time to consider of it, unanimously agreed, 1. That the declarations stated in the report were evidence proper to be left to the jury. 2. That, supposing the boy to have been guilty of this fact, there were so many circumstances stated in the report which were undoubtedly tokens of what Lord Hale calls *mischievous discretion*, that he was certainly a proper subject for capital punishment, and ought to suffer; for it would be of very dangerous consequence to have it thought that children may commit such atrocious crimes with impunity. That there are many crimes of the most heinous nature, such as (in the present case) the murder of young children, poisoning parents or masters, burning houses, &c., which children are very capable of committing; and which they may in some circumstances be under strong temptations to commit; and therefore, though the taking away the life of a boy of ten years old might savor of cruelty, yet, as the example of that boy's punishment might be a means of deterring other children from the like offences, and as the sparing the boy, *merely on account of his age*, would probably have a quite contrary tendency, in justice to the public, the law ought to take its course; unless there remained any doubt touching his guilt. In this general principle all the judges concurred: but two or three of them, out of great tenderness and caution, advised the chief justice to send another reprieve for the prisoner; suggesting that it might possibly appear, on further inquiry, that the boy had taken this matter upon himself at the instigation of some person or other, who hoped by this artifice to screen the real offender from justice.

Accordingly the chief justice granted one or two more reprieves; and desired the justice of the peace who took the boy's examination, and also some other persons, in whose pru-

insanity, with lucid intervals; and there are others who, born sane, have become permanently insane from disease or other cause: and

dence he could confide, to make the strictest inquiry they could into the affair, and report to him. At length he, receiving no farther light, determined to send no more reprieves, and to leave the prisoner to the justice of the law at the expiration of the last; but, before the expiration of that reprieve, execution was respited till further order, by warrant from one of the secretaries of state: and at the summer assizes, 1757, the prisoner had the benefit of His Majesty's pardon, upon condition of his entering immediately into the sea service. *Fost. 70, et seq.*

In New Jersey, a boy of twelve years of age, was convicted on his own confession, and was sentenced and executed. 5 Halst. Rep. 163. The court in this case remarked: "At the age of this defendant, sufficient capacity is generally possessed in our state of society, by children of ordinary understanding, and having the usual advantages of moral and religious instruction. You will call to mind the evidence on this subject; and if you are satisfied that he was able, in a good degree to distinguish between right and wrong; to know the nature of the crime with which he is charged; and that it was deserving of severe punishment, his infancy will furnish no obstacle, on the score of incapacity, to his conviction."

Such are the well established principles in regard to infants charged with the commission of felonies. In respect to the liability of infants under the age of twenty-one, to criminal punishment for misdemeanors, the rule seems not to be so well settled. In the *State v. Gorin*, 9 Humphrey's Reports, 175, the defendant had been convicted of assault and battery, in the circuit court, by the verdict of a jury; but the court refused to render judgment upon the verdict, and discharged the defendant on the ground that she was only twelve years of age, being of opinion that a minor under the age of fourteen was not subject to criminal punishment for misdemeanors, although possessed of sufficient capacity to distinguish between good and evil.

The Supreme Court say: "There is some confusion and apparent conflict in the books, in respect to the liability of an infant to criminal punishment, for misdemeanors, under the age of twenty-one. And so far as our examination has extended, no very definite or uniform rule seems to have been established. Blackstone (4, 22,) does not assert—nor do any of the authorities to which we have had access—that an infant under the age of fourteen, if possessed of sufficient capacity to discern good from evil, may not be punished in cases of misdemeanors involving violence and breaches of the peace; and we apprehend the author did not intend to be so understood. The position laid down, as far as it goes, is unquestionably correct, that infants above the age of fourteen are equally as liable as persons of full age to conviction and punishment in such cases. But this authority does not establish the conclusion attempted to be deduced from it, that under the age of fourteen an infant, regardless of his capacity to commit crime, shall be exempt from punishment. It would seem grossly absurd to hold, that an infant under the age of fourteen, if possessed of sufficient capacity, may be convicted and punished, even with death; but that in cases of breach of the peace, or violent injuries to the person of another, he shall be permitted to escape, though possessed of like capacity. Such distinction is inconsistent with reason; it is also in opposition to an admitted axiom of the law, that the higher the grade of the offence, the stronger should be the proof, not merely of the *corpus delicti*, but also of the capacity of the offender; and it is no less opposed to one of the chief ends of criminal jurisprudence, the preservation of the public peace, and security of the persons of the citizens. In Dane's Abr. vol. 6, p. 638, it is laid down, in accordance with what we understand to be the law, that, 'for a breach of the peace, a riot, battery, &c., a minor above fourteen years may be punished; under seven years of age an infant cannot be guilty; but between seven and fourteen years of age the capacity only is regarded; hence one eight years of age may be guilty and punished.' We are of opinion that the conviction was proper, and that the circuit court erred in refusing to pronounce judgment, and in discharging the defendant."

where, in any of these cases, the degree of insanity is such that the party knows not whether he is doing right or wrong, he is not punishable for any offence he may commit whilst in that state.(a)[1]

(a) *R. v. Higginson*, 1 Car. & K. 129; 16 How. St. Tr. 764; *Lord Ferrer's case*, 19 How. St. Tr. 947, 948; *R. v. Offord*, 5 Car. & P. 168 *R. v. Offord*, 9 Car. & P. 525.  
*M'Naughten's case*, where the opinions of the judges were taken in the House of Lords; 1 Car. & K. 130, n; *R. v. Arnold*, per Tracy, J.,

In *Sikes v. Johnson*, (16 Mass. Rep. 389,) the question was, whether a feme covert or a minor, might be charged as trespassers for having procured another to commit an assault and battery. And it was holden they might, for all persons aiding and abetting, or counselling and procuring a trespass to be done, are principals, whether present or not. So are those who afterwards assent to a trespass done for their benefit; and there is no exception in the law, in favor of femes covert or minors. "The cases cited to the contrary relate to civil acts done by the command of persons not having capacity to make contracts; and because such commands are in the nature of a contract, they are void. But trespasses are analogous to crimes which femes covert and minors may be answerable for, although not present at the commission of them." See Com. Dig. tit. Trespass; 4 Black. 29.

[1] Every person at the age of discretion is, unless the contrary be proved, presumed by law to be sane, and to be accountable for his actions. But if there be an incapacity, or defect of the understanding, as there can be no consent of the will, so the act cannot be culpable. This species of non-volition is either natural, accidental or affected: it is either perpetual or temporary; and may be reduced to three general heads; 1. *A nativitate, vel dementia naturalis*; 2. *dementia accidentalis vel adventitia*; 3. *Dementia affectata*.

1. Of the first, or *dementia naturalis*, is idiocy or natural fatuity. An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without lucid intervals; Co. Litt. 247; and those are said to be idiots who cannot number twenty, tell the days of the week, who do not know their fathers or mothers, or the like; but these instances are mentioned as tests of sanity only, and are not always conclusive; and although idiocy or natural fatuity is in general sufficiently apparent, the question whether idiot or not, is a question of fact, triable by the jury, Bac. Abr. Idiot, (A); Bro. Abr. Idiot, 4, and ought to be clearly made out, in order to exempt the party from punishment. *Rex v. Arnold*, 1 Russ. 9. One deaf and dumb from his birth, who has no means of learning to discriminate between right and wrong, or of understanding the penal enactments of the law, as applicable to particular offences, is by presumption of law an idiot; but if it can be shown that he has the use of understanding, which many of that condition discover by signs, then he may be tried, and suffer judgment and execution, although great caution should be observed in such proceedings. 1 Hale, 34; see *R. v. Jones*, 1 Leach, 102; *R. v. Steel*, Id. 451; Dy. 25; Moor, 4, pl. 12; F. N. B. 233; *R. v. Esther Dyson*, cor. Parke, J., York Spr. Ass. 1831; Mathew's Dig. 310.

An idiot is not, of course, capable of committing a crime; but to make a lack of natural sense a valid excuse, we are not to suppose that the party must, in all cases, come within the strict definition given above. One may possess such a glimmering of reason "as to show that he is not, strictly speaking, an idiot, and still not have sufficient discretion and judgment to enable him to distinguish between good and evil." The question, then, to be determined, with regard to such persons is, whether they possess enough reason to make them capable of malicious discretion.

A man who is born deaf, dumb and blind, is considered, by law, as being in the condition of an idiot, and incapable of any understanding, as wanting all those senses which furnish the human mind with ideas. 1 Black. Com. 304. This, however, is only a presumption of law, and if it can be shown that a person in such a condition has the use of sufficient understanding to render him capable of discriminating between right and wrong, and of



Even if a man of sound memory commit a capital offence, and before arraignment he becomes insane, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution [\*5] that he ought; if, after he is \*tried and found guilty, he become insane before judgment, judgment shall not be pronounced; and if, after judgment, he become insane, judgment shall be stayed.(a) [1]

(a) 1 Hale, 34; 4 Bl. Com. 24.

comprehending the penal enactments of the law, he may be punished. 1 Hale, 34; *Commonwealth v. Hill*, 14 Mass. Rep. 207.

In *Rex v. Dyson*, (7 C. & B. 305; S. C. 1 Lewin's C. C. 64,) before Mr. Justice J. Parke, in 1831, the prisoner was indicted for murder, and on being arraigned, stood mute. A jury was then impannelled to try whether she did so by malice, or by the visitation of God, and they found she did so by the visitation of God. The judge thereupon examined on oath, a witness who was acquainted with the prisoner, and who swore that she could be made to understand some thing by signs, and could give her answers by signs. The witness was then sworn to interpret and make known to the prisoner, the indictment and charge against her, and to the court her plea an answer thereto. The witness explained to her by signs, what she was charged with, and she made signs which imported a denial of the charge, whereupon the judge directed a plea of not guilty to be recorded. The witness, by direction of the court, then stated to her that she was to be tried by a jury, and that she might object to such as she pleased; but he testified that it was impossible to make her comprehend a matter of that nature, although she might understand subjects of daily occurrence, which she had been in the habit of seeing. A jury was thereupon "impannelled and sworn to try whether she was sane or not," and proof was given of "her incapacity at that time to understand the mode of her trial, or to conduct her defence." The judge told the jury that if they were satisfied that the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her not sane. The jury so found, and the prisoner was detained in close custody. A similar case occurred in 1836, which was disposed of in the same way. Alderson, B., said to the jury, "the question is, whether the prisoner has sufficient understanding to comprehend the nature of this trial, so as to make a proper defence to the charge. *Rex v. Pritchard*, 7 C. & P. 303. Both these prisoners had been at all times deaf and dumb. "In presumption of law, such persons are always idiots or madmen, although it may be shown that they have the use of understanding, and are capable of committing crimes for which, in that event, they should be punished." *Case of Freeman*, 4 Denio Rep. 9; 1 Russ. on Crimes, 6; and Shelf on Lunacy, 3, cited.

The New York Revised Statutes speak of persons of *unsound mind*, in contradistinction to idiots, lunatics, and habitual drunkards. 1 R. S. 52. The term is also used in Pennsylvania. Ashm. Rep. 82. In strict language, the expression seems to mean nothing else than imbecility amounting to an inability to manage one's affairs—a state which is precisely a minor degree of idiocy, and need not be distinguished from it, except as a mere variety.

[1] NEW YORK.—"No act done by a person in a state of insanity can be punished as an offence; and no insane person can be tried, sentenced to any punishment, or punished for any crime or offence, while he continues in that state." 2 Rev. Stat. 582—3.

MASSACHUSETTS.—"In case of insanity, the grand jury, shall certify that fact to the court," and thereupon the court is required to take order in the premises. Rev. Stat. Mass. ch. 136, sec. 15.

PENNSYLVANIA.—By the act of Assembly of the 13th June, 1836, entitled "An Act relating to lunatics and habitual drunkards," the mode of proceeding in the courts against persons charged with any crime or misdemeanor, and appearing to be insane, on their arraignment, trial, or when "brought before the court, to be discharged for want of prosecution,"

By stat. 39 & 40 G. 3, c. 94, s. 1, where it shall be given in evidence, upon the trial of any person for treason, murder, or felony, or any misdemeanor, (a) that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of committing such offence, and to declare whether they acquitted him on account of such insanity; and if they do so find, the court shall order such person to be kept in strict custody, in such place and in such manner as to them shall seem fit, until His Majesty's pleasure shall be known. But the grand jury have no right to ignore a bill, because it is proved to them that the party was insane at the time he committed the offence; they must find the bill as if the offender had been sane, and leave the court and petty jurors to deal with the case, in the manner here provided. (b)

And by sec. 2, where a person indicted for any offence shall be insane, and upon indictment shall be found by a jury impanelled for that purpose to be insane, so that he cannot be tried,—or where upon the trial he shall be found to be insane,—the court may record such finding, and order the party to be kept in strict custody until His Majesty's pleasure shall be known. This section applies to all cases, as well misdemeanors as felonies. (c)

Also, if any person charged with any offence, shall be brought before any court to be discharged for want of prosecution, and such person shall appear to be insane, the court may order a jury to be impanelled to try the sanity of such person; and if the jury find him to be insane, the court may order him to be kept in strict custody, in such place and in such manner as to them shall seem fit, until His Majesty's pleasure shall be known. (d)

Provision is made by stat. 3 & 4 Vict. c. 54, ss. 1, 2, for sending such lunatics to a lunatic asylum, and for their maintenance there, at the expense of the parish which is the last place of their legal settlement, if

(a) 3 & 4 Vict. ch. 54, sec. 3.

(c) *R. v. Little*, R. & Ry. 430.

(b) *R. v. Hodges*, 8 Car. & P. 195.

(d) 39 & 40 G. 3, ch. 94, sec. 2.

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is directed; and it is provided that, if the person shall be so found to be insane, the court "shall have power to order such person to be kept in strict custody, in such place, and in such manner as the said court shall see fit, at the expense of the county," &c.; the estate and effects of such person to be liable to the county for the re-imbursment of expenses, &c.; and upon the kindred or friends of such person, or the overseers of the poor, &c., giving security that such person shall be restrained from the commission of any offence, he may be delivered to them.

By this act, the course to be pursued, "if any person arrested or imprisoned in any civil action, shall appear to be of unsound mind," is prescribed. And the act contains general provisions for obtaining a commission to inquire into the lunacy or habitual drunkenness of any person, for the holding of the inquisition, the appointment, authority and duties of the committee, &c. Pamph. Laws, 1836, p. 589.

they have no property applicable to the purpose; or if they have no settlement, the expense of their maintenance shall be paid by the treasurer of the county, borough, &c., where they are imprisoned.(a)

It may be necessary to mention that drunkenness is no excuse for crime, but rather an aggravation of it,(b) unless indeed it can be proved, to the satisfaction of the jury, that the defendant was at [6] the time in such a state of mind, as \*not to be aware of the consequences of his actions.(c)[1]

(a) See Arch. Poup. Lun. 94, &c.

(c) *R. v. Monkhouse*, 14 Shaws' J. P. 115.

(b) Co. Lit. 247.

[1] The vice of drunkenness, which produces a perfect though temporary frenzy of insanity, usually denominated *dementia affectata*, or acquired madness, will not excuse the commission of any crime; and an offender under the influence of intoxication can derive no privilege from a madness voluntarily contracted, but is answerable to law equally as if he had been in the full possession of his faculties at the time; (1 Hale, 32; Co. Litt. 247; 1 Hawk. c. 1, s. 6;) although it has been said, that, upon an indictment for murder, the intoxication of the defendant may be taken into consideration, as a circumstance to show that the act was not premeditated. *R. v. Grindley*, 1 Russ. 8; *R. v. Thomas*, 7 C. & P. 817; *R. v. Meakin*, Id. 297; but see *R. v. Carroll*, Id. 145. But, if the primary cause of the frenzy be involuntary, or it have become habitual and confirmed, this species of insanity will excuse the offender equally as the former descriptions of this malady. Thus, for instance, if a man, through the unskillfulness of his physician, or the contrivance of his enemies, take that which produces a temporary frenzy, he will not, whilst under the influence of the frenzy, be accountable for his actions. So, neither will he be liable to be punished for any crime perpetrated under the influence of insanity which is habitual and fixed, though caused by frequent intoxication, and originally contracted by his own act. 1 Hale, 32.

It seems that where a person is insane, at the time he commits murder, he is not punishable as a murderer, although such insanity be remotely occasioned by undue indulgence in spirituous liquor. But it is otherwise, if he be at the time intoxicated, and his insanity be directly caused by the immediate influence of such liquors. 5 Mason's U. S. Rep. 28; Martin & Yerger, 133, 147.

There is an insanity caused not by the immediate use of intoxicating drink, but by suddenly abstaining from stimulants to which the system had long been accustomed. This is usually called *delirium tremens*, and sometimes *mania a potu*. The law looks not to the remote cause, but holds that the species of insanity, like others which have been named, furnishes the accused with a defence in cases where its existence, at the time of the act, is fully established.

But there is a species of madness produced by the immediate influence of intoxicating liquor. It is a rule of the common law that madness occasioned by voluntary intoxication is no excuse for crimes committed during its existence, and while under its influence. And accordingly in England, in Massachusetts, in New York, and under the acts of Congress, where the definition of murder stands as at common law, without any division into degrees, as in this state, convictions of murder are held to be proper without regard to this ground of defence.

This rule may seem harsh, when brought to bear upon an individual whose previous experience has furnished him with no actual knowledge of the destructive tendencies of such stimulus. But there can be no hardship in its application to one whose frequent indulgence has rendered him familiar not only with its effects upon his own brain, but with its dangerous influence in respect to the lives of others." Opinion of Lewis, Pres. Judge, in *Comm v. Haggerty*, in Oyer and Term. of Lancaster county, Pa. (1847.) Lewis Cr. Law, p. 405. See M'Kinney's Am. Mag. 62.

(c) *Wife.*

If the husband be present at the time his wife commits a felony (except murder and robbery,) the law presumes that the wife acts under

Where the deprivation of the understanding and memory is total, fixed, and permanent, it excuses all acts; so, likewise, a man labouring under adventitious insanity is, during the frenzy entitled to the same indulgence, in the same degree with one whose disorder is fixed and permanent. *Beverly's case*, 4 Co. 125; Co. Litt. 247; 1 Hale. 31. But the difficulty in these cases is, to distinguish between a total aberration of intellect and a partial or temporary delusion merely, notwithstanding which the patient may be capable of discerning right from wrong; in which case he will be guilty in the eye of the law, and amenable to punishment. Partial insanity, says Lord Hale, is the condition of many, especially of melancholy persons who generally discover their defects in excessive fear and grief, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the commission of any crime. 1 Hale, 30. Doubtless, he adds, most persons that are felons of themselves, and others, are under a degree of partial insanity when they commit these offences; it is very difficult to define the invisible line that divides perfect from partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and the jury, least on the one side, there be a kind of inhumanity towards the defects of human nature, or, on the other side, too great an indulgence given to great crimes. He concludes by suggesting, as the best measure, that such a person as, labouring under melancholy distempers, hath yet as great understanding as ordinarily a child of fourteen years hath, is such a person as can be guilty of treason and felony. 1 Hale, 30, 412. Upon this subject many cases have been decided, from which it is difficult to extract any precise or definite rule. See *R. v. Ld. Ferrers*, 19 St. Tr. 333; *R. v. Arnold*, 16 St. Tr. 714; *R. v. Parker*, Coll. 477; *R. v. Bowler*, Id. 673; *R. v. Bellingham*, Id. 636, Add.; *R. v. Hadfield*, Id. 580; *Reg. v. Oxford*, 9 C. & P. 525. It seems clear, however, that to excuse a man from punishment upon the ground of insanity, it must be proved distinctly that he was not capable of distinguishing right from wrong at the time he did the act, and did know it to be an offence against the laws of God and nature. See *R. v. Offord*, 5 C. & P. 168. If there be a partial degree of reason, a competent use is sufficient to have restrained those passions which produced the crime; if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil—then he will be responsible for his actions. 1 Russ. 13; *Reg. v. M'Naughten*, 10 CL & Fin. 200; 1 C. & K. 130, n.; *Reg. v. Higginson*, 1 C. & K. 129. Whether the prisoner were sane or insane at the time the act was committed, is a question of fact triable by the jury, and dependent upon the previous and contemporaneous acts of the party. Upon a question of insanity, a witness of medical skill may be asked whether such and such appearances proved by other witnesses are, in his judgment symptoms of insanity; but it has always been considered as very doubtful whether he can be asked, whether from the testimony given, the act with which the prisoner is charged is, in his opinion, an act of insanity; for that is the point to be decided by the jury. *R. v. Right*, R. & R. 456; see also *R. v. Searle*, 1 M. & Rob. 75.

The above cited cases of *Reg. v. M'Naughten* gave rise to a discussion on this subject in the house of lords, and the following questions were propounded to the judges, in relation to the law respecting alleged crimes committed by persons afflicted with insane delusion:—

"1st. What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit?

"2nd. What are the proper questions to be submitted to the jury, when a person, alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is

the coercion of her husband, excuses her, and punishes the husband only.(a) But if she commits it in his absence, even although it be

(a) 1 Hawk. c. 1, s. 2.

charged with the commission of a crime, (murder, for example,) and insanity is set up as a defence ?

"3rd. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed ?

"4th. If a person, under an insane delusion as to the existing facts, commits an offence in consequence thereof, is he thereby excused ?

"5th. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under and what delusion at the time ?"

To these questions the judges (with the exception of Maule, J., who gave on his own account a more qualified answer) answered as follows :—

To the first question :—"Assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion, that, notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which expression we understand your Lordships to mean the law of the land."

To the 2nd and 3rd questions :—"That the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction ; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable ; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong ; and this course, we think, is correct, accompanied with such observations and explanations as the circumstance of each particular case may require."

To the fourth question :—"The answer to this question must of course depend on the nature of the delusion ; but making the same assumption as we did before, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man

proved that he incited her to it, she is as amenable to punishment as if she were a feme sole.(a)[1] So, if a wife commit treason, murder, or

(a) 1 Hale, 45; Staundf. 26.

as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

And to the last question:—"We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

[1] The same sound principle which excuses those who have no mental will in the perpetration of an offence, protects from the punishment of the law those who commit crime, in subjection to the power of others, and not as the result of an uncontrolled free action proceeding from themselves. 4 Bl. Com. 27; 1 Hale 43. Thus if A., by force, take the hand of B., in which is a weapon; and therewith kill C., A. is guilty of murder, but B. is excused; but if merely a moral force be used, as threats, duress of imprisonment, or even an assault to the peril of his life, in order to compel him to kill C., it is no legal excuse. 1 Hale, 434; 1 East, P. C. 225. This protection also exists in the public and private relations of society: public, as between subject and prince, obedience to existing laws being a sufficient extenuation of civil guilt before a municipal tribunal; and private, proceeding from the matrimonial subjection of the wife to the husband, from which the law presumes a coercion, which, in many cases, excuses the wife from the consequence of criminal misconduct. The private relations which exist between parent and child, and master and servant, will not, however, excuse or extenuate the commission of any crime, of whatever denomination; for the command is void in law, and can protect neither the commander nor the instrument. 1 Hale, 44, 516.

In general if a felony be committed by a feme covert in the presence of her husband, the law presumes that she acted under his immediate coercion, and excuses her from punishment; (1 Hale, 45, 516; 1 Hawk. c. 1, s. 9;) thus a woman who went from shop to shop uttering base coin, her husband accompanying her each time to the door, but not going in, was holden by Bayley, J., to be under her husband's coercion; (MS. Durham Spring Ass. 1829; Mathew's Dig. 262; but if in the absence of her husband, she commit an offence, even by his order or procurement, her coverture will be no excuse; 2 Leach, C. C. 1102; 2 East, P. C. 559; *R. v. Morris*, R. & R. 27; 1 Hawk. c. 1, s. 11;) even though he appear at the very moment after the commission of the offence; and no subsequent act of his, though it may render him an accessory to the felony of his wife, can be referred to what was done by his wife in his absence. *R. v. Hughes*, 1 Russ. 21. This presumption, however, may be rebutted by evidence; and if it appear that the wife was principally instrumental in the commission of the crime, acting voluntarily, and not by constraint of her husband, although he was present and concurred, she will be guilty and liable to punishment, 1 Hale, 516. Thus a married woman, who swore falsely that she was next of kin to a person dying intestate, and so procured administration to the effects, was held responsible for the offence, though her husband was with her when she took the oath. *R. v. Dicks*, 1 Russ. 19. So, where a husband delivered a threatening letter ignorantly, as the agent of the wife, she alone was held to be punishable. *R. v. Hammond*, 1 Leach, 447. Where stolen goods are received by a married woman in the absence of her husband, and are concealed in his house without his knowledge, she alone may be indicted and punished for the offence; but if the husband's ignorance of the transaction be not satisfactorily proved, the law will, in most cases, impute the receiving to him.

robbery, even in the company of her husband, the law, on account of the odiousness and dangerous consequences of these crimes, will not excuse her.(a) So, if a wife commit an offence under felony, even in company with her husband, she is liable to punishment as if she were not married.(b)[1] Where the prisoners, husband and wife, were indicted, the wife with forging and uttering an order and certificate for prize money, and the husband as accessory before the fact, it was clear, upon the evidence, that the husband planned the matter, and urged and insisted on the wife presenting the forged order, &c., and applying for the prize-money, but he was not present when she did so; and it was therefore objected that as it appeared plainly that the wife acted under the compulsion of her husband, she could not be found guilty; and if she as principal were acquitted, he as accessory must necessarily be acquitted also; both, however, being convicted, the judges held that with respect to the wife's guilt as principal, the presumption of coercion by the husband did not arise, as he was not present at the time, and they were therefore clearly of opinion that the wife was guilty of the uttering, and the husband guilty as accessory before the fact.(c)[2] Where hus-

(a) 1 Hawk. c. 1, s. 9; 1 Hale, 47.

semb. cont.

(b) 1 Hawk. c. 1, s. 13; Dalt. c. 139, p. 314; but see *R. v. Price*, 8 Car. & P. 19,

(c) *R. v. Sarah and John Morris*, R. & Ry. 270.

[1] In regard to offences below the degree of felony, it is said to be the prevailing opinion in England, that the wife may be punished jointly with her husband for all *misdemeanors* committed by her, though in the presence and by the coercion of her husband. Arch. Cr. Pl. 16, 17; See 4 Black. Com. 29, note; Matt. Dig. 263; But Blackstone has not stated the exception so broadly. He seems to restrict it to those inferior offences which relate to the domestic economy and management of the house, as keeping a brothel, &c. The reason given by him why the wife is responsible in such cases is, that these are offences in which the wife has a principal share; and are also such offences as the law presumes to be generally conducted by the intrigues of the female sex. 4 Black. Com. 29; See also 1 Hawk. P. C. ch. 1, § 12; 10 Mod. 63; 1 Salk. 384; 1 Russ. on Cr. 16, 17.

We find no American case recognizing any distinction like the one noticed, between felonies and misdemeanors, as such merely. On the contrary, it has been expressly decided in Massachusetts, that where a wife committed an assault and battery by the command and in the presence of the husband, she was not responsible. 10 Mass. Rep. 152. In this case the court observe, that "the exceptions to the general rule exempting the wife as to crimes committed by her through the coercion of the husband, consists of crimes forbidden by the law of nature, which are *Mala in se*, and some where the wife may be presumed the principal agent." Indeed, it may be well doubted whether in this country at least, misdemeanors stand upon any different principle, in respect to the wife's responsibility, from felonies.

For the offence of keeping a bawdy house, she is doubtless responsible with her husband. 1 Russ. on Cr. 16; 4 Black. Com. 29; 1 Hawk. P. C. ch. 1, § 12. So it has been held with regard to the offence of keeping a gambling house. 10 Mod. 335. But the responsibility rests, not upon any principle applicable to misdemeanors generally, but upon her presumed voluntary participation in these particular offences. Barb. Cr. Law. 276.

[2] The prisoner, Martha Hughes, was indicted for forging and uttering Bank of England notes. The witness stated that he went to the shop of the prisoner's husband, when she took him into an inner room and sold him the notes. That while he was putting them in

band and wife were indicted for receiving stolen goods, and both were convicted, the judges held that, as the charge against the husband and wife was joint, and it had not been left to the jury to say whether she had received the goods in the absence of her husband, the conviction of the wife could not be supported, even although it appeared that she had been more active in the matter than he.<sup>(a)</sup> So, where a woman was indicted for the murder of her husband's apprentice, by not furnishing him with proper nourishment, Lawrence, J., held, that as the wife was in that respect the servant of her husband, and as it was not her duty to provide the boy with proper nourishment, she could not be guilty of any breach of duty in neglecting to do so; if, indeed, the husband had given her food for the boy, \*and she had wil- [\*7] fully withheld it, it would be otherwise.<sup>(b)</sup>

A woman, however, may be convicted of perjury, even although her husband were present at the time of her taking the oath, &c.<sup>(c)</sup> So, she and her husband, or she alone, may be indicted for keeping a disorderly house,<sup>(d)</sup>[1] or gaming house,<sup>(e)</sup> or for forcible entry,<sup>(g)</sup>[2] riot, conspiracy, &c. But a wife cannot be charged with having conspired with her husband alone, for conspiracy must be between two persons at the least, and husband and wife are but one person in law.<sup>(h)</sup> Nor is she deemed accessory after the fact, in receiving her husband, although she may know at the time of his having committed a felony; for she is under his power, and is obliged to receive him.<sup>(i)</sup> So, if the husband and wife jointly receive a third person, knowing him to be

(a) *R. v. Ellis Archer et al.*, Ry. & M. 143; see *R. v. M'Clarens*, 13 Shaw's J. P. 343; *R. v. Mathews et al.*, 14 Shaw's J. P. 399.

(b) *R. v. Squire and Wife*, 1 Russ. 16.

(c) *R. v. Dicka*, MS., Bayley, J., cited 1 Russ. 16.

(d) 1 Hawk. c. 1, s. 12.

(e) *R. v. Dixon and wife*, 10 Mad. 335.

(g) Dalt. 126.

(h) 1 Hawk. c. 72, s. 8.

(i) 1 Hale, 47, and see *R. v. Mary Good*, 1 Car. & K. 185.

his pocket, the husband put his head in and said, "Get on with you." On returning to the shop, he saw the husband, who, as well as the wife, desired him to be careful. It was objected that the offence was committed under coercion, but the court held otherwise, and said that the law, out of tenderness to the wife, if a felony be committed in the presence of the husband, raises a presumption, and *prima facie* only, as is clearly laid down by Lord Hale, that it was done, under his coercion; but it is absolutely necessary that the husband should be actually present, and taking part in the transaction. Here, it is entirely the act of the wife. It is indeed in consequence of a previous communication with her husband that the witness applies to the wife, but she is ready to deal, and has on her person, the articles which she delivers to the witness. There was a putting off before the husband came, and it is sufficient, if before that time she did that which was necessary to complete the crime. *The coercion must be at the time of the act done*; but when the crime has been completed in his absence, no subsequent act of his, (though it might possibly make him an accessory to the felony, of his wife,) can be referred to what was done in his absence. Russ. & Ry. C. C. 270. Roscoe's Cr. Ev. 785. 1 Russ. on-Cr. 18.

[1] *Com. v. Lewis*, 1 Metc. Rep. 151.

[2] *State v. Harvey*, 3 New Hampshire Rep. 65.



guilty of felony, the husband alone is guilty, the wife not; but if the wife alone receive him, in the absence of her husband, she may be convicted.(a)

That a wife, who has committed a felony, has done so under the coercion of her husband, is, however, a presumption which, like all other presumptions, may be rebutted by evidence to the contrary; and, therefore, if it appear clearly upon evidence, that the wife was not drawn into it by the husband, but that she was the principal actor in, and inciter to, it, she seems to be guilty as well as her husband.(b)[1]

Also, a woman can never be said to be guilty of larceny of the goods of her husband, or of goods which are the property of her husband and others, unless she steal them from some third person, with the intent to make such person chargeable for them; for, as the husband and wife are one person in law, the wife's possession is deemed the possession of the husband.(c) Where money, belonging to a friendly society, was deposited in a box, and placed in the custody of one of the members, and his wife broke open the box and stole the money, the judges held that an indictment against her as for larceny, could not be sustained.(d) If, however, the box at that time were in custody of any other person but the husband, she might be convicted, although the husband were a part owner of the money in it; because the taking would have the effect of charging the bailee.(e) Where the wife of the prosecutor, and a man with whom she afterwards cohabited, jointly took money and goods belonging to the husband, the judges held that an indictment as for larceny would lie against the man, although not against [8] the wife; and that, notwithstanding the wife's consent,\* the property must be considered as having been taken *invito domino*.(g) And where, upon an indictment against a woman for setting fire to the house of her husband, it appeared that she had lived separate from him for two years, and had gone by her maiden name; and it also appeared clearly from the evidence, that she had set fire to the house out of malice to her husband, she having declared that she wished to burn him in the house: the judges held that she ought not to be convicted.(h)

If the woman be indicted as a wife,—that being an admission upon record that she is so, will be sufficient.(i) Otherwise, if she set up her

(a) 1 Hale, 621.

(b) 1 Hale, 516; *R. v. Boober*, 14 Shaw's J.P. 355.

(c) 1 Hale, 514; 1 Hawk. c. 33, s. 19.

(d) *R. v. Willis*, Ry. & M. 375.

(e) 1 Hale, 513; and see *R. v. Phoebe Bram-*

*ley*, R. & Ry. 478.

(g) *R. v. Tolfree*, Ry. & M. 243; *R. v. Thompson*, 14 Shaw's J. P. 309; *R. v. Tollett & Taylor*, Car. & M. 112.

(h) *R. v. Eliza March*, Ry. & M. 182.

(i) *R. v. Knight and wife*, 1 Car. & P. 116.

[1] Where, in a case of arson, it appeared that the husband, though present, was crippled and bed-ridden in the room, it was held that the presumption of coercion was repelled. *Reg. v. Pollard*, cited in *Reg. v. Cross*, 2 M. C. C. Rep. 53.

coverture as a defence, she must prove it. And proof merely of cohabitation with the man, and passing by his name, does not seem to be sufficient proof of this;(a) although, on the other hand, actual evidence of the marriage would not, perhaps, be required.(b)

(d) *Ambassadors and their servants.*

For offences which are *mala prohibita* merely, and not *mala in se*, ambassadors and their suites are not punishable in this country. But for direct attempts against the life of the queen, they are punishable; and if they are not punishable in the same manner for conspiracies against the queen, this arises rather from political reasons, than from any rules of law.(c)[1] Also for murder, rage, or any other offence of great enormity against nature and the fundamental laws of society, they are punishable by the laws of this country as any other alien.(d) And Lord Hale cites, as an instance, the execution of Don Pantaleon Sa, the Portuguese ambassador's brother, and some of the ambassador's servants, for a murder committed by them in London. See, however, the case of *R. v. Guerchy*,(e) where the attorney-general entered a *nolle prosequi* to an indictment found against the French ambassador, for hiring a person to assassinate the Chevalier D'Enon.[2]

(a) *R. v. Hassal et al.*, 2 Car. & P. 434.

(d) *Id.*

(b) See *R. v. Mary Good*, 1 Car. & K. 185.

(e) 1 W. Bl. 545.

(c) 1 Hale, 96—99; Fost. 187, 188.

[1] As to the immunities of a public minister, and the inviolability of his person and rights, and those of his household, see *Respublica v. Delongchamps*, 1 Dall. 111, 117. *Ex parte Cabrera*, Whart. Penn. Dig. 288. A foreign Consul is not privileged from arrest and prosecution, for a misdemeanor, by virtue of his consular appointment. *United States v. Ravara*, 2 Dall. 99, n. And a prior assault by a foreign minister, deprives him of his privileges, and will excuse a battery committed on his person. *United States v. Little*, Whart. Penn. Dig. 288; see 3 Story on Constit. 518—526. It seems a consul general is not protected by the law of nations from a prosecution and indictment for rape. *Commonwealth v. Kosloff*, 5 Serg. & Rawle, 545. But the state courts have no jurisdiction in such case; the exclusive jurisdiction is vested in the court of the United States, *id.* See farther, *State v. La Foret*, 2 Nott & M'Cord, 217.

[2] Ambassadors form an exception to the general case of foreigners resident in the country, and they are exempted absolutely from all allegiance, and from all responsibility to the laws of the country to which they are deputed. As they are the representatives of their sovereigns, and requisite for negotiations and foreign intercourse, their persons, by the consent of all nations, have been deemed inviolable; and the instances are rare, in which popular passions, or perfidious policy, have violated this immunity. If, however, ambassadors should be so regardless of their duty, and of the object of their privilege, as to insult, or openly attack the laws or government of the nation to which they are sent, their functions may be suspended by a refusal to treat with them, or application can be made to their own sovereign for their recall, or they may be dismissed or required to depart within a reasonable time. The writers on public law go still farther, and allow force to be applied to confine or send away an ambassador, when the safety of a state, which is superior to all other con-

(c) *Aliens.*

Aliens are punishable in this country, for offences committed here, in precisely the same way as natural born subjects; and if indicted, it

siderations, absolutely requires it, arising either from the violence of his conduct, or the influence and danger of his machinations. This is all that can be done; for ambassadors cannot in any case, be made amenable to the civil or criminal jurisdiction of the country. By fiction of law, an ambassador is considered as if he were out of the territory of the foreign power; and it is an implied agreement among nations, that the ambassador, while he resides in a foreign State, shall be considered a member of his own country; and the government he represents has exclusive cognizance of his conduct, and control of his person. An ambassador is also deemed to be under the law of nations in his passage through the territories of a third and friendly power, while upon his public mission, in going to and returning from the government to which he is deputed. To arrest him under such circumstances would be a breach of his privilege as a public minister. The attendants of an ambassador, attached to his person, and the effects in his use, and the house in which he resides, are under his protection and privilege, and equally exempt from the foreign jurisdiction, though there are strong instances in which their inviolability has been denied and invaded. Passports, though named in our law, are unknown in practice. The protection is implied by natural and municipal law; and it is the duty of courts of justice, when cases arise before them, to enforce the law of nations, on this subject, as part of the law of the land.

The distinction between ambassadors, ministers plenipotentiary, envoys extraordinary, and resident ministers, relates to diplomatic precedence and etiquette, and not to their essential powers and privileges.

A *charge d'affaires* is a diplomatic representative or minister of the fourth grade; and a resident minister seems not to be equal to a minister plenipotentiary. Nor is a minister plenipotentiary of equal rank and dignity with an ambassador, who represents the person of his sovereign. The great powers of the Congress of Vienna in 1815, by an arrangement, divided diplomatic agents into four classes: 1. Ambassadors, legates or nuncios; 2. Envoys, ministers and other agents, accredited to the sovereigns; 3. Ministers resident, accredited to sovereigns; 4. *Charges des affaires*, accredited to the department of foreign relations. The United States are usually represented at the courts of the great powers of the first class by ministers plenipotentiary; and at those of an inferior class by *charges des affaires*; and they have never sent a person of the rank of an ambassador, in a diplomatic sense.

*Consuls* are commercial agents, appointed to reside in the seaports of foreign countries, with commissions to watch over the commercial rights and privileges of the nation deputing them. The establishment of consuls is one of the most useful modern commercial institutions. Consuls have been multiplied and extended to every part of the world, where navigation and commerce can successfully penetrate; and their duties and privileges are now generally defined and limited in treaties of commerce, or by the statute regulations of the countries which they represent. In some places they have been invested with judicial powers in disputes between their own merchants in foreign ports. But no government can invest its consuls with judicial powers over its own subjects, in a foreign country, without the consent of the government of the foreign country, founded on treaty; and there is no instance in Europe, of the admission of criminal jurisdiction in foreign consuls.

The laws of the United States, on the subject of consuls and vice-consuls, specially authorize them to receive the protests of masters of vessels, and others, relating to American commerce; and they declare that consular certificates, under seal, shall receive full faith and credit in the courts of the United States. It is, likewise, made their duty, where the laws of the country permit, to administer on the personal estate of American seamen dying within their consulates, and having no legal representatives; and to take charge of and secure the effects of stranded American vessels, in the absence of the master, owner or consignee;

is no excuse whatever that the act charged against them is no offence by the laws of their native country.(a)[2]

(a) *R. v. Esop*, 7. Car. & P. 456.

and they are bound to provide for destitute seamen within their consulates, and to send them, at the public expense, to the United States; and it is made the duty of masters of American vessels, on their arrival at a foreign port, to deposit their registers, sea letters, and passports, with the consul, vice-consul, or commercial agent, if any, at the port; though this injunction only applies where the vessel shall have come to an entry, or have transacted business at the port. These particular powers and duties are similar to those prescribed to British consuls, and to consuls under the consular convention between the United States and France in 1788; and they are in accordance with the usages of nations, and are not to be construed to be in exclusion of others resulting from the nature of the consular appointment. The doctrine of our courts is, that a foreign consul, duly recognized by our government may assert and defend, as a competent party, the rights of property of individuals of his nation, in the courts of the United States, and may institute suits for that purpose, without any specific authority from the party for whose benefit he acts. But the court, in that case, said, that they would not go so far as to recognize a right in a consul to receive actual restitution of the property, or its proceeds, without showing some specific power, for the purpose, from the party in interest.

Consuls are to be admitted in the usual form; and if any consul be guilty of illegal or improper conduct, he is liable to have his *exequatur*, or written recognition of his character, revoked, and to be punished according to the laws of the country in which he is consul; or he may be sent back to his country, at the discretion of the government which he has offended. Though the function of a consul would seem to require that he should not be a subject of state in which he resides, yet the practice of the maritime powers is quite lax on this point, and it is usual and thought most convenient to appoint subjects of the foreign country to be consuls at its ports.

A consul is not such a public minister as to be entitled to the privileges appertaining to that character; nor is he under the special protection of the law of nations. He is entitled to privileges to a certain extent, such as for safe conduct; but he is not entitled to the *jus gentium*. Vattel thinks that his functions require that he should be independent of the ordinary jurisdiction of the country, and that he ought not to be molested, unless he violates the law of nations by some enormous crime; and that if he be guilty of any crime, he ought to be sent home to be punished. But no such immunities have been conferred on consuls by the modern practice of nations; and it may be considered as settled law, that consuls do not enjoy the protection of the law of nations, any more than any other person who enters the country under a safe conduct. In civil and criminal cases, they are equally subject to the laws of the country in which they reside. The same doctrine declared by public jurists, has been frequently laid down in the English and American courts of justice.

By the Constitution of the United States, the Supreme Court of the United States has original jurisdiction in all cases affecting consuls, as well as ambassadors and other public ministers; and the federal jurisdiction is understood to be exclusive of the state courts. 1 Kent's Com. 35—45, and notes.

[2] Citizens are all persons born within the jurisdiction of the United States, or duly naturalized. Aliens are persons born out of the jurisdiction of the United States, and not naturalized.

Under the naturalization act of Congress, the children of aliens, though born out of the jurisdiction of the United States, if dwelling within the Union at the time of the naturalization of their parents, become citizens by such naturalization. And the provisions of the act of Congress on the subject is prospective, so as to embrace the children of aliens naturalized after the passage of the act, as well as the children of those who were naturalized before. 8 Paige's Ch. Rep. 433.

(f) *Corporations.*

It was formerly imagined that an indictment would not lie against a corporation aggregate; and it was then the custom to join in [\*9] the indictment with the corporation, \*or indict alone, such of the leading members of the body as principally caused the act or omission complained of. It was afterwards holden that an indictment would lie against them by their corporate name for a breach of duty.(a) And it is now fully settled that an indictment will lie against a corporation aggregate, as well for a misfeasance as a non-feasance—for a wrongful act as well as for a wrongful omission.(b)[1]

(g) *Persons offending from chance, mistake, &c.*

Where a man, in the execution of one act, by misfortune or chance, and not designedly, does another act, for which, if he had wilfully committed it, he would be liable to be punished:—in that case, if the act he was doing were lawful, or merely *malum prohibitum*, he shall not be punishable for the act arising from misfortune or chance; but if *malum in se*, it is otherwise.(c)

Even the killing of another by misfortune, or in any other way not felonious, is not now punishable, nor is any forfeiture incurred. But this exemption from punishment must be understood of cases where the innocent act is done with reasonable skill and care:—if the unintended offence arise from ignorance, where skill was required, or from negligence, where care and caution were required, the party will in most cases be liable to punishment for the act done, which was not in-

(a) *R. v. The Birmingham and Gloucester Railway Co.* 11 Shaw's J. P. 21.  
*Railway Co.* 3 Q. B. 223.

(c) 1 Hale, 39; Fost. 259.

(b) *R. v. The Great North of England Rail-*

The children of citizens, though they were born abroad, are considered, in law, as citizens of the United States, if their parents have at some time resided here. Walk. *Introd. to Am. Law*, p. 137.

[1] In Maine, it has been held that where an offence is committed by virtue of corporate authority the individuals concerned in its commission, in their personal capacity, and not as a corporation, must be indicted. *State v. Great Works*, 20 Maine Rep. 41, and in Virginia, it has been determined that a corporation cannot be impleaded *criminaliter* by its artificial name at common law. *Com. v. Swift Run Gap Turnpike Co.*, 2 Virg. Cas. 362.

In New York an indictment lies against a corporation *quasi* a corporation, for neglecting to do what the common good requires; as where the corporation of a city have power to direct the excavating, deepening or cleansing of a basin connected with a river, and neglect, to take the proper measures in that respect, whereby the air becomes infected by noisome and unwholesome stench and a *nuisance* is created. 11 Wend. 539.

In Pennsylvania it was determined that where an act of assembly directed "the president, managers, and company," of a turnpike road to remove a gate on the road, that an indictment would not lie against the president and managers *individually* for not removing the gate. 12 Serg. & Rawle Rep. 389.

tended. If a man take upon himself an office or duty, requiring skill or care,—if by his ignorance, carelessness, or negligence he cause the death of another, he will be guilty of manslaughter: as if a person, by careless or furious driving, unintentionally run over another and kill him, it will be manslaughter; (a) or if a person in command of a steamboat, by negligence or carelessness, unintentionally run down a boat, &c., and the person in it is thereby drowned, he is guilty of manslaughter. (b) In like manner, if a person, whether a medical man or not, profess to deal with the life or health of another, he is bound to use competent skill and sufficient attention; and if he cause the death of the other through a gross want of either, he will be guilty of manslaughter. (c) Or, if a man, without malice to any individual, wilfully do an act, which he knows must or will probably cause the death of some person whom he knows not, and a man be thereby killed, he will be guilty of murder. If a \*man, in building or repair- [\*10] ing a house, throw a stone from it into the street or way, and it hit a person passing, and kill him,—if he did this in a street where many persons were passing, and without properly warning the persons below, he is guilty of murder; if in a retired place where no persons were likely to pass, he would not be liable to punishment. (d) If a man, being on a horse which he knows to be used to kick, wilfully ride him amongst a crowd of persons, and the horse kick a man and kill him, the rider is guilty of murder, although he had no malice against any particular person, nor any other intention than that of diverting himself by frightening the persons around him. (e) But if a horse run away with his rider, so that he has no control over him, and the horse kill or injure a man, the rider is dispunishable. (g) [1]

(a) *R. v. Walker*, 1 Car. & P. 320; *R. v. Van Butchell*, 3 Id. 629; *R. v. Williamson, Mastin*, 6 Car. & P. 396; *R. v. Grouse*, Id. Id. 635; *R. v. St. John Long*, 4 Id. 398, 629; *R. v. Timmins*, 7 Id. 499; *R. v. Swindall et al.*, 2 Car. & K. 230. (d) 3 Inst. 70; *Fost.* 263.

(b) *R. v. Green*, 7 Car. & P. 156; and see *R. v. Allen*, Id. 153.

(e) 1 Hawk. c. 31, s. 68.

(c) *R. v. Spiller*, 5 Car. & P. 333; *R. v. Ld. Raym.* 38.

(g) See *Gibbon v. Pepper*, 2 Salk. 638; 1

[1] Parents, masters, and other persons having authority in domestic affairs, may give reasonable correction to those under their care; and if death ensue from such correction, it will be no more than accidental death. But if the correction exceed the bounds of due moderation, either in the measure of it, or in the instrument made use of for that purpose, it will be either murder or manslaughter, according to the circumstances. If done with a cudgel, or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter; if with a dangerous weapon likely to kill or maim, it will be murder; due regard being had in both instances, to the age and strength of the party. Grey, a blacksmith, struck his servant with a bar of iron by way of correction for improper behavior, by which he was killed,—held, murder. A woman kicked and stamped on the belly of her child, and ruled the same.

Accidents frequently occur among persons following their lawful occupations, especially

A person, from ignorance or mistake, not of law but of fact, may commit an offence, and still be dispunishable for it: as if a man, think-

such from whence danger may probably arise. If they saw the danger, and yet persisted, without sufficient warning, it will be murder. If the act were such as was likely to breed danger, and they neglected the ordinary caution, it will be manslaughter at least, on account of such negligence; making due allowance for the nature of the occupation, and the probability of the danger, which, if very remote, and in the particular instance not reasonably to be expected, may reduce the act to misadventure. The criterion in such cases is, to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct. 1 East's C. L. 260, 261, 262.

If, when engaged in unlawful and dangerous sport, a man kill another by accident, it is manslaughter; if the sport were lawful, and not dangerous, it would be homicide by misadventure only. Under the former class, however, cannot be reckoned prize fighting, public box matches, and cases of such character, which are exhibited for the sake of lucre, and are calculated to draw together a number of idle, disorderly people. For, in such cases, the intention of the parties is not innocent in itself, each being careless of what hurt may be given, provided the promised reward or applause be obtained. Such meetings have also a strong tendency in their nature to a breach of the peace. Addis. 279; 1 East's C. L. 263, 279.

If one, assuming to be a physician, however ignorant of the medical art, administer to his patient remedies which resulted in his death, he is not guilty of manslaughter unless he has so much knowledge or probable information of the fatal tendency of his prescriptions as to raise a presumption of obstinate, wilful rashness.

Where, however, such person has opportunity to know of the injurious effects of his remedies, and then administers them, it would be competent for the jury to find him guilty of manslaughter, even though he might not have intended any bodily harm to his patient. 6 Mass. Rep. 134; Whart. C. L. 254.

He who wilfully neglects to prevent a mischief, which he may and ought to provide against, is answerable for the consequence: as where a man, having an ox which he knows to be mischievous, by being used to gore, does not put him in some place of security, but lets him range where persons are likely to pass, and he afterwards kills a man: according to some opinions, the owner may be indicted for manslaughter. And it is agreed by all, that such a person is at least guilty of a very great misdemeanor. East's C. L. 264.

With respect to cases where death happens from some unexpected occurrence in human affairs, any criminality turns on the question, whether due caution have been used or not. And in general, it may be observed, that the degree of caution requisite to bring the case within the limits of misadventure, must be proportioned to the probability of danger attending the act immediately conducive to the death. Inferences of guilt are not to be drawn from remote causes, all malice apart.

Where a man leaves a loaded gun in his house, and it is afterwards discharged by another, who knew not it was loaded, whereby death ensues, the first is in no respect answerable to the law, for the consequences.

One lays poison to kill rats, and another takes it and dies: this is misadventure. If it was laid in such a manner and place as to be easily mistaken for proper food, it might, in some cases, amount to manslaughter.

A gentleman came to town in a chaise, and before he got out of it fired his pistols in the street, which, by accident, killed a woman. This was ruled manslaughter.

In none of these instances, where the act of the party is immediately conducive to the death, does the law require the utmost caution that can be used; it is sufficient that a reasonable precaution, that is usual and ordinary in like cases, should be taken; and such as has been found by long experience in the course of human affairs, to answer the end; for such conduct shows that the party was regardful of social duty, and free from any manner of guilt. 1 East's C. L. 265, 266.

ing to kill a housebreaker in his house, kill one of his own family, he is not punishable for it.(a)

But if the act he intended doing were unlawful, he may in general be punishable for the act he committed through ignorance or mistake, in the same way as if he wilfully did it: as, for instance, if a man intending to kill A. kill B., he will be equally guilty as if he had killed A.[2]

(h) *Persons offending through compulsion.*

If a man be forced to commit an offence, by such threats or menaces of personal violence by others, as induces a well-grounded apprehension of death or other bodily harm in case he should refuse to do it, this will in general excuse him.(b) Even if a man be thus compelled to join rebels or foreign enemies, in a time of rebellion or war, he will be excused for remaining with them so long as the compulsion lasted.(c) But no threat to burn his house or destroy his property, or the like, will be sufficient for this purpose.(d)[3]

(a) Cro. Car. 538; 4 Bl. Com. 27.

(d) *McGrowther's case*, Fost. 13; 9 St.

(b) See 3 Inst. 10; 1 Hale, 56; Fost. 217. Trial, 566.

(c) Fost. 216, 217.

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[2] Ignorance of the *law* will not excuse any person of capacity enough to be responsible for his criminal acts; for all are presumed to know the law. 4 Black. Com. 27; 1 Russ. on Cr. 20; Arch. Cr. Pl. 17. And it is no defence for a foreigner charged with a crime committed in this country, that he did not know he was doing wrong; the act not being an offence in his own country. 1 Russ. on Cr. 24; *Rex v. Esop*, 7 Car. & P. 456. But ignorance or mistake of *facts* is in some cases allowed as an excuse for the inadvertent commission of crime; as if a man intending to kill a thief in his own house kill one of his own family: in this case he is guilty of no offence. 1 Hale's P. C. 42; 4 Black. Com. 27; 1 Russ. on Cr. 20. So in larceny, the criminal intent may, in many cases, be rebutted by showing that the goods were taken through mistake—the person accused supposing they were his. Roscoe's Cr. Ev. 471; 1 Hale's P. C. 507. And the same principle applies to a variety of cases ranging under the heads of accident or misfortune. It should be observed, however, that the rule alluded to proceeds upon the supposition that the original intention of the accused was lawful. For if an unforeseen consequence ensue from an act which was in itself unlawful, and in its original nature wrong and mischievous, the actor is criminally responsible for whatever consequence may ensue. 4 Bl. Com. 27; Arch. Cr. Pl. 18.

The rule also supposes an opportunity to know the law. Therefore, where a person was indicted for an offence under a statute, upon the high seas, shortly after the statute was passed and before notice of it could have reached the place where the offence was committed, the judges held that as he could not have been tried for the offence before that act, and as he could not have heard of it, he ought to be pardoned. 1 Russ. & Ry. C. C. 1.

In this state, however, to prevent the ignorance of a recent statute from injuring a party, it is provided that no act of the legislature shall take effect until twenty days after it is passed, unless there be a special provision to the contrary. 1 R. S. 157, sec. 12.

[3] The fear which compels a man to do an unwarrantable action, ought to be just and well grounded. 1 Blk. Com. 30.



(i) *Persons who are the innocent agents of others.*

If a man procure an offence to be committed by an innocent agent, the man alone is guilty, the agent not. If an idiot or madman be incited to commit murder, and he do it, the inciter is guilty of the murder, the idiot or madman not. And the inciter in such a case is deemed principal in the first degree, though not present when the offence was committed: he cannot be deemed accessory, for that necessarily presupposes a principal, and the idiot or madman, so far from being principal, is merely the instrument of death in the hands of the inciter; he must therefore be principal, and in the first degree, [\*11] \*for there is no other person whom he can aid or abet.(a)

Where a man was indicted as principal in stealing coal from a mine, and it appeared that was lessee of one mine, and from thence caused his workmen to take the coal of other persons under the adjoining land,—he was convicted, the judge, (Erle, J.) saying that although the prisoner did not, by his own hand, pick or remove the coal, yet if a man do, by means of an innocent agent, an act which amounts to a felony, the employer, and not the agent, is the person accountable for the act.(b)

So, where a post-office order was payable to Wm. Smart, and the prisoner, knowing the fact, forged Smart's name to a letter authorizing one Bartlett to sign Smart's name to the usual receipt on the money order, which Bartlett (not knowing the fraud) accordingly did, and received the amount of the post office order, and gave it to the prisoner for Smart: the prisoner being indicted for forgery of the receipt, Platt, B., after conferring with the Lord Chief Baron, held that Bartlett must be deemed an innocent agent, and the case must therefore be considered the same as if the prisoner himself signed the receipt.(c)

So, where A. employed B., a die-sinker, to make dies which would impress the resemblance of the two sides of a shilling, and B. immediately communicated the matter to the officers of the Mint, who directed him to execute A.'s order, and he did so: A. being indicted for the offence as principal and convicted, the judges held that he was rightly convicted.(d)[1]

(a) 1 Hale, 617; 2 Hawk. c. 29, s. 11.

(c) *R. v. Clifford*, 2 Car. & K. 202.(b) *R. v. Bleasdale*, 2 Car. & K. 765.(d) *R. v. Barman*, 1 Car & K. 295.

[1] It is a principle of law, both in civil and criminal cases, that a person is liable for what is done under his presumed authority. And in the application of the principle, an exception to the general rule in respect to the presumption of innocence is admitted in some cases of agency. Thus, in an indictment against a contract baker for selling unwholesome bread, where it appeared that the defendant allowed his foreman to use alum, though not in such quantities as to render the bread unwholesome, it was held by the court that he might be legally convicted, on proof that the servant had introduced alum into the bread to a delete-

rious extent. 6 Car. & Payne, N. P. 292. So, the directors of a gas company were held criminally answerable, on an indictment for a nuisance, for an act done by their superintendent an engineer, under a general authority to manage the works, though they were personally ignorant of the particular plan adopted, and though such plan was a departure from the original and understood method, which the directors had no means to suppose was discontinued. Cam. Rep. 12; 3 M. & S. Rep. 11; 2 Camp. & Jerv. Rep. 493; 2 Tyr. Rep. 523. In like manner, where a libel is sold in a bookseller's shop, by his servant, in the ordinary course of his employment, this is evidence of a guilty publication by the master; though, in general, an authority to commit a breach of the law is not to be presumed. The exception is founded on public policy, lest irresponsible persons should be put forward, and the principal and real offender should escape. But such exception is not conclusive against the master, who may still prove, under the plea of not guilty, that the publication was in fact made "without his authority, consent or knowledge," and that there was "no want of care or caution on his part." The same law is applied to newspapers. 10 Johns. Rep. 443; 2 Taylor on Ev. p. 95, sec. 93.

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INSANITY, HOW FAR A DEFENCE IN CRIMINAL PROSECUTIONS.

Before dismissing the subjects of this section, it may be well to treat the question of insanity at more length, than has been done in the text.

In prosecutions for crimes, the defence of insanity is so frequently interposed, as to render the subject one of prominent importance in criminal jurisprudence. A due regard for the ends of justice, and the peace and welfare in society, no less than mercy to the accused, requires that it should be thoroughly and carefully weighed.

"Whether a man is sane or not, whether partially or totally deranged, and if only in part deranged, where accountability to the laws shall begin, and where end, are questions of great and embarrassing subtlety. The laws of the sane mind are but little understood; much less are the laws, if indeed such phraseology is predicable of it, of the unsound mind understood. We can judge of the one, by external developments and by our own consciousness; of the other, only by external indicia. There are few men so balanced in intellect as not at some times, and upon some subjects, to approximate towards derangement. All men, almost, have some train of thought in which the mind delights to run, at a comparative abandonment of the ordinary routine of thought. Intellectual enthusiasm, not unfrequently, approaches the line of insanity. The numerous cases of mania, or delusion, which leave the mind sound in general, but as to certain things, shattered or wholly obliterated, have increased the difficulty of any specific general rule as to the responsibility of those who are generally classed as insane. A crazy, or partially deranged person, is a mystery; such a person is so, by the *visitation of God*. The subject of insanity, is not responsible—humanity, reason, the law so adjudges. To punish an insane man, would be to rebuke Providence. Hence, in all definitions of murder, of which I have knowledge, the requirement is found, that the slayer must be of sound mind. Our own statutory definition, requires him to be "a person of sound memory and discretion." Accountability for crime, pre-supposes a *criminal intent*, and that requires a power of reasoning upon the character and consequences of the act; a will subject to control. For this reason it is, that a homicide, committed under the influence of uncontrollable passion, is not murder. The reason is dethroned, the will is not subject to control, and in tenderness to human infirmity, he is considered as not having a malicious, murderous intent. The difficulty is to determine who is "a person of sound memory and discretion," who is incapable of a criminal intent, who is incapable of reasoning upon the character and consequences of the act, and who is without control over his will. That is the work, that the labor. Men are, upon proof of the criminal act, presumed to be responsible, and therefore the burden of proving irresponsibility devolves upon the defendant.

"One does not fail to perceive, also, in looking into this subject, that the rules now recognized as governing pleas of insanity, are different from what they were in the time of Lord

Coke, and indeed, long subsequent to his day. The improvements in the science of medical jurisprudence, a more enlarged benevolence, and a clearer sense of christian obligation, have relaxed the cruel severity of the earlier doctrines. The plea of insanity is now, as it ought to be, as much favored as any other plea resting upon the ground of reason and justice. Courts are now not afraid to trust the juries with the investigation of questions of insanity; nor are all cases now, as they once were, subjected to the application of one rule, unjust because of its sweeping generality. There was a time when the insane were looked upon as victims of Divine vengeance, and therefore to be cast out of the protection of human laws, and beyond the pale of human sympathies. Not so now. The insane hospitals of our land, founded by provision of public law and by private charity, prove that the insane are the peculiar care of the State, as well as of private benevolence.

"As late as 1723, it was held in England, that for a man to be insane, *he must have no more reason than a brute, an infant, or wild beast.*

"It seems then to have been believed that for derangement to protect its subject from criminal responsibility, it must be total in its character; either manifesting itself in wild, ungovernable, and incongruous actions, or in stupid and passive imbecility. It seems not to have been then understood that men might ordinarily act sensibly, and yet be insane; and reason acutely or learnedly upon most subjects, whilst they were upon some one or more totally deranged. This inhuman rule cut off from the benefits of this plea, all the partially insane, and admitted to its privileges only the raving maniac or the drivelling idiot." See opinion of the court in the case of *Roberts v. The State of Georgia*, 3 Kelly's Rep. 310.

Insanity may be divided into *dementi accidentalis*, or adventitious insanity; and *dementia affectata* or voluntary insanity.

Those who labor under the first mentioned kind are such as have had understanding, but have lost the use of their reason, by disease, grief, or other accident. 1 Blk. 304. When the affliction is permanent, constant, and total, it is called *madness*. When it is temporary, the subject only being afflicted at times, enjoying lucid intervals when his reason returns, it is called *lunacy*; the name of *lunacy* being taken from the influence which the moon was supposed to have in all disorders of the brain, a notion which has been exploded by the sounder philosophy of modern times.

*Voluntary insanity*, is that which is produced by intoxication, which puts men in a temporary phrenzy.

Where the insanity is total, fixed, and permanent, it excuses all acts; so likewise, during the frenzy, in the case of a man laboring under adventitious insanity. "But the difficulty in these cases, is to distinguish between a total aberration of intellect and a partial or temporary delusion merely, notwithstanding which, the patient may be capable of discerning right from wrong; in which case he will be guilty in the eye of the law, and amenable to punishment. Partial insanity, says Lord Hale, is the condition of many, especially of melancholy persons, who generally discover their defects, in excessive fear and grief, and yet are not wholly destitute of reason; and this partial insanity seems not to excuse them in the commission of any crime. 1 Hale, 30. Doubtless, he adds, most persons that are felons of themselves, and others, are under a degree of partial insanity when they commit these offences; it is very difficult to define the invisible line that divides perfect from partial insanity; but it must rest upon circumstances duly to be weighed and considered, both by the judge, and the jury, least on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side, too great indulgence given to great crimes. It seems clear, that to excuse a man from punishment upon the ground of insanity, it must be proved distinctly that he was not capable of distinguishing right from wrong at the time he did the act, and did not know it to be an offence against the laws of God and nature. If there be a partial degree of reason, a competent use is sufficient to have restrained those passions which produced the crime; if there be thought and design, a faculty to distinguish the nature of actions to discern the difference between moral good and evil, he will be responsible for his actions. Whether the prisoner were sane or insane, at the time the act was committed, is a question of fact triable by the jury and dependent upon the previous and contemporaneous acts of the party." See Arch. Cr. Pl. and cases cited.

The application of the rules and principles laid down in these cases to each particular case as it may arise, will necessarily in many instances, be attended with difficulty; more especially with regard to the true interpretation of the expressions which state that the prisoner, in order to be a proper subject of exemption from punishment on the ground of insanity should appear to have been unable "*to distinguish right from wrong,*" or to discern "*that he was doing a wrong act,*" or should appear to have been "*totally deprived of his understanding and memory.*" 1 Russ. 13.

In the case of Lord Ferrers, who was tried before the house of lords for murder, it was proved that his lordship was occasionally insane, and incapable from his insanity of knowing what he did, or judging of the consequences of his actions. But the murder was deliberate; and it appeared that when he committed the crime he had capacity sufficient to form a design and know its consequences. It was urged, on the part of the prosecution, that complete possession of reason was unnecessary to warrant the judgment of the law, and that it was sufficient if the party had such possession of reason as enabled him to comprehend the nature of his actions, and discriminate between moral good and evil. And he was found guilty and executed. *Lord Ferrer's case*, 19 St. Tri. (by Howell,) 947.

In *Arnold's case*, who was tried at Kingston, before Mr. J. Tracey, for maliciously shooting at Lord Onslow, it appeared clearly that the prisoner was to a certain extent, deranged, and that he had greatly misconceived the conduct of Lord Onslow; but it also appeared that he had formed a regular design, and prepared the proper means for carrying it into effect. Mr. Justice Tracey left the case to the jury, observing that where a person has committed a great offence, the exemption of insanity must be very clearly made out before it is allowed; that it is not every kind of idle and frantic humour of a man, or something unaccountable in his actions which will show him to be such a madman as is to be exempted from punishment; but that where a man is totally deprived of his understanding and memory, and does not know what he is doing, any more than an infant, a brute, or a wild beast, he will properly be exempted from justice or the punishment of the law. *Arnold's case*, MS.; *Collison on Lunacy*, 475; 8 St. Tri. 318; 16 St. Tri. (by Howell,) 764, 765. The jury found the prisoner guilty; but at Lord Onslow's request he was relieved; and was confined in prison thirty years till he died.

In *Parker's case*, who was indicted for aiding the king's enemies, by entering into the French service in time of war between France and this country, the defence of the prisoner was rested upon the ground of insanity; and a witness on his behalf stated, that his general character from a child was that of a person of very weak intellects; so weak that it excited surprise in the neighborhood when he was accepted for a soldier. But the evidence for the prosecution had shown the act to have been done with considerable deliberation and possession of reason and that the prisoner, who was a marine, having been captured by the French and carried into the Isle of France, after a confinement of about six weeks, entered voluntarily into the French service, and stated to a captive comrade that it was much more agreeable to be at liberty and have plenty of money than remain confined in a dungeon. The attorney general replied to the defence of insanity, that before it could have any weight in rebutting a charge so clearly made out, the jury must be properly satisfied that at the time when the crime was committed the prisoner did not really know right from wrong. And the jury, after hearing the evidence summed up, without hesitation pronounced the prisoner guilty. (*Parker's case*, tried by a special commission, in Horsemonger-lane, 11th of February, 1812, for high treason, *Collis*. 477.)

Thomas Bowler was tried at the Old Bailey, on the 2nd July, 1812, for shooting at and wounding William Burrowes. The defence set up for the prisoner was, insanity occasioned by epilepsy; and it was deposed, by the prisoner's housekeeper, that he was seized with an epileptic fit on the 9th July, 1811, and was brought home apparently lifeless, since which time she had perceived a great alteration in his conduct and demeanor; that he would frequently rise at nine o'clock in the morning, eat his meat almost raw, and lie on the grass exposed to the rain; and that his spirits were so dejected that it was necessary to watch him, lest he should destroy himself. Mr. Warburton, the keeper of a lunatic asylum, deposed, that it was characteristic of insanity occasioned by epilepsy for the patient to imbibe violent

antipathies against particular individuals, even his dearest friends, and to have a desire of taking vengeance upon them from causes wholly imaginary, which no persuasion could remove, and that yet the patient might be rational and collected upon every other subject. He had no doubt of the insanity of the prisoner, and said he could not be deceived by assumed appearances. A commission of lunacy was also produced, dated the 17th of June, 1812, and an inquisition taken upon it, whereby the prisoner was found insane, and to have been so from the 30th of March last. The report of this case, in *Collison on Lunacy*, 673, does not state the day on which the prisoner shot at W. Burrowes.

Mr. Justice Le Blanc, after summing up the evidence, concluded by observing to the jury, that it was for them to determine whether the prisoner, when he committed the offence with which he stood charged, was incapable of distinguishing right from wrong, or under the influence of any *illusion* in respect of the prosecutor which rendered his mind at the moment insensible of the nature of the act he was about to commit; since in that case he would not be legally responsible for his conduct.

On the other hand, provided they should be of opinion that when he committed the offence he was capable of distinguishing right from wrong, and not under the influence of any *illusion* as disabled him from discerning that he was doing a wrong act, he would be amenable to the justice of his country, and guilty in the eye of the law. The jury, after considerable deliberation, pronounced the prisoner guilty. *Bowler's case*, Old Bailey, 2d July, 1812, *Collis*, 673, in the note.

In *Bellingham's Case*, who was tried for the murder of Mr. Perceval, a part of the prisoner's defence, not urged by himself but by his counsel, was insanity; and upon this part of the case, Mansfield, Chief Justice, is reported to have stated to the jury, that in order to support such a defence, it ought to be proved by the most distinct and unquestionable evidence that the prisoner was incapable of judging between right and wrong; that in fact it must be proved beyond all doubt, that at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature; and that there was no other proof of insanity which would excuse murder, or any other crime. That in the species of madness called lunacy, where persons are subject to temporary paroxysms, in which they are guilty of acts of extravagance, such persons committing crimes when they are not affected by the malady would be, to all intents and purposes, amenable to justice; and that so long as they could distinguish good from evil they would be answerable for their conduct. And that in the species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act, if such a person be capable in other respects of distinguishing right from wrong, there would be no excuse for any act of atrocity which he might commit under this description of derangement. *Bellingham's Case*, Old Bailey, 15th May, 1812, *Collis*, Addend. 636. "I will not refer to *Bellingham's Case*, as there are some doubts as to the mode in which that case was conducted." Per Sir J. Campbell, Atty. Gen. in *Reg. v. Oxford*, 9 C. & P. 533.

In the trial of Oxford, for shooting at the Queen, Lord Denman, C. J. told the jury, "Persons *prima facie* must be taken to be of sound mind till the contrary is shown. But a person may commit a criminal act, and not be responsible. If some controlling disease was, in truth, the acting power within him which he could not resist, then he will not be responsible. It is not more important than difficult to lay down the rule by which you are to be governed." "On the part of the defence, it is contended that the prisoner was *non compos mentis*, that is (as it has been said) unable to distinguish right from wrong, or, in other words, that from the effect of a diseased mind he did not know at the time that the act he did was wrong." "Something has been said about the power to contract and to make a will. But I think that those things do not supply any test. The question is, whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act, that it was a crime?" *Reg. v. Oxford*, 9 C. & P. 525.

James Hadsfield was tried in the court of king's bench, in the year 1800, on an indictment for high treason, in shooting at the king, in Drury-lane theatre; and the defence made for the prisoner was insanity. It was proved that he had been a private soldier in a dragoon regiment, and in the year 1793 received many severe wounds in battle, near Lisle, which had caused partial derangement of mind, that he had been dismissed from the army on account of insanity. Since his return to this country he had been annually out of his mind from the beginning of spring to the end of the dog-days, and had been under confinement as a lunatic. When affected by his disorder, he imagined himself to hold intercourse with God; sometimes called himself God, or Jesus Christ, and used other expressions of the most irreligious and blasphemous kind; and also committed acts of the greatest extravagance; but at other times he appeared to be rational, and discovered no symptom of mental incapacity or disorder. On the 11th of May preceding his commission of the act in question his mind was very much disordered, and he used many blasphemous expressions. At one or two o'clock on the following morning, he suddenly jumped out of bed, and alluding to his child, a boy of eight months old, of whom he was usually remarkably fond, said he was about to dash his brains out against the bed-post, and that God had ordered him to do so; and upon his wife screaming, and his friends coming in, he ran into a cupboard and declared he would lie there, it should be his bed, and God had said so; and when doing this, having overset some water, he said he had lost a great deal of blood. On the same and the following day he used many incoherent and blasphemous expressions. On the morning of the 15th of May he seemed worse, said that he had seen God in the night, that the coach was waiting, and that he had been to dine with the king. He spoke very highly of the king, the royal family, and particularly of the Duke of York. He then went to his master's workshop, whence he returned to dinner at two, but said that he stood in no need of meat, and could live without it. He asked for tea between three and four o'clock, and talked of being made a member of the society of Odd Fellows; and, after repeating his irreligious expressions, went out and repaired to the theatre. On the part of the crown it was proved that he had sat in his place in the theatre nearly three quarters of an hour before the king entered; that at the moment when the audience rose, on his majesty's entering his box, he got up above the rest, and presenting a pistol loaded with slugs, fired it at the king's person, and then let it drop; and when he fired, his situation appeared favorable for taking aim, for he was standing upon the second seat from the orchestra in the pit; and he took a deliberate aim, by looking down the barrel, as a man usually does when taking aim. On his apprehension, amongst other expressions, he said that "he knew perfectly well his life was forfeited; that he was tired of life, and regretted nothing but the fate of a woman who was his wife, and would be his wife a few days longer, he supposed." These words he spoke calmly, and without any apparent derangement; and with equal calmness repeated that he was tired of life, and said that "his plan was to get rid of it by other means; he did not intend anything against the life of the king; he knew the attempt only would answer his purpose."

The counsel for the prisoner, (the late Lord Erskine, then at the bar,) in his very able address to the jury, put the case as one of a species of insanity in the nature of a *morbid delusion* of the intellect, and admitted that it was necessary for them to be satisfied that the act in question was the immediate unqualified offspring of the disease. And Lord Kenyon held that as the prisoner was deranged immediately before the offence was committed, it was improbable that he had recovered his senses in the interim; and although were they to run into nicety, proof might be demanded of his insanity at the precise moment when the act was committed; yet, there being no reason for believing him to have been at that period a rational and accountable being, he ought to be acquitted. *Hadsfield's Case*, Collis. 480. The verdict of the jury was, "Not Guilty; it appearing to us that he was under the influence of insanity when the act was committed."

Nesbitt, J., in delivering the opinion of the court in *Roberts v. The State of Georgia*, 3 Kelly's Rep. 310, thus speaks of the efforts of Mr. Erskine in this case: "The great speech of Mr. Erskine in defence of Hadsfield, has shed new light upon the law of insanity. So conclusive was that celebrated argument, that it is now looked upon by the profession as

authority. In the records of forensic eloquence, ancient and modern, nothing is to be found surpassing Erskine's defence of Hadsfield, for condensation, perspicuity and strength of reasoning, as well as for beauty of illustration and purity of style. In that case, he assumed the position that a man might have reason sufficient to distinguish between the right and wrong of the act about to be committed, and yet be irresponsible; that the mind might be cognizant of the distinction between right and wrong as regards the act, and yet, by reason of some *delusion*, overmastering the will, there might be no criminal intent. To apply this proposition, it was admitted by Mr. Erskine, that the act itself must be connected with the peculiar delusion under which the prisoner labors. This doctrine can be best understood by illustration, and it is illustrated by Hadsfield's case. He had been a soldier in the British armies, and had received several severe wounds, one of which, on the head, it was thought, had injured the brain, and caused the derangement under which he suffered. He imagined that he had constant intercourse with the Almighty, that the world was coming to a conclusion, and like our blessed Saviour, he was to sacrifice himself for its salvation. Unwilling to commit suicide, it was argued by Mr. Erskine, he sought to do an act which would forfeit his life to the law, and thus bring about the sacrifice, which, in his morbid imagination, he held necessary to the salvation of the world. Under the influence of this delusion, he shot at the king, in the theatre. Now, in this case, it was not pretended that Hadsfield was a raving madman, or an imbecile idiot; nor was it contended that he was incapable of knowing that shooting a pistol at the king, would, or might kill him, or that if he should kill the king, that he would deserve death for the act; (for that really was what he desired,) or that he was incapable of distinguishing between the right and the wrong of the act; but it was contended, that the delusion under which he labored had so shattered his intellect, as to control his will, and impel him resistlessly to the commission of the act, and *therefore* there was no criminal motive, no wicked or mischievous intent, and if these were wanting, he was irresponsible. To use the language of Mr. Erskine, "Reason is not driven from her seat, but distraction sits down upon it, along with her, holds her trembling upon it, and frightens her from her propriety." Hadsfield was acquitted; and since that day, the exception which his case established has been recognized." See Erskine's Speech in Appendix to Cooper's Medical Jurisprudence; 29 Howell State Tr. 1281.

In *Clark v. The State of Ohio*, 12 Ohio Rep. 483, the court say: "The question may be safely stated to you thus: Was the accused a free agent in forming the purpose to kill Cyrus Sells? Was he, at the time the act was committed, capable of judging whether that act was right or wrong? In trying this question of insanity, it should be borne in mind that the law presumes every person of the age of fourteen years to be of sufficient capacity to form the criminal purpose; to deliberate and premeditate upon the acts, which malice, anger, hatred, revenge, or other evil disposition might impel him to perpetrate, to defect this legal presumption which meets the defence of insanity at the threshold, the mental alienation relied upon by the accused, must be affirmatively established, by positive or circumstantial proof. You must be satisfied, from the evidence, that the perverted condition of the faculties of the mind, indicated in the main question already stated as excusing from crime, did exist at the time Sells was killed. It is not sufficient if the proof barely shows that such a state of mind was possible; nor is it sufficient if it merely shows it to have been probable. The proof must be such as to overrule the legal presumption of sanity; it must satisfy you that he was not sane. It would be unsafe, to let loose upon society great offenders upon mere theory, hypothesis, or conjecture. A rule that would produce such a result, would endanger community by creating a means of escape from criminal justice which the artful and experienced would not fail to embrace. The defence of insanity is not uncommon. It is by no means a new thing in a court of justice. It is a defence often attempted to be made, more especially in cases where aggravated crimes have been committed, under circumstances which afford full proof of the overt acts, and render hopeless all other means of evading punishment. While then, the plea of insanity is to be regarded as a not less full and complete, than it is a humane defence when satisfactorily established, and while you should guard against inflicting the penalty of crime upon the unfortunate maniac, you should be equally careful that you do not suffer an ingenious counterfeit of the malady to furnish pro-

tection to guilt. Supposing that you should find the proof of insanity prior to, and subsequent to the homicide sufficient, counsel have requested us to instruct you that the defendant must go acquit, even if you should find that the act was committed during a lucid interval. We do not so understand the law. An act done during a lucid interval, is an act for which the law will hold the individual accountable. By a lucid interval we mean that state of mental sanity which is indicated in the main question that I have already stated to you. Proof of prior insanity throws upon the state the burden of proving the crime perpetrated during a lucid interval. It defects the legal presumption of sanity, and creates a legal presumption of continued lunacy, which, like the former, must be overthrown by proof."

To amount to a complete bar of punishment, either at the time of committing the offence or of the trial, the insanity must have been of such a kind, as entirely to deprive the prisoner of the use of reason, *as applied to the act in question*, and the knowledge that he was doing wrong in committing it. If, though somewhat deranged, he is able to distinguish right from wrong, *in his own case* and to know that he was doing wrong in the act which he committed, he is liable to the full punishment of his criminal acts. *Ib.* 13; *Alisons Cr. Law*, cited.

In a leading case in England, *Rex v. Offord*, 5 C & P. 168, where it appeared that the defendant labored under a notion that the inhabitants of Hadleigh, and particularly the deceased, were continually issuing warrants against him, with intent to deprive him of his life and liberty, Lord Lyndhurst, C. B., told the jury that "they must be satisfied before they could acquit the prisoner on the ground of insanity, that he did not know when he committed the act what the effect of it, if fatal, would be with reference to the crime of murder. The question was, did he know that he was committing an offence against the laws of God and nature?"

Mr. Shelford (*Shelf. on Lunacy*, 458,) thus states the rule:—"If a person liable to partial insanity which only relates to particular subjects or notions, upon which he talks and acts like a madman, still has as much reason as makes him to distinguish between right and wrong, he will be liable to that punishment which the law attaches to his crime."

In the case of *Rogers*, (*Abner Rogers' Tr.* p. 275,) the Supreme Court of Massachusetts say: "A person, in order to be punishable by law, or in order that his punishment by law may operate as an example to deter others from committing criminal acts under like circumstances, must have sufficient memory, intelligence, reason, and will, to enable him to distinguish between right and wrong, in regard to the particular act about to be done; to know and understand that it will be wrong, and that he will deserve punishment by committing it." This rule does not require total insanity. If the prisoner is perfectly sane as to all other things, and wants, as to the act about to be committed, reason enough to distinguish between the right and wrong of *that act*—if he does not know and understand that *that act* is wrong, and that he will deserve punishment for committing it, he is irresponsible. So, also, on the other hand, according to this rule, the person may be deranged as to other things, yet, if he has sufficient reason to distinguish as to the right and wrong of the particular act about to be committed—if he knows and understands that for committing that act he will be liable to be punished—he is a responsible agent, and ought to be convicted.

In a late case (*Commonwealth v. Mosler*), before the Supreme Court of Pennsylvania, the defence of insanity was set up in an indictment for murder, and discussed at great length. Chief Justice Gibson, in delivering the charge to the jury, said:

"Insanity is *mental* or *moral*—the latter being sometimes called homicidal mania, and properly so. It is my purpose to deliver to you the law on this ground of defence, and not to press upon your consideration, at least to an unusual degree, the circumstances of the present case, on which the law acts. A man may be mad on all subjects, and then, though he may have glimmerings of reason, he is not a responsible agent. This is general insanity, but if it be not so great in its extent or degree as to blind him to the nature and consequences of his moral duty, it is no defence to an accusation of crime. It must be so great as entirely to destroy his perception of right and wrong; and it is not until that perception is thus destroyed, that he ceases to be responsible. It must amount to delusion or hallucination, controlling his will and making the commission of the act, in his apprehension, a duty of over-



ruling necessity. The most apt illustration of the latter is the perverted sense of religious obligation, which has caused men sometimes to sacrifice their wives and children.

"Partial insanity is confined to a particular subject—the man being sane on every other. In that species of madness, it is plain that he is a responsible agent, if he were not instigated by his madness to perpetrate the act. He continues to be a legitimate subject of punishment, although he may have been laboring under a moral obliquity of perception, as much so as if he were merely laboring under an obliquity of vision. A man whose mind squints, unless impelled to crime by this very mental obliquity, is as much amenable to punishment as one whose eye squints. On this point, there has been a mistake as melancholy as it is popular. It has been announced by learned doctors, that, if a man has the least taint of insanity entering into his mental structure, it discharges him of all responsibility to the laws. To this monstrous error may be traced both the fecundity in homicides which has dishonored this country, and the immunity which has attended them. The law is that, whether the insanity be general or partial, the degree of it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action.

"But there is a *moral* or *homicidal* insanity, consisting of an irresistible inclination to kill, or to commit some other particular offence. There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or, at least, to have evinced itself in more than a single instance. It is seldom directed against a particular individual; but that it may be so, is proved by the case of the young woman who was deluded by an irresistible impulse to destroy her child, though aware of the heinous nature of the act. The frequency of this constitutional malady is fortunately small, and it is better to confine it within the strictest limits. If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a justification in any particular case, it is necessary either to show, by clear proofs, its contemporaneous existence, evinced by present circumstances, or the existence of an habitual tendency developed in previous cases, becoming in itself a second nature."

The jury convicted the prisoner, and the court was unanimous in refusing a new trial. *Com. v. Mosler*, 6 Penn. L. J. 93; 4 Barr. Rep. 264.

In a recent case in Massachusetts, (*Com. v. Rogers*, 7 Metc. 500,) the court says: "In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power; or if, through the overwhelming violence of mental disease, his intellectual power is, for the time, obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

"But these are extremes easily distinguished, and not to be mistaken. The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging, or so perverted by insane delusion, as to act under false impressions and influences. In these cases, the rule of law, as we understand it, is this: A man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing; a knowledge and consciousness, that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of just and right, injuries to others, and a violation of the dictates of duty.

"On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act, and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he will do wrong and receive punishment; such partial insanity is not sufficient to exempt him from responsibility for criminal acts.

"If then, it is proved that the mind of the accused was in a diseased and unsound state,

the question will be, whether the disease existed to so high a degree, that for the time being, it overwhelmed the reason, conscience and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse.

"The character of the mental disease relied upon, to excuse the accused in this case, is partial insanity, consisting of melancholy, accompanied by delusion. The conduct may be in many respects regular, the mind acute, and the conduct apparently governed by rules of propriety, and at the same time there may be insane delusion by which the mind is perverted. The most common of these cases, is that of *monomania*, when the mind broods over *one idea*, and cannot be reasoned out of it.

"The questions, then, in the present case, will be these: 1. Was there such a delusion and hallucination? 2. Did the accused act under a false, but sincere belief that the warden had a design to shut him up, and under that pretext destroy his life; and did he take this means to prevent it? 3. Are the facts of such a character, taken in connexion with the opinions of the professional witnesses, as to induce the jury to believe that the accused had been laboring for several days under monomania, attended with delusion; and did this indicate such a diseased state of the mind, that the act of killing the warden was to be considered as an outbreak or paroxysm of disease, which, the time being, overwhelmed and superseded reason and judgment, so that the accused was not an accountable agent?"

The law relative to the accountability of insane persons, is fully reviewed in the case of *Freeman*, (4 Denio, 9,) where the court say: "The statute declaring that no insane person can be tried, sentenced to any punishment, or punished for any crime or offence, while he continues in that state, although new as a legislative enactment in New York, was not introductory of a new rule, for it is in strict conformity with the common law on the subject. 'If a man,' says Blackstone, 'in his sound memory, commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it, with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed, for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution. Indeed,' it is added, 'in the bloody reign of Henry the eighth, a statute was made, which enacted that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute of 1 and 2 Ph. and M. c. 10. For, as is observed by Sir Edward Coke, the execution of an offender is, for example, *ut poena ad paucos metus ad omnes perveniat*; but so it is not, when a madman is executed, but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others.' 4 Blk. Com. 24. The true reason why an insane person should not be tried is, that he is disabled by an act of God, to make a just defence, if he have one. As is said in 4 Harg. State Trials, 205, 'there may be circumstances lying in his private knowledge, which would prove his innocency, of which he can have no advantage, because not known to the persons who shall take upon them his defence.' The most distinguished writers on criminal jurisprudence, concur in these humane views, and all agree that no person, in a state of insanity, should ever be put upon his trial for an alleged crime, or be made to suffer the judgment of the law. A madman cannot make a rational defence, and as to punishment, *furiosus solo furore puniatur*. 1 Hale P. C. 34, 35; 4 Blk. Com. 395, 396; 1 Ch. Cas. Lond. ed. 1841, p. 761; 1 Russ. on Cr. ed. 1845, p. 14; Shelf on Lunacy, 467, 468; Stock on Non Com. 85, 86.

"By the 39 & 40 Geo. 3, ch. 94, sec. 2, it is enacted 'that if any person indicted for any offence, shall be insane, and shall upon arraignment, be found so to be, by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment, it shall be lawful for the court before when any such person shall brought to be arraigned, to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody till His Majesty's pleasure shall be known.' 1 Russ. 15. The question upon this statute, is the same as upon ours, that is, is the alleged offender insane. Russell says, p. 15:

'If a prisoner have not, at the time of the trial, from the defect of his faculties, sufficient intelligence to understand the nature of the proceedings against him, the jury ought to find that he is not sane, and upon such finding, he may be ordered to be kept in custody under this act.'

"In the case of the *The Queen v. Goode*, 7 A. & E. 536, which occurred in 1837, the prisoner was brought into the court of Queen's bench, and arraigned on an indictment for a misdemeanor. As he showed clear symptoms of insanity a jury was immediately impannelled to try whether he was then insane or not; and upon evidence given, as well as upon his appearance in court, the jury found that he was insane. The prisoner was thereupon detained in custody under the statute.

"In *Ley's case*, 1 Lewin's C. C. 239, on the trial of a similar question, Hullock, B. said to the jury. 'If there be a doubt as to the prisoner's sanity, and the surgeon says that it is doubtful, you cannot say that he is in a fit state to be put upon his trial.'

"The course at common law, was much the same. In *Frith's case*, 22 How. State Tr. 307, 318, which preceded the act of 39 and 40 Geo. 3, to which reference has been made, the prisoner was arraigned for high treason, and a jury sworn to enquire whether he was of sound mind and understanding, or not, Lord Kenyon, chief justice of the court of king's bench presided at the trial, assisted by one of the judges of the court of common pleas, and one of the barons of the court of exchequer. It was observed by the court to the jury, that the inquiry was not whether the prisoner was insane when the alleged crime was committed, nor was it necessary to enquire at all, what effect his present state of mind might have when that question came to be discussed; but the humanity of the law of England had prescribed that no man should be called upon to make his defence, at a time when his mind was in such a situation that he appeared incapable of doing so: that however guilty he might be, the trial must be postponed to a time when, by collecting together his intellects, and having them entire, he shall be able so to model his defence, if he had one, as to ward off the punishment of the law; and it was for the jury to determine whether the prisoner was then in that state of mind. Shelf. on Lunacy 468.

"With these lights before us, the construction of the statute which forbids the trial of any insane person, cannot be attended with much difficulty. A state of general insanity, the mental powers being wholly perverted or obliterated, would, necessarily preclude a trial; for a being in that deplorable condition, can make no defence whatever. Not so, however, where the disease is partial, and confined to some subject other than the imputed crime, and the contemplated trial. A person in this condition may be fully competent to understand his situation in respect to the alleged offence, and to conduct his defence with discretion and reason. Of this, the jury must judge; and they should be instructed that if such is found to be his condition, it will be their duty to pronounce him sane. In the case at bar, the court professed to furnish a single criterion of sanity, that is, a capacity to distinguish between right and wrong, this, as a test of insanity, is by no means invariably correct; for while a person has a very just perception of the moral qualities of most actions, he may at the same time, as to some one in particular, be absolutely insane, and consequently, as to this, be incapable of judging accurately between right and wrong. If the delusion extends to the alleged crime, or the contemplated trial, the party manifestly, is not in a fit condition to make his defence, however sound his mind may, in other respects, be. Still, the insanity of such a person being only partial, a jury, under a charge like that given in this case, might find the prisoner sane; for in most respects, he would be capable of distinguishing between right and wrong. Had the instruction been, that the prisoner was to be deemed sane, if he had a knowledge of right and wrong *in respect of the crime with which he stood charged*, there would have been but little fear that the jury could be misled; for a person who justly apprehends the nature of a charge made against him, can hardly be supposed incapable of defending himself in regard to it, in a rational way. At the same time, it would be well to impress distinctly on the minds of jurors, that they are to gauge the mental capacity of the prisoner, in order to determine whether he is so far sane as to be competent in mind to make his defence, if he has one; for unless his faculties are equal to that task, he is not in a fit condition to be put on his trial. For the purpose of such a question, the law regards a person thus

disabled by disease, as *non compos mentis*, and he should be pronounced unhesitatingly, to be insane within the true intent and meaning of this statute.

"Where insanity is interposed as a defence to an indictment for an alleged crime, the inquiry is always brought down to the single question of a capacity to distinguish between right and wrong, *at the time when the act was done*. This is the rule laid down by all the English judges but one, in the late case of *McNaughten* while pending in the house of lords, cited *ante*. In *Reg. v. Oxford*, 9 C. & P. 525, Lord Denman, C. J., charged the jury in this manner: 'The question is, whether the prisoner was laboring under that species of insanity which satisfies you, that he was quite unaware of the nature, character, and consequences of the act he was committing, or in other words, whether he was under the influence of a diseased mind, and was really unconscious, at the time he was committing the act, that it was a crime.' The insanity must be such as to deprive the party charged with crime of the use of reason *in regard to the act done*. He may be deranged on other subjects, but if capable of distinguishing between right and wrong in the particular act done by him, he is justly liable to be punished as a criminal.

"Such is the undoubted rule of the common law on this subject. Partial insanity is not, by that law, necessarily an excuse for crime, and can only be so, where it deprives the party of his reason, in regard to the act charged to be criminal. Nor, in my judgment, was the statute on this subject, intended to abrogate or qualify the common law rule. The words of the statute are, "No act done by a person in a state of insanity can be punished as an offence." 2 R. S. 697, § 2. The clause is very comprehensive in its terms, and at first blush, might seem to exempt from punishment any act done by a person who is insane *upon any subject whatever*. This would indeed be a mighty change in the law, as it would afford absolute impunity to any person in an insane state, although his disease might be confined to a single and isolated subject. If this is the meaning of the statute, jurors are no longer to inquire whether the party was insane 'in respect to the very act with which he is charged,' but whether he was insane in regard to any act or subject whatever; and if they find such to have been his condition, render a verdict of not guilty. But the statute is not so understood by me. I interpret it as I should have done if the words had been 'no act done by a person in a state of insanity, *in respect to such act*, can be punished as an offence.' The act, in my judgment, must be an *insane act*, and not merely the act of an *insane person*. This was plainly the rule of law before the statute was passed, and although that took place more than sixteen years since, I am not aware that it has, at any time, been held, or intimated by any judicial tribunal, that the statute had abrogated, or in any respect modified this principle of the common law.

"The jury found, not as the issue required them to do, that the prisoner was or was not, insane, but that he was '*sufficiently sane in mind and memory to distinguish between right and wrong*.' This verdict was defective: it did not directly find any thing, and certainly not the point in issue, but evaded it, by an argumentative finding. As the utmost, the jury only made an approach towards the point to be decided, but failed to reach it. They should have been required to pass directly on the question of insanity, and should not have been allowed to evade it, by an argumentative verdict of any sort. Such a finding as this, would be objectionable in a civil proceeding, (*In the matter of Morgan*, 7 Paige Rep. 296,) and in a criminal case should not be allowed."

#### INSANITY FROM DRUNKENNESS.

*Voluntary* insanity produced by intoxication is considered rather as an aggravation than as an excuse for an offence; for it is said that one who is drunk has no excuse thereby, but whatsoever ill he thereby commits, his drunkenness only aggravates it. 1 Just. 247. But where the primary cause of the phrenzy was involuntary, or where it has become habitual and confirmed it is then an excuse for crime. Thus, if a man through the ignorance of a physician, or by the contrivance of others, take some drug which produces temporary insanity, he will be excused for criminal acts committed while under its effects. Nor will one be liable for any crime perpetrated under the influence of insanity which is habitual

## 11—11 PERSONS PUNISHABLE OR EXCUSABLE FOR CRIME.

and fixed, though caused by frequent intoxication, or though it be otherwise originally contracted by his own act. Arch. Cr. Law 12.

In *United States v. Alexander Drew*, 5 Mason's U. S. Rep., the opinion of the court was as follows:—

Story, J. "We are of opinion, that the indictment upon these admitted facts cannot be maintained. The prisoner was unquestionably insane at the time of committing the offence. And the question made at the bar is, whether insanity whose remote cause is habitual drunkenness is or is not an excuse in a court of law for a homicide committed by the party while so insane, but not at the time intoxicated, or under the influence of liquor. We are clearly of opinion that insanity is a competent excuse in such a case. In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason which includes responsibility. An exception is, when the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. But the crime must take place, and be the *immediate* result of the fit of intoxication, *and while it lasts*; and not, as in this case, a remote consequence, superinduced by the antecedent exhaustion of the party, arising from gross and habitual drunkenness. However criminal in a moral point of view, such an indulgence is, and however justly a party may be responsible for his acts arising from it, to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed while Drew was in a fit of intoxication, he would have been liable to be convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offence. The law looks to the immediate, and not to the remote cause; to the actual state of the party, and not to the causes which remotely produced it. Many species of insanity arise remotely from what, in a moral view, is a criminal neglect or fault of the party, as from religious melancholy, undue exposure, extravagant pride, ambition, &c. Yet such insanity has always been deemed a sufficient excuse for any crime done under its influence."

In *Cornwell v. State of Tennessee*, Martin & Yerger, (Tenn.) Rep. 147, the court charged the jury, "that if at the time the homicide was committed the prisoner had not sufficient understanding to distinguish right from wrong, and was in a state of insanity, it would be excusable—but that must be proved; but if his insanity or bad conduct arose from drunkenness, it was no excuse. There may be cases where insanity is produced by long continued habits of intoxication; but it must be a permanent insanity. Insanity which is the immediate effect of intoxication, is no excuse; the party being fully responsible for all his acts." The counsel for the prisoner requested the court to charge the jury, if they believed all the circumstances of the case, that the prisoner, at the time of slaying, labored under a temporary suspension of reason, although intoxication might have been the exciting cause—it is a circumstance of excuse or mitigation, and more especially, if intoxication were not intended at the time of drinking, but the same was accidental, or a consequence not intended or apprehended. But the court refused to charge as above. The jury found the prisoner guilty of murder. On appeal in the nature of a writ of error, judgment affirmed. See also, *Bennett v. Tennessee*, Mar. & Yerger, 133.

But in Massachusetts, in the case of *Commonwealth v. French*, Thacher's Cr. Cas. 163, it was held that a temporary mental derangement produced by drinking intoxicating liquor, under which a boy of thirteen years of age committed a theft, authorized a jury to acquit him.

The following may be enumerated among numerous similar cases tried in the State of New York:—

N. M. Thomas was tried May 13, 1840, for the murder of Hallet Greenman, at Florida, Montgomery Co. N. Y., Nov. 24, 1839. The homicide was committed during a fit of intoxication, and the prisoner was found guilty. The judges of the supreme court and the attorney-general certified to the legality of the conviction and the sufficiency of the evidence. The sentence was commuted to imprisonment for life.

John Smock was tried in December, 1839, for the murder of his wife in the city of New

York, Tuesday, June 25, 1839. They were both very intemperate, and in a fit of drunkenness the wound was inflicted, of which she died, a few days after. The physician of the city prison testified that he was laboring under *delirium tremens* at the time. He was found guilty, with a recommendation to mercy; in accordance with which the sentence was commuted to imprisonment for life.

Robert Miller was tried in October, 1839, for the murder of Barney Leddy, at Utica, April, 1839. On the trial it was proved that the killing grew out of a drunken quarrel and fight, (without previous animosity,) brought on by a jug of liquor which the deceased brought to Miller's house. The accused was convicted *and hung*.

Jabez Fuller was tried in March, 1840, for the murder of his wife at Somerstown, Westchester Co. May 26, 1839. They were both very intemperate, and in a fit of intoxication, prompted by jealousy, he injured her so severely by stamping upon her, that she died four days afterward from the effect of her bruises. It appeared from the testimony, that he was of intemperate habits, and quick tempered; but when sober, of a civil and quiet demeanor. He was convicted *and hung*, May 22, 1840.

John Johnson was tried in November, 1840, for the murder of his wife at Buffalo, August 19, 1840. It was proved on the trial that he was much intoxicated on the day of the murder, though several witnesses gave him a good character, as a quiet and peaceable man, industrious and trusty. He was convicted *and hung* on the 19th of June, 1841.

It has been held that where the material question is, whether an act was premeditated, or done only with sudden heat and impulse, the fact of the party being intoxicated is a circumstance proper to be taken into consideration. In *Pigman v. The State of Ohio*, 14 Ohio Rep. 555, the court says: "Drunkenness is no excuse for crime; yet in that class of crimes and offences which depend upon guilty knowledge; or the coolness and deliberation with which they shall have been perpetrated, to constitute their commission, or fix the degree of guilt, it should be submitted to the consideration of the jury. If this act is of that nature that the law requires it should be done with guilty knowledge, or the degree of guilt depends upon the calm and deliberate state of the mind at the time of the commission of the act, it is proper to show any state or condition of the person that is adverse to the proper exercise of the mind, and the undisturbed possession of the faculties. The older writers regarded drunkenness, as an aggravation of the offence, and excluded it for any purpose. It is a high crime against one's self and offensive to society and good morals; yet every man knows that acts may be committed in a fit of intoxication, which would be abhorred in sober moments. And it seems strange that any one should ever have imagined that a person who committed an act from the effect of drink, which he would not have done if sober, is worse than the man who commits it from sober and deliberate intent. The law regards an act done in sudden heat, in a moment of phrenzy, when passion has dethroned reason as less criminal than the same act when performed in the cool and undisturbed possession of all the faculties. There is nothing the law so much abhors as the cool, deliberate and settled purpose to do mischief. That is the quality of a demon; whilst that which is done on great excitement, as when the mind is broken up by poison or intoxication; although to be punished, may, to some extent, be softened and set down to the infirmities of human nature. Hence, not regarding it as an aggravation, drunkenness, as anything else, showing the state of mind or degree of knowledge, should go to the jury. Upon this principle, in modern cases, it has been permitted to be shown that the accused was drunk when he perpetrated the crime of killing, to rebut the idea that it was done in a cool and deliberate state of the mind necessary to constitute murder in the first degree. The principle is undoubtedly right. So on a charge of passing counterfeit money; if the person was so drunk that he actually did not know that he had passed a bill that was counterfeit, he is not guilty. It often times requires much skill to detect a counterfeit. The crime of passing counterfeit money consists of knowingly passing it, to rebut that knowledge, or to enable the jury to judge rightly of the matter, it is competent for the person charged to show that he was drunk at the time he passed the bill. It is a circumstance, among others, entitled to its just weight."

It has been held in Pennsylvania that drunkenness does not incapacitate a man from forming a premeditated design of murder, but as drunkenness clouds the understanding and ex-

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cites passion, it may be evidence of passion only, and of want of malice and design. *Penn. v. McFall*, Adda. 257. It may also be considered in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation; and that passion is more easily excitable in a person when in a state of intoxication than when he is sober. *R. v. Thomas*, 7 C. & P. 817; *R. v. Pearson*, 2 Lewin, 144. But if there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was, ought not to be regarded. *Ib.* So upon an indictment for stabbing, the jury may take into their consideration, among other circumstances, the fact of the prisoner being drunk at the time, in order to determine whether he acted under a bona fide apprehension that his person or property was about to be attacked. *Marshall's case*, 1 Lewin, 76; *Parke, J. Goodier's case*, *Ibid.* So where the question is whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the party uttering them, is proper to be considered. *Rex v. Thomas*, *Ib.*

In *Reg. v. Cruse*, 8 C. & P. 546, Patteson, J. said, "although drunkenness is no excuse, in any crime whatever, it is often of very great importance, in cases where it is a question of intention. A person may be so drunk, as to be utterly unable to form any intention, and yet, he may be guilty of very great violence." So with regard to intention, in a case of maliciously stabbing, drunkenness might perhaps, be adverted to, according to the nature of the instrument used. If a man used a stick, a jury would not infer a malicious intent so strongly against him if drunk, when he made an intemperate use of it, as they would if he had used a different kind of weapon; but where a dangerous instrument was used, which, if used, must produce grievous bodily harm, drunkenness could have no effect on the consideration of the malicious intent of the party. *Rex v. Meakin*, 7 C. & P. 297. See 1 Russell on Cr. 8.

In the case of *The State v. Bullock*, (13 Alabama Rep. 413,) the court, among other remarks, says:—"It is insisted by the prisoner's counsel that, although drunkenness does not excuse or justify the offence, yet it may be evidence of passion only, and want of malice. It is certainly true there must be malice, either express or implied, to constitute the offence charged in the indictment, and any circumstances calculated to disprove its existence, was proper to be considered by the jury. Malice may be inferred from the deadly character of the weapon used in the commission of the act. Would the legal presumption deducible from the use of such weapon, be rebutted by the fact that the party was intoxicated? Suppose the prisoner in a state of intoxication, with a large knife, such as was calculated to produce death, had, without provocation, assaulted and slain his victim, would it, at common law, have been a sufficient plea to an indictment for murder, that he was drunk? If so, then drunkenness would excuse the crime of murder. But we have seen that it is no excuse for crime. If, then, in the present case, had the prisoner killed Robertson with the deadly weapon with which he stabbed him, the crime would not have been reduced from murder to manslaughter, by reason of his intoxication, it follows that the court did not err in refusing the charge asked for, and in charging the jury that the drunkenness of the prisoner (which we must presume, in the absence of proof to the contrary, was voluntary, should not be considered by them. The authorities referred to by the counsel for the prisoner, we apprehend, do not conflict with the views here expressed. In the case of *Penns. v. McFall*, (Adda. Rep. 257,) the law, as applicable to murder in the first degree, as defined by a statute of that state, is laid down as contended for, by the counsel for the prisoner. So, also, in the case of *Swan v. The State*, (4 Humph. Tenn. Rep. 136,) the point is similarly ruled. In these cases it became important to ascertain whether the homicide was of that 'kind of *willful, deliberate, malicious, and premeditated killing*' which, by the provisions of the statute, constituted the crime of murder in the first degree, as contradistinguished from murder in the second degree. The question involved was the *mental status* at the time of the commission of the act, and with reference to it. Was it one of fixed purpose, by deliberation and premeditation, to take the life of the deceased? The mental state required by the statute to constitute the crime, was one of deliberation and premeditation. Hence, drunkenness, which excluded such condition of the mind as was necessary to constitute the statutory offence,

was allowed to be considered by the jury not as an excuse for the crime, but to show it had not been committed. Indeed, the court, in the last case referred to, assert that drunkenness is no excuse or justification for any crime. Whether the offence committed was the result of a preconceived determination to kill and murder, or was induced by the voluntary intoxication of the prisoner, he is nevertheless guilty." See Boston Law Reporter, vol. 10.

Thus much for the plea of insanity at common law, whether the insanity is accidental or voluntary. In most of the states of this country, provision is also made by statute, for interposing this defence. Some allusion has already been made to the statute of New York. That statute is as follows:

"No act done by a person in a state of insanity, can be punished as an offence, and no insane person be tried, sentenced to any punishment, or punished for any crime or offence while he continues in that state." 2 N. Y. R. S. 582, part 4, tit. 7, sec. 2.

In Maryland, "where any person shall be indicted for a crime or misdemeanor, and such person sets up, or alleges insanity or lunacy in his defence, it shall be the duty of the jury impaneled to try such person by their verdict, to find whether such person was, at the time of the commission of such offence, or still is, insane, lunatic, or otherwise; and if such jury find, by their verdict, that such person was, at the time of committing the offence, and then is, insane or lunatic, that then it shall be the duty of the court before whom such trial was had, to cause such person to be sent to the almshouse of the county to which such person belonged, at the time of the commission of such act, or to a hospital, or to some other place better suited, in the judgment of said court, to the condition of such prisoner, there to be confined until such person shall have recovered his reason, and be discharged by due course of law: *provided*, that nothing in this section contained, shall be construed to allow any one to avail himself of the plea or allegation of drunkenness, at the time of the commission of the offence of which he is indicted." Dorsey's Laws, p. 881, ch. 197, sec. 1.

"And where any person shall be arrested for improper or disorderly conduct, or is charged with any crime, offence or misdemeanor, and who appears to the court, or is alleged to be lunatic or insane, and against whom there is no indictment, it shall be the duty of the several county courts of this state, or of Baltimore city court, as the case may be, if in session at the time of such arrest or charge, to cause a jury of twelve good and lawful men to be impanelled forthwith, and to charge such jury to inquire whether said person was, at the time of the commission of the act complained of, insane or lunatic, and still is so; and if such jury shall find that such person was, at the time of the commission of such act, insane or lunatic, and still is so, that then it shall be the duty of the court to cause such person to be sent to the almshouse of the county to which such person belongs, or to a hospital, or to some other place better suited in the judgment of the said court to the condition of such prisoner, there to be confined at the expense of the county, or Baltimore city, as the case may be, until he shall have recovered and been discharged by due course of law." Ibid. sec. 2.

"And if during the recess of such courts, any person appearing to be, or alleged to be insane or lunatic shall be arrested and charged for any crime or misdemeanor before any judge of any of the said county courts, or before any judge of Baltimore city court, it shall be the duty of such judge, and he is hereby empowered to issue an order to the sheriff of the county where said offence hath been committed, requiring him forthwith to summon a jury of twelve good and lawful men, and to charge such jury to inquire whether such person was lunatic or insane at the time such offence was committed, and then is so; and if such jury shall find that the person so charged, was insane or lunatic at the time of the commission of the said offence, and still is so, then it shall be the duty of such judge to send (or commit) such person to the almshouse or other place, as is hereinbefore mentioned, and to do all other that the court of which he is a judge could, or might lawfully do, under this act, was such court in session: *Provided nevertheless*, that if such insane or lunatic person be possessed of real and personal property, the annual profit or rent of which shall be adequate to his reasonable support in any established hospital or asylum for the reception of insane or lunatic persons, it shall be the duty of the court to appoint a trustee of the



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estate of said lunatic or insane person, and to require of the said trustee a bond to the state of Maryland in such penalty, and with such security, as the keeper shall approve, with condition that he will cause the said lunatic or insane person to be confined and supported in some hospital or asylum for the reception of insane or lunatic persons until such person shall have recovered his reason; and that such trustee will faithfully administer and fully account for all such estate, income and effects of the said lunatic as shall come to his possession, or be under his care or direction."

In Massachusetts, "When any person held in prison on a charge of having committed an indictable offence, shall not be indicted by the grand jury, by reason of insanity, the grand jury shall certify that fact to the court; and thereupon, if the discharge, or going at large of such insane person shall be deemed manifestly dangerous to the peace and safety of the community, the court may order him to be committed to the state lunatic hospital, otherwise, he shall be discharged." R. S. 758, c. 136, sec. 15.

"When any person indicted for an offence, shall, on trial, be acquitted by the jury, by reason of insanity, the jury in giving their verdict of not guilty, shall state that it was given for such cause; and thereupon, if the discharge or going at large of such insane person shall be considered manifestly dangerous to the peace and safety of the community the court may order him to be committed to the state lunatic hospital; otherwise, he shall be discharged." Ibid. 162, c. 137, sec. 12.

"If it shall appear, to the satisfaction of the governor and council, that any convict who is under sentence of death, has become insane, the warrant for his execution may be delayed, or, if such warrant has been issued, the execution thereof, may be respited from time to time, so long as the governor and council shall think proper; and if any female convict, who is under sentence of death, shall be quick with child, the governor and council shall forbear to issue a warrant for her execution, or if such warrant has been issued, the execution thereof shall be respited until it shall appear to the satisfaction of the governor and council that such female convict is no longer quick with child." Ibid. 767, c. 139, sec. 12.

In New York, "No act done by a person in a state of insanity can be punished as an offence; and no insane person can be tried, sentenced to any punishment, or punished for any crime or offence while he continues in that state." 2 N. Y. R. S. 582, part 4, tit. 7, sec. 2.

In Pennsylvania, "In every case in which it shall be given in evidence upon the trial of any person charged with any crime or misdemeanor, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether such person was acquitted by them, on the ground of such insanity, and if they shall so find and declare, the court, before whom the trial was had shall have power to order such person to be kept in strict custody, in such place, and in such manner, as to the said court shall seem fit, at the expense of the county in which the trial was had, so long as such person shall continue to be of unsound mind." Act of June 13, 1836, sec. 58.

"The same proceedings may be had, if any person indicted for an offence, shall, upon arraignment, be found to be a lunatic, by a jury lawfully impaneled for the purpose, or if upon the trial of any person so indicted, such person shall appear to the jury charged with such indictment, to be a lunatic, in which case, the court shall direct such finding to be recorded, and may proceed as aforesaid." Ib. sec. 59.

"In every case in which any person charged with any offence shall be brought before the court to be discharged for want of prosecution, and shall, by the oath and affirmation, of one or more credible persons, appear to be insane, the court shall order the prosecuting attorney to send before the grand jury a written allegation of such insanity, in the nature of a bill of indictment, and thereupon, the said grand jury shall make inquiry into the case, as in cases of crime, and make presentment of their finding to said court, and if said grand jury shall affirm said written allegation, they shall endorse the same thereon, and thereupon the court shall order a jury to be impaneled to try the insanity of such person, but before a trial thereof be ordered, the court shall direct notice thereof to be given to the next of kin of such

person, by publication, or otherwise, as the case may require; and if the jury shall find such person to be insane, the like proceedings may be had as aforesaid." *Ib.* sec. 60.

"Provided that if the kindred or friends of any person who may have been acquitted as aforesaid on the ground of insanity, or in default of such, the guardians, overseers, or supervisors of any county, township, or place, shall give security, in such amount as shall be satisfactory to the court, with condition that such lunatic shall be restrained from the commission of any offence, by seclusion or otherwise; in such case it shall be lawful for the court to make an order for the enlargement of such lunatic, and his delivery to his kindred or friends, or as the case may be, to such guardians, overseers, or supervisors." *Ib.* sec. 61.

"The estate, and effects of every such lunatic shall, in all cases, be liable to the county aforesaid, for the re-imbursement of all costs and expenses paid by such county, in pursuance of such order, but if any person acquitted on the ground of insanity, shall have no estate or effects, the county, township, or place, to which such lunatic may be chargeable, under the laws of this commonwealth, relating to the support and employment of the poor, shall, after notice of his detention, as aforesaid, be liable for all costs and expenses, as aforesaid in like manner as if he had become a charge upon any township not liable for his support, under the laws aforesaid." *Ib.* sec. 62.

In Vermont, "When any person held in prison on a charge of having committed any offence, shall not be indicted by the grand jury, by reason of insanity, the grand jury shall certify that fact to the court, and thereupon, if the discharge or going at large, of such insane person, shall be deemed manifestly dangerous to the peace and safety of the community, the court may order such person to be confined in the county jail, or some suitable place, at his own expense, if he have estate sufficient for that purpose, and if not, at the charge of the person or town legally chargeable with his support, and if no person or town be so chargeable, at the expense of the state." *R. S. ch. 23, sec. 15.*

"When any person prosecuted by indictment or information for any offence, shall, on trial, be acquitted by the jury, by reason of insanity, the jury in giving their verdict of not guilty shall state that it was so given for such cause, and thereupon, if the discharge or going at large of such insane person shall be considered manifestly dangerous to the peace and safety of the community, the court may order him committed, as provided in the preceding section." *Ib.* sec. 16.

In Georgia, "Drunkenness shall not be an excuse for any crime or misdemeanor, unless such drunkenness was occasioned by the fraud, artifice, or contrivance, of other person or persons, for the purpose of having a crime perpetrated, and then, the person or persons, so causing said drunkenness for such malignant purpose, shall be considered a principal, and suffer the same punishment as would have been inflicted on the person or persons committing the offence, if he she, or they, had been possessed of sound reason and discretion." *Hotchkiss Stat. Law of Georgia, p. 702.*

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No rules can be so specific as to embrace the infinite variety of forms in which insanity or derangement, may show itself. Each case must therefore depend very much upon the circumstances, facts, and developments which attend it. Thus Lord Hale says: It is very difficult to define the invisible line that divides perfect and partial insanity. But it must rest upon circumstances duly to be weighed and considered by the judge and jury, lest on the one side there be a kind of inhumanity towards the defect of human nature, or on the other, too great indulgence be given to great crimes. So Taylor, (*Med. Jurisp.* 649:) "There are no certain legal or medical rules whereby homicidal mania may be detected. Each case must be determined by the circumstances which attend it." See 5 *Car. & Payne* 168; 9 *Id.* 525. So also C. J. Denman before the House of Lords in 1843, says: "It is difficult to lay down any abstract rule on the subject, applicable to all cases. Each case must be decided, in a great measure, upon the facts and circumstances peculiar to it, under the discretion of the court."

## SECTION II.

## DEGREES OF GUILT.

A PARTY is guilty either as a principal or accessory: as principal, he is either principal in the first degree or in the second; as accessory, he is either accessory before the fact, or accessory after it.

(a) *Principals.*

\* The distinction between principals and accessories, only obtains in felonies; in treason and misdemeanors all are principals.[1]

Principals are either in the first degree or in the second. He who actually commits the offence, is said to be principal in the first degree; he who is present, aiding and abetting him in doing it, is said to be principal in the second degree.(a)

Persons who are present at the commission of an offence, are said to be aiding and abetting the party actually committing it, if they [\*12] be confederated or \*engaged with him in a common design, of which the offence is part,(b) or if by their presence they encourage him in the commission of it.(c) And persons are said to be so present, who, being engaged in the same design with the person who actually commits the offence, although not actually present at the commission of it, are yet at such convenient distance as to be able to come to the immediate assistance of their associate, if required, or to watch to prevent surprise, or the like.(d) And where a person was waiting outside of a house, to receive goods which his confederate was stealing within, he was holden to be a principal in the theft.(e)[2]

So persons present, aiding and abetting in part of the offence, may,

(a) See *R. v. Boyce*, 4 Burr. 2073.

(c) *R. v. Murphy*, 6 Car. & P. 103.

(b) *R. v. Tattersall*, 1 Russ. 22; *R. v. Standley*, R. & Ry. 305; *R. v. Bowen*, Car. & M. 149; and see *R. v. Hornby et al.*, 1 Car. & K. 305.

(d) See Fost. 350-355; *R. v. Goggerly & Whitford*, R. & Ry. 343.

(e) *R. v. Owen*, Ry. & M. 96.

[1] 3 Inst. 21, 438; 1 Hale, 233, 613; Dalt. J. c. 161; Fost. 341; 12 Co. 812; Co. Lit. 57; Hawk. b. 2, c. 29, s. 1; 4 Bla. Com. Cro. C. C. 49; *Whitaker v. English*, 1 Bay, 15; *Chanit v. Parker*, 1 Rep. Con. Ct. 323; *State v. Goode*, 1 Hawk. 463; *Ourin v. State*, 4 Yerger, 143; *Com. v. McAtee*, 8 Dana, 28; *Com. v. Major*, 6 Dana, 293; *Com. v. Burns*, 4 J. J. Marshall, 182; *Com. v. Gillespie*, 7 Serg. & Rawle, 469; *U. S. v. Morrow*, 4 Wash. C. C. 733; *Com. v. Macomber*, 3 Mars. 254; *U. S. v. Mills*, 7 Peters, 38; *State v. Westfield*, 1 Bailey, 132; *State v. Barden*, 1 Devereux, 518.

[2] Although a man be present whilst a felony is committed if he take no part in it, and do not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavor to prevent the felony or apprehend the felon. 1 Hale, 439; Fost. 350.

A mere participation in the act, without a felonious participation in the design, will not

if the offence be completed by their confederate, be indicted as principals: and therefore where two persons, with their umbrella, screened a third whilst he was breaking into a dwelling house in the day time, and then went away, and were not seen near the place whilst the third party was committing a larceny within the house, Gaselee, J., and Gurney, B., held that they were principals as to the whole offence, namely, the breaking and entering the dwelling house, and stealing therein. (a) [2]

(a) *R. v. Jordan et al.*, 7 Car. & P. 432.

be sufficient. 1 East, P. C. 258; *R. v. Plummer*, Kel. 109. Thus, if a master assault another with malice prepense, and the servant, ignorant of his master's felonious design, take part with him, and kill the other, it is manslaughter in the servant, and murder in the master. 1 Hale, 446. So, on an indictment under the statute 1 Vict. c. 85, s. 2, charging A. with the capital offence of inflicting a bodily injury dangerous to life, with intent to commit murder, and B. with aiding and abetting him, it was held to be essential, to make out the charge as against B., that he should have been aware of A.'s intention to commit murder. *Reg. v. Oruse*, 8 C. & P. 541.

In the case of murder by duelling, in strictness both of the seconds are principals in the second degree; yet Lord Hale considers, that, as far as relates to the second of the party killed, the rule of law in this respect, has been too far strained; and he seems to doubt whether such second shall be deemed a principal in the second degree. 1 Hale, 422, 452. However in a late case it was holden by *Patteson, J.*, that all persons present at a prize fight, having gone thither with the purpose of seeing the prize-fighters strike each other, were principals in the breach of the peace; (*R. v. Perkins*, 4 C. & P. 537; see *R. v. Murphy*, 6 C. & P. 103;) and, upon the same principle the seconds in a duel, being participators in an unlawful act, would both be guilty of murder, if death were to ensue; and so the law was laid down in *Reg. v. Young*, 8 C. & P. 645, and in *Reg. v. Cuddy*, 1 C. & K. 210. If the principal were insane at the commission of the act, no person can be convicted as an aider and abettor of his act. *Reg. v. Tyler*, 8 C. & P. 616. Arch. Cr. Law, 12. But where an insane person collected together a number of persons, who armed themselves with a common purpose of resisting the lawful authorities, and in their presence he shot a peace officer who came to apprehend him under a warrant, it was held that they were guilty of murder as principals in the first degree; and that no apprehension of personal danger to themselves from him furnished any excuse to him for assisting in his illegal acts. *Id.*

If one encourage another to commit suicide, and is present aiding him while he does so, such person is guilty of murder as a principal; and if two encourage each other to murder themselves, and one does so, the other being present, but the latter fail in an attempt upon himself, he is principal in the murder of the first: but if it be uncertain whether the deceased really killed himself, or whether he came to his death by accident before the moment when he meant to destroy himself, it will not be murder in either. *Rex v. Dyson*, Russ. & R. C. C. 523; *Rex v. Russell*, Moody, C. C. 356; *Rex v. Allison*, 9 C. & P. 418. The same point was determined in an early case in Massachusetts. *Com. v. Bowen*, 13 Mass. 359. It was there said by Parker, C. J., in charging the jury, "The important fact to be inquired into is, whether the prisoner was instrumental in the death of Jewett, (the deceased,) by advice or otherwise. The government is not bound to prove that Jewett would not have hung himself had Bowen's counsel have reached his ear. The very act of advising to the commission of a crime is, in itself, unlawful. The presumption of law is, that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise: as that the counsel was received with scoff, or was manifestly rejected and ridiculed at the time it was given." Wharton's Cr. Law. p. 29.

[1] *Com. v. Knapp*, 9 Pick. Rep. 496; *State v. Harden*, 2 Dev. & Batt. 407; *State v. Town*, Wright's Ohio Rep. 75; *State v. Coleman*, 5 Porter, 32.

But if a man be at such a distance from the place where the offence is committed, that he could not assist in it if required, he cannot be deemed a principal: and therefore it was holden, that going towards the place where a larceny was to be committed, for the purpose of assisting in carrying off the property, and assisting accordingly, did not make the party a principal in the larceny, where it appeared that he was at such a distance at the time of the felonious taking, that he could not have assisted in it.(a) So, where persons, having stolen goods from a warehouse, carried them along the street for about thirty yards, and then fetched the prisoner, who was apprised of the robbery, but not at all acting in it, and he assisted in carrying away the property: it was holden that he was not a principal, but an accessory merely.(b) So, where a servant let another into his master's house, for the purpose of stealing in it, and where he remained all night; the servant left the house the next morning and did not return until the evening, and during his absence the other committed a larceny in the house: the servant being indicted as accessory before the fact, it was contended by his counsel that he should have been indicted as principal; but Coleridge, J., held that there was no ground for the objection, as no part of the larceny was committed whilst the servant was in the house or [\*18] could be aiding in it.(c) So, \*where several persons were out for the purpose of committing a felony, but, upon an alarm, ran different ways, and one of them, to avoid being taken, wounded a man who was pursuing him; it was holden that the others could not be deemed principals in this offence.(d) So, where two persons were riding their horses violently along the road, seemingly racing, and the first of them passed a man on horseback without injuring him, but the last rode against him, threw him, and he was killed: Patteson, J. held that the first of the two could not be deemed a principal in the homicide.(e)

The law, however, recognizes no difference between the offence of the principal in the first degree, and of the principal in the second; both are equally guilty.

And so immaterial is the distinction considered in practice, that if a man be indicted as principal in the first degree, proof that he was present aiding and abetting another in committing the offence, although his was not the hand which actually did it, will support the indictment;(g) and on the other hand, if he be indicted as principal in the second degree, proof that he was not only present, but committed the

(a) *R. v. Kelly*, R. & Ry. 421.

(b) *R. v. King*, R. & Ry. 332.

(c) *R. v. Tuckwell & Perkins*, Car. & M.

(d) *R. v. White*, R. & Ry. 99.

(e) *R. v. Martin et al.*, 6 Car. & P. 396.

(g) 2 Hawk. c. 34, s. 64.

offence with his own hand, will support the indictment.[1] Therefore if A. be indicted for being present aiding and abetting B. in committing a felony, A. may be convicted, although B. is acquitted.(a)

So when an offence is punishable by a statute which makes no mention of principals in the second degree, such principals are within the meaning of the statute as much as the parties who actually commit the offence; and therefore in the case of rape, a person may be convicted on an indictment charging him with being present aiding and abetting another who actually committed it.(b)

So, for the same reason, principals in the second degree are always punishable in the same manner as principals in the first degree: this is sometimes expressly mentioned in the statutes relating to the offences, as in Peel's Acts for Larceny, &c.,(c) and for malicious injuries,(d) in the statute relating to forgery,(e) and in the statute relating to counterfeiting the coin,(g) and others; but such express enactment appears to

(a) See *R. v. Phelps et al.*, Car. & M. 180.

(d) 7 & 8 G. 4, c. 30, s. 26.

(b) *R. v. Crisham*, Car. & M. 187.

(e) 1 W. 4. c. 66, s. 25.

(c) 7 & 8 Geo. 4, c. 29, s. 61.

(g) 2 W. 4, c. 34, s. 18.

[1] The distinction between principals in the first and second degree, it has been said is a distinction without a difference; and, therefore it need not be made in indictments. *State v. Fley and Rochelle*, 2 Brevard, 338. Such is only the case, however, where the punishment is the same for the two divisions. 2 Hawk. c. 25, s. 64; *Mackalley's case*, 9 Co. 67 b.; Foster, 345. But where, by particular statute the punishment is different, then principals in the second degree must be indicted specially, as aiders and abettors. 1 East, P. C. 348, 350; *R. v. Home*, 1 Leach, 473. In an indictment for murder, if several be charged as principals, one as principal perpetrator, and the others as aiding and abetting, it is not material which of them be charged as principals in the first, degree as having given the mortal blow; for the mortal injury given by any one of those present, is, in contemplation of law, the injury of each and every of them. *State v. Mair*, 1 Cox's R. 453; Foster 551; *State v. Fley and Rochelle*, 2 Brevard, 338; *R. v. Brothwick*, Doug. 207; 1 East, P. C. 350. There are cases, however, where the provisions of a statute require the distinction to be observed; thus an indictment which charges that the prisoner caused and procured a certain instrument to be forged, and willingly assisted in the forgery, &c., is to be understood as charging that he caused it to be done in his presence, and that he aided, being present; in other words, as charging him as principal in the second degree, and not as accessory. See *Rusnick's case*, 2 Virg. Ca. 356; *Huffman v. Com.*, 6 Randolph, 685. Wharton's Am. Cr. Law. p. 33.

If the actual perpetrator of a murder should escape by flight, or die, those present abetting the commission of the crime, may be indicted as principals; and though the indictment should state the mortal injury was committed by him who is absent, or dead, yet if it be substantially alleged that those who were indicted were present at the perpetration of the crime, and did kill and murder the deceased by the mortal injury so done by the actual perpetrator, it shall be sufficient. *State v. Fley and Rochelle*, 2 Rice's S. C. Digests, 104; 2 Brevard, 338. By the ancient law, principals in the second degree could not be tried until the principal had been convicted and outlawed. Foster, 347. Such however, is no longer the case, and the party charged as principal in the second degree may be convicted, though the party charged as principal in the first degree is acquitted. *R. v. Taylor*, 1 Leach, 360; *Benson v. Offley*, 2 Shaw, 570; 3 Mod. 121; *R. v. Wallis*, Salk. 334; *R. v. Trole*, R. & R. 314; 3 Price, 145; 2 Marsh. 465; Archbold's C. P. 6; Wharton's Am. Cr. Law. p. 33.

have been unnecessary from what has been above observed as to the identity of the offence of the principal in the second degree with that of principal in the first degree.[2]

But although a principal in the second degree may be convicted and punished upon an indictment charging him as having committed the offence, yet, as a grand jury, ignorant of this rule of law, may by mistake imagine in such a case that the evidence does not support the indictment, and ignore the bill, it may be thought convenient in some cases to indict the aider and abettor in felony, as such.

[\*14] \*The following may be the form of an

*Indictment against a Principal in the second Degree.*

*Berks, } The jurors for our lady the Queen upon their oath present,  
to wit. }* that A. B., on the — day of —, in the year of our Lord, 1851, [*&c., stating the offence of the principal in the first degree: and then, before the conclusion adding:*] And the jurors aforesaid on their oath aforesaid do further present, that C. D., on the day and year aforesaid, feloniously was present, aiding, abetting, and assisting the said A. B., the felony aforesaid to do and commit. Against [*the form of the statute in such case made and provided,*] and against the peace of our lady the Queen, her crown and dignity.

[2] The distinction between principals in the first and second degree is, in this state, practically of little or no importance; and much of the learning applicable to it has become comparatively useless, except so far as it may aid us in discriminating between principals and accessories. For though it was once held that aiders and abettors were accessories at the fact, and so could not be tried until the principal had been convicted, this notion has long been exploded. And in England, as well as in this country, it is settled by an unbroken current of authority, that those who are present aiding and abetting in a felony are not accessories, but principals in the second degree, and may be arraigned and tried before the principal in the first degree has been dealt with. Indeed, they may be convicted though the principal in the first degree has been acquitted. Arch. Cr. Pl. 6. 1 Russ. on Cr. 21. 2 Hawk. P. C. 312; Fost. 347; 1 Bay's Rep. 488; 1 Overton, 230.

Moreover, in respect to all mere misdemeanors, principals in the second degree might always be treated in the proceedings as principals in the first degree. The same rule also applies, in this state, to the whole range of felonies. For by the revised statutes, principals in the second degree in the commission of a felony are visited with the same punishment as principals in the first. 2 R. S. 698, § 6. And as a consequence of this provision, it follows that principals in the second degree may be prosecuted as principals in the first. This is the doctrine of the common law in regard to all cases where the punishment of principals in the first and second degrees is the same; (Arch. Cr. Pl. 6; 2 Hawk. P. C. ch. 25, § 64; see 9 Coke's Rep. 67, b.) though aiders and abettors, or principals in the second degree, may be proceeded against specially, as such, if the prosecutor chooses. Arch. Cr. Pl. 6.

*Indictment.*] In all felonies in which the punishment of principals in the first and second degrees is the same, the indictment may charge all who are present and abet the act, as principals in the first degree; (2 Hawk. P. C. ch. 23, § 76; 3 T. R. 105,) provided the offence admits of participation. Fost. 342. But where the punishment is different, then principals in the second degree must be indicted specially, as aiders and abettors. Matt. Dig. Cr. L. 6.

Where a man was indicted for murder, the indictment stating the wound to have been given on the 27th May, and the death to have been on the 29th, and two others were indicted as principals in the second degree, the indictment stating that they on the day and year first aforesaid were present aiding, &c. : it was objected that this was repugnant and bad, as the offence was not completed until the death, on the 29th ; but the judges held it to be correct.(a)

(b) *Accessories before the Fact.*

*Who and in what cases.*] An accessory before the fact to a felony, is one who counsels, incites, moves, procures, hires or commands another to commit it, but is not himself present aiding or abetting in the commission of it.(b)[1]

And if the felony afterwards committed, be the same in substance with that counselled or commanded, the party who counselled or commanded it will be deemed an accessory to it, although there be some variance in time, place, manner, or other circumstance between the advice or command and the execution of it : as where a person advises a man to kill another in the day, and he kills him in the night,—or to kill him in the fields, and he kills him in the town,—or to poison him, and he stabs or shoots him,—in these cases he is as much an accessory, as if his advice or command had been strictly pursued.(c)

But if the execution vary in substance from the advice or command,—as if a man advise another to kill A., and he kills B.,—or to burn the house of A., and he burns the house of B.,—or to steal an ox, and he steals a horse,—or to steal a particular horse, and he steals

(a) *R. v. O'Brian et al.*, 2 Car. & K. 115. v. *Tuckwell et al.*, Car. & M. 215.

(b) 2 Hawk. c. 29, s. 16; *R. v. Gordon*, 1 (c) 2 Hawk. c. 29, s. 20.  
Leach, 515; 1 East, P. C. 352; and see *R.*

[1] An accessory before the fact is, according to Sir Matthew Hale, one who being absent at the time of the commission of the offence doth yet procure, counsel, or command another to commit it. Absence is indispensably necessary to constitute one an accessory ; for if he be actually or constructively present when the felony is committed, he is an aider and abettor, and not an accessory before the fact. 1 Hale's P. C. 615; 1 Leach, 515; 1 East's P. C. 352; 4 Black. Com. 36, 7; Arch. Cr. Pl. 7.

In all felonies there may be accessories, except in crimes which the law deems sudden and unpremeditated, as manslaughter, which therefore can have no accessories before the fact. 1 Hale, 615. And therefore, if A. be prosecuted for murder, and B. as accessory before the fact, if A. is found guilty of manslaughter merely, B. must be acquitted. Id. 347, 450, 616; Arch. Cr. Pl. 8.

An accessory cannot be guilty of a higher crime than his principal. 3 Inst 139.

A new felony created by statute has all the incidents it would have at common law. Therefore, the procurers or abettors are principals or accessories upon the same circumstances which would make them so at common law; though the act be silent as to abettors or accessories. 1 Leach, 76.

*Accessories before the fact are considered principals in California*



another,—or to commit a felony of one kind, and he commits another of quite a different nature,—in these and the like cases, the [\*15] party who advised or \*commanded, &c., cannot be deemed an accessory before the fact to the felony actually committed.(a)[1]

There cannot however be an accessory before the fact to manslaughter; for that offence, in its nature, cannot be premeditated.(b) The doctrine as to accessories, also, is confined entirely to felonies; for in treason and misdemeanors, those who, by counsel or incitement, &c., would be accessories before the fact in felony, are deemed principals, and prosecuted and punished accordingly.[2] Thus where a woman

(a) 2 Hawk. c. 29, s. 21.

(b) 1 Hale, 616.

[1] Though it has been said, (1 Hale, 617; Plowd. 475; Hawk. b. 2, c. 29, s. 18; Com. Dig. Justices, tit. 1,) that if A command B. to poison C., and B. in mistake poison D., that A. is not answerable, this seems a position hardly reconcilable to the reason of the case, nor borne out by the authority cited to support it; for the true *criteria* to determine whether the instigator of a felony is guilty, as accessory, to a felony somewhat different, are, that if the principal committed the crime in consequence of the flagitious advice—and if the event, in the ordinary course of things, was the natural consequence of the acts suggested, A. is unquestionably guilty, but if the agent, from the mere wickedness of his own mind, intentionally commits a different offence, A. will not be implicated in the guilt of the principal. Fost. 372; Com. Dig. Justices, tit. 1; 1 East Rep. 106. If the crime solicited to be committed be not perpetrated, then the adviser can only be indicted for a misdemeanor. 2 East Rep. 5; and see Russ. & Ry. C. C. 106, 107, notes.

At all events, it is clear that the accessory is liable for all that ensues upon the execution of his unlawful command or advice; as if A. command B. to beat C., and he beat him so that he dies, A. is accessory to the murder. 4 Black. Com. 37; 1 Hale, 617; Arch. Cr. Pl. 7. Or if A. command B. to burn the house of C., and in doing so, the house of D. is also burnt, A. is accessory to the burning of D.'s house. Plowd. 475; Arch. Cr. P. 7. So if the offence commanded be committed, though by different means from those prescribed by the command; for instance, if A. hire B. to poison C., and instead of poisoning he shoots him, A. is nevertheless liable as accessory. Fost. 369; Arch. Cr. Pl. 7.

[2] *State v. Barden*, 1 Dev. 518; *State v. Westfield*, 1 Bailey, 132; *Curlin v. State*, 4 Yerg. 143; *Commonwealth v. Burns*, 4 J. J. Marsh. 182; *U. S. v. Mills*, 7 Peters, 138. See also, *Commonwealth v. Macomber*, 3 Mass. 254; *Commonwealth v. Gillespie*, 7 Serg. & Rawle, 463; *U. S. v. Morrow*, 4 Wash. C. C. 733; *Whitaker v. English*, 1 Bay, 15; *Chanet v. Parker*, 1 Russ. Const. Ct. 333.

Whatever constitutes one an accessory in a capital offence, renders him liable as principal in a misdemeanor. *State v. Westfield*, 1 Bailey, 132. In misdemeanors, there are no accessories, all concerned are principals. *Commonwealth v. M'Antee*, 8 Dana, 28; *Caldwell v. Commonwealth*, 7 Dana, 229.

One who incites others to commit an assault and battery is guilty, and may be punished as a principal, if the offence be actually committed, although he did not otherwise participate in it. 1 Brevard, 385.

It has been held in this country, that a person who advises, persuades and procures another to commit suicide, might be indicted as accessory before the fact, to the self-murder. 15 Mass. Rep. 38; Whart. Prec. 36. It has been ruled, however, in England, and it seems to be the late doctrine, that at common law there can be no accessories to suicide, because the principal cannot be tried. But a party who is present aiding in the commission of a suicide, is a principal in the offence, and may be indicted for the murder of the deceased. 8 C. & P. 418; Whart. Prec. 66.

advised and encouraged a man to set fire to a malthouse, and he attempted to do so, but she was not present at the time, it was holden that both of them might be jointly indicted as principals for the attempt.(a)

It is not necessary, in order to constitute the offence of accessory, that there should be any direct communication between him and the principal; the procurement may be through the intervention of an agent.(b) And if managed through an agent, it is not necessary that the principal should be named by the accessory; if the latter desire the agent to procure some person to commit the offence, without naming him, and the agent accordingly procure a person, wholly unknown to the accessory, to commit it, it will be sufficient to constitute the offence of accessory before the fact.(c)

If the principal felon be unknown, the indictment of the the accessory may state it accordingly; and if it afterwards turn out that he is known, although this formerly would be a fatal variance,(d) yet now it seems the court may order the indictment to be amended according to the fact.(e)[3]

*When, and how tried and punished.*] Formerly accessories, before the fact could only be tried with the principal or after the principal was convicted; and they were punishable in various ways by several statutes.(g)[4] But now, by stat. 7 G. 4, c. 64. s. 9, if any person shall

(a) *R. v. Clayton et al.*, 1 Car. & K. 128.

(b) *R. v. Cooper*, 5 Car. & P. 534.

(c) *Id.*

(d) *R. v. Walker*, 3 Camp. 264.

(e) See 14 & 15 Vict. c. 100, s. 1.

(g) See 2 Hawk. c. 29.

[3] With regard to the degree of incitement put in requisition by the accessory, in procuring the offence to be committed, no rule is laid down in the cases. That it was sufficient to effect the evil purpose, is proved by the result. On principle, it seems that any degree of incitement, with the actual intent to procure the consummation of the illegal object, is sufficient to constitute the guilt of the accessory. Hence it is unnecessary to show that the crime was effected in consequence of such incitement; and it would be no defence to show that the offence would have been committed without any incitement. Roscoe's Cr. Ev. 168; 2 Stark. Ev. 8.

In New York, on the trial of an indictment under the statute, for an attempt to commit arson, it was shown that the prisoner solicited one K. to set fire to a barn, and gave him materials for the purpose: it was held sufficient to warrant a conviction, though the prisoner did not mean to be present at the commission of the offence, and K. never intended to commit it. *People v. Bush*, 1 Hill's N. Y. Rep. 133.

[4] It would seem that in New York the common law rule still prevails. See Barb. Cr. Law page 291, 2d ed.; 3 Mass. Rep. 126; 16 Mass. Rep. 423. The New York revise statutes however provide that in an indictment against a person for receiving or buying stolen goods, it shall not be necessary to aver, nor on the trial to prove that the principal who stole the goods has been convicted. 2 New York, Rev. Stat. 480, sec. 72.

In Massachusetts where there has been two principals, one of whom has been convicted, the other of whom is dead, the accessory must answer notwithstanding the non-conviction of the second. *Com. v. Knapp*, 10 Pick. Rep. 477.

counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law or by statute, the person so counselling, procuring, or commanding shall be deemed guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon or after his conviction, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory may be punished; and the offence of the person so counselling, procuring, or commanding, howsoever indicted, may be inquired of, tried, determined, and [\*16] punished, by any \*court which shall have jurisdiction to try the principal felon, in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed on the high seas or at any place on land, whether within his majesty's dominions or without; and that in case the principal felony shall have been committed within the body of any county, and the offence of counselling, procuring, or commanding shall have been committed within the body of any other county, the last-mentioned offence may be inquired of, tried, determined, and punished in either of such counties.[1]

See *Commonwealth v. Andrews*, 3 Mass. R. 126; *State v. Graff*, 1 Murphey R. 270; *Commonwealth v. Phillips*, 16 Mass. R. 427. See the law of the several states on this head in 1 Russell, 21, n. (A.); 2 Rev. Stat. of New York, 727. See *Stoops v. Commonwealth*, 7 Serg. & Rawle, 491; *Harty v. State*, 3 Black. 386; *Commonwealth v. Frye*, 1 Virg. Cas. 18; *Butler v. State*, 3 M'Cord, 384; *State v. Goode*, 1 Hawkes, 463; *Commonwealth v. Williamson*, 2 Virg. Cas. 211; *Commonwealth v. Sheriff*, 16 Serg. & Rawle, 304; *State v. Crank*, 2 Bailey, 66; *State v. Sims*, 2 Bailey, 29.

In *Massachusetts*, accessories in cases of felony either before or after the fact, may now be indicted, convicted and punished, whether the principal felon shall or shall not have been convicted or shall or shall not be amenable to justice. Rev. Stat. ch. 133, § 2, 5. So in *Maine*. See acts of the session of the legislature of Maine, Jan. 1831, ch. 504.

In North Carolina, the accessory is not liable to be tried while the principal is amenable to the laws of the state, and is still unconvicted. *State v. Graff*, 1 Murphey's R. 270; see *State v. Goode*, 1 Hawks, 463; *Harty v. State*, 3 Blackford's Ia. R. 386.

In Virginia, where the principal and accessory were charged in the same indictment for murder, and the principal was first tried, and convicted of murder in the second degree, and before judgment was pronounced against him, the accessory was tried, and the jury found a verdict against him, subject to the opinion of the court, whether the accessory could be tried before the principal had judgment, he being in custody, convicted as principal, it was decided that, under the statute, conviction alone, without attainder, is sufficient. *Com. v. Williamson*, 2 Virg. Cas. 211.

[1] In *Massachusetts* the accessory may be tried for a substantive felony, whether the principal be convicted or not; and the same provision exists in several of the states. So far as receiving stolen goods, knowing them to be stolen, is concerned, the modification is almost universal. In general, however, in other respects, the common law remains unchanged.

It seems that in *Massachusetts* the statute, like that of 7 Geo. 4, c. 64, s. 9, of which it is a transcript, only applies where the accessory might at common law have been indicted with

In order to amend the law still further, by stat. 11 & 12 Vict. c. 46, s. 1, after reciting that it was expedient that an accessory before the fact to felony should be liable to be indicted, tried convicted, and punished, in all respects like the principal, as was then the case in treason and in all misdemeanors,—it was enacted, that “if any person shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any statute or statutes made or to be made, such person may be indicted, tried, convicted, and punished in all respects as if he were a principal felon.”[1]

In all cases of felony, therefore the accessory is punishable in the same manner precisely as the principal felon; and he may now be indicted either as a principal, that is, he may be charged in the indictment with having actually committed the offence as principal in the first degree, or he may be indicted as accessory as for a substantive felony, or he may be indicted as accessory with the principal, at the option of the prosecutor. The following may be a form of an

*Indictment of an Accessory before the Fact, with the Principal.*

Yorkshire, } The jurors for our lady the Queen upon their oath  
to wit. } present, that A. B., on the — day of —, in the  
year of our Lord —, [*&c., stating the offence against the principal; and then, before the conclusion, stating the offence of the accessory thus:*] And the jurors aforesaid upon their oath aforesaid do further present that C. D., before the committing of the said felony by the said A. B. as aforesaid, to wit, on the day and year aforesaid, feloniously did counsel, procure, and command the said A. B. the said felony in manner and form aforesaid to commit: [*against the form of the statute in such case made and provided,*] and against the peace of our lady the Queen, her crown and dignity.[2]

or without the conviction of the principal, and therefore where a defendant was indicted as accessory before the fact to the murder of S. N., she having, by his procurement, killed herself, it was holden that the statute did not apply. Whart. Crim. Law. p. 35.

[1] The Criminal Code of Illinois declares that an accessory before the fact shall be deemed and considered as principal, and punished accordingly. *Baxter v. The People*, 3 Gilman, 368.

[2] In South Carolina, it has been held, that at common law it is not necessary in an indictment against an accessory before the fact, in a felony, to set out the conviction or execution of the principal. *State v. Sims*, 2 Bail. Rep. 29.

Mr. Wharton very properly remarks (Cr. Law, p. 36.) that the indictment should show the offence to have been committed with as much particularity as is necessary in an indictment against the principal and he cites the case of *Com. v. Dudley*, 6 Leigh's Virg. Rep. 614, in which the indictment was as follows:—“Amherst county, superior court of law and chancery, to wit: The grand jurors empaneled and sworn at September term 1834, upon their oath present, that J. W. Dudley late of the county of Amherst, laborer, with force and arms, in the county aforesaid, and within the jurisdiction of the said Superior Court, on the 1st day of September, 1834, did, wilfully and knowingly, aid, abet and counsel, a certain W. M. Davis, in unlawfully, maliciously, and wilfully, fighting a duel with pistols, with a certain

It is not necessary in this indictment to conclude "*against the* [\*17] *form of the statute,*" unless the offence of the principal \*require it. But in an indictment against an accessory alone, as for a substantive felony, the conclusion ought to be so.[1] In other respects the indictment against the accessory as for a substantive felony, is the same in form as the above.

W. M. Lambert, then and there being. The probable consequence of such weapons might be the death of the said Davis or the said Lambert, and the jurors upon their oaths say, that the said Dudley did, as aforesaid, aid, abet, and counsel the said Davis in fighting the said duel which took place at the time, place and manner aforesaid, against the form of the statute in such case made and provided, and against the peace and dignity of this commonwealth." Upshur, J. on demurrer said: "In an indictment for aiding and assisting in fighting a duel, it is indispensable to charge that a duel was fought. Perhaps it was the intention of the attorney to do so in this instance, and the language of the indictment may possibly be susceptible of a different construction; and therefore is wanting in that directness and precision of averment which are necessary in an indictment. This defect, being, in our opinion fatal, we have not thought it necessary to turn our attention to other objections."

[1] An indictment for an offence created by statute, concludes, "Against the form of the statute in such case made and provided, and against the peace of the people," &c.

Where a statute either creates the offence altogether, or makes an offence at common law an offence of a higher nature, (as where it makes a misdemeanor a felony,) an indictment for the offence must conclude "against the form of the statute." 13 Wend. 159; 2 Hale, 192; 2 Hawk. ch. 25, sec. 116; 1 Salk. 370; 7 Mass. Rep. 9; 11 id. 279; 2 id. 116; 10 Pick. 37; Hardin, 95. Or, at least, it must refer clearly and explicitly to the statute as the foundation of the prosecution. 7 Mass. Rep. 9; 2 id. 116; 11 id. 279.

But where a statute does not create an offence, but alters the punishment for an offence at common law, it is not necessary that the indictment should conclude, *contra formum statuti*. *Williams v. The Queen*, (in error,) 10 Jur. 155; *S. C.* 14 Law J. N. S. 164. If the statute be merely declaratory of an offence at common law, without adding to or altering the punishment, &c., an indictment for the offence may conclude either "against the form of the statute," or as at common law. 2 Hale, 189; 13 Wend. 159; 1 Black. 163.

But where a statute merely takes away a certain privilege or benefit from a person committing a common law offence under the particular circumstances, to which benefit or privilege the defendant, but for the statute, would have been entitled at common law, an indictment for the offence, though it must charge it to have been committed under the circumstances mentioned in the statute, should not conclude "against the form of the statute." *Id.* 190.

An indictment against A., for shooting at B., and against others as aiding, &c., was held sufficient in a late case, without concluding "against the form of the statute," as to each offence, but only at the conclusion of the count. 6 Car. & Payne, 347.

Where one statute is relative to another, as where one creates the offence and the other the penalty, and indictment for the offence must conclude "against the form of the statute." 2 Hale, 173; Cro. Jac. 142. But where the offence is prohibited by several independent statutes, the indictment may either conclude "against the form of the statutes," or "statute," in the singular. 2 Hawk. ch. 25, sec. 117; 6 Cowen, 512; 2 Sum. Rep. 19. And although two statutes are set forth in an indictment, it is not necessary to allege the offence to have been committed "against the form of the statutes," where it is wholly created by one of the statutes, and the second merely makes some alterations in the first, without affecting the offence *Kane v. The People*, 8 Wend. 203.

If the statute creating the offence be temporary, and be continued or made perpetual by another statute, an indictment for the offence may conclude against the form of the "statute." If one statute imposes a pecuniary penalty for an offence, and a subsequent statute

The indictment against the accessory as a principal, is of course in the same form as an ordinary indictment against the person who actually committed the principal felony. There is an inconvenience, however, in indicting in the latter form alone, as the grand jury, perhaps, not knowing the law upon the subject, may ignore the bill. In order to avoid this, it may be advisable to add a count as accessory, in the above form.

And lastly, by stat. 14 & 15 Vict. c. 100, s. 15, reciting that it often happens that the principal in a felony is not in custody or amenable to justice, although several accessories to such felony, or receivers at different times of stolen property the subject of such felony, may be in custody and amenable to justice:—for the prevention of several trials, it is enacted that any number of such accessories or receivers may be charged with substantive felonies in the same indictment, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.

It is not stated whether by the word accessories here is meant accessories before the fact, or after the fact, or both; probably as the word is coupled with "receivers," it will be understood to mean accessories after the fact. It does not appear also whether it was intended that the section should extend to accessories in all felonies, or in larceny only; probably the latter. It is also not stated whether there may be several counts against each accessory or receiver; probably it will be holden that there may.

(c) *Accessories after the Fact.*

*Who, and in what cases.]* After a felony has been committed, if any person receive, harbor, or assist the principal felon, knowing him to have committed the felony, he is deemed an accessory after the fact; in law, any assistance whatever given to him, in order to hinder his

makes the offence a felony, an indictment for the felony should conclude "against the form of the statute." Russ. & Ry. C. C. 425; 8 Greenl. 113. But an indictment for a common law felony, committed abroad and made triable here by statute, need not conclude "against the form of the statute." Russ. & Ry. C. C. 294.

If an indictment conclude "against the form of the statute," when it should conclude as at common law, the mistake is not material, and the words *contra form. stat.* may be rejected as surplusage. 5 T. R. 162; Sayer, 225; 1 Vent. 103; 2 Dana, 417; 3 Har. & John. 154.

In an indictment on a statute, besides the conclusion "against the form of the statute," the words "against the peace of the people," are absolutely essential; (2 Hale, 188,) for the former conclusion will not supply the omission of the latter. Russ. & Ry. C. C. 176.

Formerly, omitting to conclude "against the form of the statute," when it was essential, was error, and might be taken advantage of by demurrer, motion in arrest of judgment, or writ of error. Matt. Dig. Cr. L. 279. Defects of this kind, however, are now cured by the statute, notwithstanding the offence may have been created, or the punishment declared, by a statute. 2 R. S. 728, sec. 52, sub. 3.

being apprehended or tried, or to prevent his suffering the punishment to which he is liable,—rescuing him, allowing him to escape, opposing his apprehension, or the like,—the party knowing at the time that he had committed a felony, makes such party guilty as accessory after the fact to the felony.(a)[2]

Upon the trial of a man as principal in the second decree to a larceny, it appeared that a person, having stolen goods from a warehouse, carried them along the street for about thirty yards, and then fetched the prisoner, who was apprised of the robbery, but not at all acting in it, and he assisted in carrying away the property : it was holden that [\*18] he was not a principal, but an accessory \*after the fact.(b) But receiving stolen goods, knowing them to have been stolen, did not amount to the offence of accessory after the fact to the principal

(a) 2 Hawk. c. 29, ss. 26, 27.

(b) *R. v. King*, R. & Ry. 332.

[2] But merely suffering the principal to escape will not make the party an accessory after the fact; for it amounts at most but to a mere omission. 9 H. 4, 1; 1 Hale, 619. So, if a person supply a felon with victuals or other necessaries for his sustenance, (1 Hale, 620;) or relieve and maintain him if he is bailed out of prison, (Id.;) or if a physician or surgeon professionally attend a felon sick or wounded, although he knew him to be a felon, (1 Hale, 332;) or if a person speak or write in order to obtain a felon's pardon or deliverance, (26 Ass. 47;) or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly, (3 Inst. 139; 1 Hale, 620;) or even if he himself agree, for money, not to give evidence against the felon, (Moor, 8;) or know of the felony, and do not discover it, (1 Hale, 371, 618;) none of these acts would be sufficient to make the party an accessory after the fact. He must be proved to have done some act to assist the felon personally. See *Reg. v. Chapple*, 9 C. & P. 355. But if he employ another person to do so, he will be equally guilty as if he harbored or relieved him himself. *R. v. Jarvis*, 2 M. & Rob. 40.

To constitute this offence, it is necessary that the accessory have notice, direct or implied, at the time he assists or comforts the felon, that he had committed a felony. 2 Hawk. c. 29, s. 32. It is also necessary that the felony be complete at the time the assistance is given; for, if one wound another mortally, and, after the wound given, but before death ensues, a person assist or receive the delinquent, this does not make him accessory to the homicide; for until death ensues, no felony is committed. 2 Hawk. c. 29, s. 35; 4 Bl. Com. 38.

The New York Revised Statutes contain the following provision on this subject:—

"Every person who shall be convicted of having concealed any offender, after the commission of any felony, or of having given such offender any other aid, knowing that he has committed a felony; with intent and in order that he may avoid, or escape from arrest or trial, conviction or punishment, and no others, shall be deemed an accessory after the fact, and upon conviction, shall be punished by imprisonment in a state prison, not exceeding five years, or in a county jail not exceeding one year, or by fine not exceeding \$500, or by both such fine and imprisonment."

The above provision, of course, supersedes the common law in all cases where the latter conflicts with, or varies from the former. Such instances, however, will, it is apprehended, be found somewhat rare.

There may be an accessory to a person who was accessory before the act : as if A. advise and procure B. to murder C. By this A. is accessory *before* the fact; and though but accessory, yet if D. receives and conceals him from justice, D. thereby becomes an accessory to a person who was accessory. But there cannot be an accessory to a person who was accessory *after* the fact. 3 P. Wms. 475.

felon, until made so by stat. 3 & 4 W. & M. c. 9, and 5 Anne, c. 31, s. 5.(a) And a wife cannot be convicted as accessory after the fact, for any receipt of or assistance to her husband.(b) But the exemption does not extend further: a husband may be indicted as accessory after the fact to his wife, a brother to a brother, a master to a servant, a servant to a master.(c) And the doctrine extends to every felony, and to manslaughter as well as to others.(d) But it must be considered as having reference to felony only; the same receipt which in felony will make a man accessory after the fact, will in treason make the party a principal traitor,(e) but in misdemeanors is not punishable.(g)

*When and how tried.*] Formerly an accessory after the fact could only be tried with the principal, or after the principal was convicted; and if tried after the conviction of the principal, he could only be tried in the county where the offence of accessory was committed.[2]

But by stat. 11 & 12 Vict. c. 46, s. 2, reciting this, and that it was sometimes productive of a failure of justice, it is enacted that if any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by statute, he may be indicted and convicted either as an accessory after the fact to the principal felony together with the principal felon, or after the conviction of the principal felon,—or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously con-

(a) 2 Hawk. c. 29, s. 3.

(b) Id. s. 34; see *R. v. Mary Good*, 1 Car. & K. 185.

(c) 2 Hawk. c. 29, s. 34.

(d) *R. v. Greenacre*, 8 Car. & P. 35.

(e) 1 Hale, 238.

(g) 1 Hale, 613.

[1] At common law these distinctions as to principals and accessories had an important bearing in regard to the indicting and trial of an offender. As formerly no man could be tried as accessory till after the principal was convicted, or at least he must have been tried at the same time with him: and questions arose as to the place of trial, where the principal offence was committed in a different county from that where the accessory act was done. But the law on this subject has been much modified, or particular provisions have been enacted, by statute in the several states, and by the laws of the United States in cases under their jurisdiction.

And indeed, it may well be asked, why should not these distinctions be done away with? And why should not the systems of criminal law contain a general provision for prosecuting and punishing all who aid, abet, procure, or participate in the commission of an offence, in the same manner, as those who actually perpetrate it, and without reference to the trial or conviction of the latter, or to their being found or not?

A magistrate, on the examination of a prisoner or accused person before trial, who appears to be guilty as accessory or concerned in the commission of a crime, ought to proceed against him as in other cases, setting out the offence substantially and distinctly, and taking the necessary measures for compelling his appearance to answer at the proper court; being careful that a due investigation of such a case is not prevented by too nice doubts as to the degree of guilt; as that, with other particulars, should be left for the subsequent trial in court.



victed, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished; and the offence of such person, howsoever indicted, may be inquired of, tried, determined, and punished, by any court which shall have jurisdiction to try the principal felon, in the same manner as if the act by reason of which such person shall have become an accessory had been committed at the same place as the principal felony.

The following may be the form of an

*Indictment against an Accessory after the Fact, with the Principal, or for a substantive Felony.*

*Hants,* { The jurors for our lady the Queen upon their oath pre-  
to wit. } sent, that A. B., on the——day of ——, in the year of our  
Lord ——, [*&c., stating the offence against the principal; and im-*  
[\*19] *mediately before the conclusion \*add.:*] And the jurors aforesaid  
upon their oath aforesaid do further present, that C. D., after  
the said A. B. had done and committed the said felony, to wit, on the  
day and year aforesaid, well knowing that the said A. B. had done  
and committed the same, him the said A. B. did feloniously receive,  
harbor, and maintain: against the form of the statute in such case  
made and provided, and against the peace of our lady the Queen, her  
crown and dignity.

This form answers, as well where the accessory is tried alone for a substantive felony, according to stat. 11 & 12 Vict. c. 46, s. 2, above-mentioned, as where he is tried with the principal.<sup>(a)</sup> In either case, the prosecutor must first prove the offence of the principal, as if he alone were on his trial; and then he must prove the receipt or assistance of the accessory, and that he knew at the time that the principal had committed the felony. On the other hand, the accessory may not only controvert his own guilt, but that of his principal also; and if he succeed in either, he must be acquitted.[1]

(a) *R. v. Hansell*, 13 Shaw's J. P. 556.

[1] Where the principal and accessory are joined in an indictment, and tried separately, the record of the principal's conviction is, prima facie, evidence of his guilt, upon the trial of the accessory; and as the burden of proof is on the accessory, he must show clearly that the principal ought not to have been convicted. *Com. v. Knapp*, 10 Pick. 484; *State v. Chittam*, 2 Devereux, 49. But the accessory, in such case, is not restricted to proof of facts that were not shown on the former trial, and which are incompatible with the guilt of the principal. *Com. v. Knapp*, 10 Pick. 484. The record of the conviction of a slave before a court of magistrates and freeholders as principal in a felony, (i. e. murder,) may be given in evidence on the trial of an indictment against a free white man as accessory before the fact. *State v. Sims*, 2 Bail. S. C. Rep. 29; *State v. Crank*, Ibid 66. In New York, a copy of the

As to the joinder of several accessories, see stat. 14 & 15 Vict. c. 100, s. 15, *ante*, p. 17.

*Punishment.*] There is no uniform punishment for the offence of accessory after the fact. The offence in all cases is felony; but it is punishable in various ways, by the several statutes which assign the punishment to the principal felony. In felonies within stat. 7 & 8 G. 4, c. 29 (the Larceny Act,) accessories after the fact are punishable with imprisonment with or without hard labor, for any term not exceeding two years, by sect. 61; and the same, in felonies within stat. 7 & 8 G. 4, c. 30 (Malicious Injuries,) by sect. 26; in felonies within stat. 9 G. 4, c. 21 (Offences against the person,) by sect. 31; in felonies within stat. 1 W. 4, c. 66 (Forgery,) by sect. 25; in felonies within stat. 2 W. 4, c. 32 (Coin,) by sect. 18; and in felonies within stat. 1 Vict. c. 36 (Post Office,) by sect. 35.

(b) *Persons who solicit and incite others to commit Offences, which are not afterwards committed.*

We have seen that the offence of accessory before the fact is, where a person incites another to commit a felony, which the other afterwards commits.[2] The offence of the accessory in this case is a felony.

But if the party thus incited do not afterwards commit felony, or if a man solicit or incite another to commit an indictable misdemeanor which the other does not afterwards commit, the offence of the inciter is but a common law misdemeanor, punishable as such with imprisonment or fine, or both.(a)[3]

(a) *R. v. Higgins*, 2 East, 5.

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original minutes of the court, in which the original was convicted, if entered according to the direction of the statute, is proper evidence against an accessory before the fact; it appearing that no record of judgment of such conviction has been signed and filed; and it is reasonable to suppose, that the original minutes are equally sufficient. *People v. Gray*, 25 Wendell, 465. But the rough minutes or original entries, not inspected or approved by the court, according to the statutes, are not evidence. *Ibid.*; Whart. Cr. Law, p. 38.

[2] One who incites others to commit an assault and battery, is guilty, and may be punished as a principal, if the offence be actually committed, although he did not otherwise participate in it. 1 Brevard Rep. 397.

[3] Thus, it is an indictable offence to advise A., against whom a sheriff has a precept, and whom he is about to arrest, to draw a line on the ground, and forbid the officer to pass it, asserting at the time, that if the sheriff passed the ground and A. killed him, the law was on A's side. *State v. Cadwell*, 2 Tyler, 212.

In an indictment under the New York statute for soliciting the commission of an offence, the particular manner in which the solicitation was made, need not be set out. *People v. Bush*, 4 Hill, 133.

[\*20] \*The following may be the form of an

*Indictment for soliciting a Person to commit an indictable Offence.*

*Bedfordshire,* } The jurors for our lady the Queen, upon their oath  
to wit: } present, that A. B., on the — day of —, in the year  
of our Lord —, unlawfully did solicit and incite one C. D. to [*here*  
*state the offence:*] against the peace of our lady the Queen, her crown  
and dignity.

Also, by stat. 1 Vict. c. 36, which defines and punishes several felonies and misdemeanors in respect of the post office, such as stealing or embezzling letters, stealing from letters, opening or delaying letters, &c., it is enacted by sect. 36, that every person who shall solicit or endeavor to procure any other person to commit a felony or misdemeanor punishable by the post office act, shall be deemed guilty of a misdemeanor, and be adjudged to be imprisoned for a term not exceeding two years.[1]

(e) *Persons who attempt to commit Crimes, but do not complete them.*

All attempts to commit a felony, not specially provided for and made punishable by some particular statute, are punishable as misdemeanors at common law, whether committed with force or otherwise.(a) And in like manner, every attempt to commit a misdemeanor, either at common law, or created by statute, is itself a misdemeanor at common law.(b)

The punishment at common law is by fine or imprisonment, or both. But the punishment by statute, for some cases of this description, is more severe ;[2] an assault with intent to commit a felony, generally,

(a) See *R. v. Higgins*, 2 East, 5.

son, J. ; *R. v. Roderick*, 7 Car. & P. 795 ; *R.*

(b) *R. v. —*, R. & Ry, 107, per Le Blanc, v. *Ball*, Car. & M. 249.  
J. ; *R. v. Butler*, 6 Car. & P. 368, per Patte-

[1] See post, 578, *et seq.*

[2] MASSACHUSETTS.—Every person who shall attempt to commit an offence prohibited by law, and in such attempt shall do any act towards the commission of such offence, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, where no express provision is made by law for the punishment of such attempts, shall be punished as follows :

First, if the offence, attempted to be committed, is such as is punishable with death, the person convicted of such attempt, shall be punished by imprisonment in the state prison, not more than ten years :

Secondly, if the offence, so attempted to be committed, is punishable by imprisonment in the state prison for life, or for five years or more, the person, convicted of such attempt, shall be punished by imprisonment in the state prison, not more than three years, or in the county jail, not more than one year :

Thirdly, if the offence, so attempted to be committed, is punishable by imprisonment in the state prison for a term less than five years, or by imprisonment in the county jail, or by

is punishable with imprisonment, with or without hard labor, for not more than two years; (a) an assault with intent to rob, is made a felony, and punishable with imprisonment with or without hard labor, for not more than three years; (b) attempts to murder, by poison, by stabbing, cutting or wounding, by shooting or attempting to shoot, or by attempts to drown, suffocate, or strangle,—are all made felonies, and punishable with great severity. (c) These several offences we shall notice fully in a subsequent part of the work, when we come to give the forms of indictments, and the evidence necessary to support them.

(a) 9 G. 4, c. 31, s. 25.

(c) 1 Vict. c. 85.

(b) 1 Vict. c. 87, s. 6.

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fine, the offender, convicted of such attempt, shall be punished by imprisonment in the county jail, not more than one year, or by fine not exceeding three hundred dollars; but in no case shall the punishment, by imprisonment, exceed one half of the greatest punishment which might have been inflicted, if the offence so attempted had been committed. Rev. Stat. ch. 133, sect. 12.

NEW YORK.—Every person who shall attempt to commit an offence prohibited by law, and in such attempt shall do any act towards the commission of such offence, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same; upon conviction thereof, shall, in cases where no provision is made by law for the punishment of such attempt, be punished as follows:

1. If the offence attempted to be committed, be such as is punishable by the death of the offender, the person convicted of such attempt, shall be punished by imprisonment in a state prison not exceeding ten years:

2. If the offence so attempted, be punishable by imprisonment in a state prison for four years or more, or by imprisonment in a county jail, the person convicted of such attempt, shall be punished by imprisonment in a state prison, or in a county jail, as the case may be, for a term not exceeding one half the longest term of imprisonment prescribed upon the conviction for the offence so attempted:

3. If the offence so attempted, be punishable by imprisonment in a state prison for any term less than four years, the person convicted of such attempt, shall be sentenced to imprisonment in a county jail for not more than one year:

4. If the offence so attempted, be punishable by a fine, the offender convicted of such attempt, shall be liable to a fine not exceeding one half of the largest amount which may be imposed, upon a conviction for the offence so attempted:

5. If the offence so attempted, be punishable by imprisonment and by a fine, the offender convicted of such attempt, may be punished by both imprisonment and fine, not exceeding one half of the longest time of imprisonment and one half of the greatest fine which may be imposed, upon conviction for the offence so committed. 2 N. Y. Rev. Stat. 698, sec. 3.

In an indictment under the above section of the statute, for attempting to commit an offence, the particular manner in which the attempt was made need not be set out. *The People v. Bush*, 4 Hill, 133. It seems that merely soliciting one to commit a felony without any other act being done, is sufficient to warrant a conviction, under the statute. *Ibid.*

No person can be convicted of an attempt to commit an offence when it shall appear that the crime intended or the offence attempted was actually perpetrated. 2 R. S. 702, § 26. Nor when it shall appear that he has been previously acquitted on a trial for the principal offence. *Ibid.* § 28. But a person may be convicted of an attempt to commit an offence upon an indictment for the commission of the crime itself. *Ibid.* § 27.

APPREHENSION OF THE OFFENDER.

I propose to arrange the matter of this chapter under the following heads :

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- (b) *In case of Riots*, p. 23.
- (c) *After offence committed*, p. 25.
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- (g) *On hue and cry*, p. 28.
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SECTION I.

ARREST OF OFFENDER WITHOUT WARRANT.

(a) *In the Act of committing the Offence*. [1]

Every person,—private individuals as well as constables,—present when a felony is committed or a dangerous wound given, not only may apprehend the offender, but they are bound to do so.(a)

If a private person be present at an affray, he may stay the affrayers until the heat is over, and then deliver them over to the constable, and he may stop others coming to join either party;(b) and a constable of course may act in like manner, and may keep any of the affrayers in safe custody until he can bring them before a justice of the peace. So, it has been holden that any person may arrest another, whom he sees cheating with false dice.(c) But after the affray is ended, the parties cannot be arrested without warrant.(d)[2]

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|---|--|
| (a) 2 Hawk. c. 12, s. 1. 1 East, P. C. 377, | (c) 2 Hawk. c. 12, s. 20.                  |
| s. 1.                                       | (d) 2 Hawk. c. 13, s. 8. Id. c. 12, s. 20. |
| (b) 2 Hawk. c. 13, s. 8.                    | 2 Inst. 52.                                |

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[1] See Burns' Justice, tit. *Arrest*; Waterman's Cr. Law, tit. *Arrest*.

[2] An arrest in criminal cases, is the apprehending or detaining of the person, in order to be forthcoming to answer an alleged or suspected crime. Burn. Just. tit. *Arrest*. To this arrest, all persons are in general liable when accused of capital or violent injuries. 4 Blk. Com. 289. The exemptions which exist in civil cases, here cease to operate. Thus a married woman, when she has committed an offence for which she is subject to punishment

In all cases of offences against stat. 7 & 8 Geo. 4, c. 29, (Peel's Act, Larceny, &c.) it is enacted, that any person found committing any

is liable to be apprehended. Neither in such case are senators and representatives in Congress exempted from arrest. Const. of U. S. art. 1. sec. 6, § 1; 2 Story on Const. 325, *et seq.* Nor in general, are the members of legislative bodies of the several states, exempted from arrest in these cases. See Const. and Laws of several States.

When the party suspected is at large, he may in general, before an indictment has been found, be apprehended, either without warrant, by a private individual, or by a constable or other officer *ex officio*; or, under a warrant granted by a justice of the peace, or a judge or the secretary of state; and if the supposed offender be in custody in a civil suit, he may be charged criminally under such warrant, though he cannot be taken, by its authority, out of the custody of the court, and sent to the county jail. 2 Stra. 828; 1 Wms. J. Arrest; 2 Barn. 114; 1 Barn. 129.

There seems to be considerable difficulty in precisely ascertaining in what cases a party suspected may be apprehended before a bill is found against him. It having been enacted by Magna Charta, that no one should be taken or imprisoned but by the lawful judgment of his peers, or by the law of the land (9 Hen. 3, c. 29); it was, for some time insisted that no one could be deprived of his liberty for any offence, until after the finding of a bill against him by a grand jury, which afforded probable evidence that he was guilty. 4 Inst. 176, 7, 8. Comb. 359. All the deviations from this rule have been considered as encroachments on the common law. 1 Show. 54; Hawk. b. 2, c. 13, s. 11, 16 and 18; 3 Burr. 1775; Burns' Just. Warrant, III; Dick's Just. Peace, Justices of, 3. An exception was very early allowed to prevail, when a thief was taken in a *mainour*, that is, apprehended with the stolen goods actually in his possession. 1 Show. 24. And it is now fully established that in every case of treason, felony, or actual breach of the peace, the party may be arrested on suspicion, before any indictment is preferred against him. 2 Hale, 72, 78, 108; Comb. 359; 3 Burr. 1775; Hawk. b. 2, c. 12, and c. 13, s. 11 and 18; 4 Bla. Com. 290; Just. Warrant, III.

*Private* individuals are *enjoined* by law to arrest an offender when present at the time a felony is committed, or dangerous wound given, on pain of fine and imprisonment, if he escape through their negligence. As to arrests by private persons, see in general, Hawk. b. 2, c. 12, s. 1, c. 13, s. 7 and 8; 4 Bla. Com. 292; 1 Hale, 587; Com. Dig. Imprisonment, H. 4. Bac. Abr. Trespass, D. 3; Burns' Justice, Arrest, III; 1 East, P. C. 298, &c. And every private person is bound to ~~assist~~ an officer, demanding his help in the taking of a felon, or the suppressing an affray, and apprehending the affrayers, and, if he refuse to assist, before the determination of the affray, he is punishable with fine and imprisonment. *Id.* Ibid. Bac. Abr. Trespass, D. 3. A private individual may arrest a lunatic who seems disposed to do mischief. Bac. Abr. Trespass, D. 3. If the officer has authority to make the arrest, a by-stander, when called upon for aid, is guilty of a misdemeanor, if he does not obey. But if the officer does not act under a lawful authority, the by-stander is a trespasser, if he assists him. *Elder v. Morrison*, 10 Wendell, 128. See *Commonwealth v. Field*, 13 Mass. 321; 1 Russell, 522, 525. And there are other cases in which, though the law may not enjoin an arrest, yet it *permits* it. Thus upon probable suspicion, a private person may, if a felony has actually been committed by some one, arrest, or direct a peace officer to arrest, the party whom he supposes to be guilty; Cald. 291; Douglas, 359; 1 Hale, 588, 9, Hawk. b. 2, c. 12; Com. Dig. Imprisonment, H. 4. Bac. Abr. Trespass, D. 3. A felon may be arrested by any person without warrant, whether there be time to obtain one or not; (*Holly v. Mix*, 3 Wendell, 350;) and if it can be proved that a felony has been committed by some person and there were a reasonable and probable ground for suspicion, he will not be liable to an action though it shall afterwards be proved that the party imprisoned was innocent. *Id.* Ibid; 4 Taunt. 24; 5 Price, 525, *acc.*; but see Selw. 3d edit. 830, notes; *Semb. cont.* But if no felony has been committed by any one, such arrest is illegal. *Holly v. Mix*, 3 Wendell, 350.

offence punishable, either upon indictment or upon summary conviction, by virtue of that act, (except only the offence of angling in the

PENNSYLVANIA.—An arrest may be made for felony without warrant notwithstanding section. 7, article 9 of the constitution of Pennsylvania; and a private person may make it at his peril; but, quære, if he can arrest for misdemeanor or for receiving stolen goods. *Wakely v. Hart*, 6 Binney, 316. NEW YORK.—A private person cannot of his own authority arrest a person who has been engaged in an affray or breach of the peace. 11 John. 486. But during an affray, any person may without a warrant from a magistrate to restrain any of the offenders, in order to preserve the peace. Platt, J. Ibid. See *Wallace's case*, 4 Roger's Rec. 111. See *Holly v. Mix*, 3 Wendell, 350; *Commonwealth v. Deacon*, 8 Serg. & R. 49. In South Carolina, it has been decided, that the city guard of Charleston, have authority, without warrant, to arrest persons committing affrays or breaches of the peace. 2 Nott & M'Cord, 475. But there is a distinction as to the authority to apprehend, when the felony was committed in the view of a private person, and when committed in his absence, and the arrest is afterwards attempted in consequence of the suspicion of the guilt.

NEW YORK.—All persons whatsoever who are present when a felony is committed, or a dangerous wound given, are bound to apprehend the offenders. 1 John. 486. See *Holley v. Mix*, 3 Wendell's N. Y. Rep. 350. In the first case, any one may justify the breaking open doors upon following the felon, and if he kill him, provided he could not otherwise take him, the act is justifiable, and if he be killed in endeavoring to make such arrest, it is murder in the parties resisting. 2 Hale, 77. But a private person cannot justify breaking open doors to apprehend another upon probable suspicion of felony, and if he do, and either party be killed in the attempt, it is manslaughter, but no more; (2 Hale, 82, 3; Com. Dig. Imprison. H. 4; 4 Bla. Com. 293; 1 East, P. C. 299, §00;) it is not murder, because there is no malicious design to kill: but it amounts to manslaughter, because it would be of most pernicious consequence if, under pretence of suspecting felony, a man unarmed by any legal power might break open a house or kill another; and also because such arrest upon suspicion is barely permitted by the law, and not enjoined as in the case of actual presence, when a felony is committed. So, regularly, no private person can, of his own authority, apprehend another for a bare breach of the peace after it is over; for, as an officer cannot justify such an arrest without a warrant from a magistrate, *a fortiori* it cannot be allowable in a private person. Hawk. b. 2, c. 12, s. 21; 1 East, P. C. 300; Bac. Abr. Trespass, D. 3. With respect to interference, and arrests in order to prevent the commission of a crime, any person may lawfully lay hold of a lunatic about to commit any mischief, which, if committed by a sane person, would constitute a criminal offence; or any other person whom he shall see on the point of committing a treason or felony, or doing any act which will manifestly endanger the life or person of another, and may detain him until it may be reasonably presumed that he has changed his purpose: but where he interferes to prevent others from fighting, he should first notify his intention to prevent the breach of the peace. Hawk. b. 2, c. 12, s. 19; 1 Hale, 589; 2 Rol. Ab. 559, E, pl. 3, n. 8; Sewl. 3d ed. 830; Com. Dig. Pleader, 3 M. 22; Bac. Abr. Trespass, D. 3; 1 East, P. C. 304. Thus any one may justify breaking and entering a party's house and imprisoning him, to prevent him from murdering his wife, who cries out for assistance. 2 B. & P. 260; Selw. 3d edit. 830; Bac. Abr. Trespass, D. 3. And the riding in a body to quell a riot is lawful, and no information will be granted for small irregularities in the pursuit of such a design. 1 Bla. Rep. 47; 2 B. & P. 264, n. a; 1 East, P. C. 304. In one ancient case, the court seems to have thought, that if the cause of suspicion should appear reasonable, the justification would be good, though no felony were committed by any one. Samuel and Payne, Dougl. 359, note 7. But the current of authorities seems to establish, that a private person, in justifying the imprisonment, without warrant, of an innocent man, must state in his pleadings and prove in evidence, that a felony was committed by some one, as well as that, under all the circumstances, there was reasonable ground for suspecting the plaintiff, or he will be liable



day time,) may be immediately apprehended without a warrant, by any peace officer,—or by any owner of the property on or with respect to which the offence shall be committed,—or by his servant,—or by any person authorized by him,—and forthwith taken before some neighboring justice of the peace, to be dealt with according to law.(a)

So, in all offences against stat. 7 & 8 G. 4, c. 30, (Peel's Act, Malicious Injuries,) persons found offending may be apprehended in like manner.(b) In these cases, and in cases within ch. 29 above mentioned, the offender must be taken, either in the act of committing the [\*22] offence, or on fresh \*pursuit;(c) but not on his return after committing the offence.(d)

So, by the statute against night poachers, 9 G. 4, c. 69, s. 2, it is enacted, that if any person shall be found on any land, committing any such offence as hereinbefore mentioned, it shall be lawful for the owner or occupier of such land,—or for any person having a right or reputed right of free-warren or free-chase thereon,—or for the lord of the manor or reputed manor wherein such land may be situate,—and also for any gamekeeper or servant of any of the persons herein mentioned, or any persons assisting such gamekeeper or servant,—to seize

(a) 7 & 8 G. 4, c. 29, s. 63.

*R. v. Curran*, 3 Car. & P. 397.

(b) *Id.* s. 28.

(d) *R. v. Phelps et al.* Car. & M. 180.

(c) *Hanway v. Boulbee*, 1 Mood. & R. 15.

to pay damages. 2 Inst. 52; Hawk. b. 2, c. 12, s. 8 to 19; 4 Taunt. 34; Com. Dig. Imprisonment, H. 4, Cald. 291; Dougl. 359; 6 T. R. 315; 3 Campb. 420; 4 Esp. Rep. 81; 1 Campb. 187; The case of *Adams and Moore*, Selw. N. P. 4th edit. 865, is not law to the extent reported. It is safer, therefore, to obtain a warrant when time will allow; because, where the arrest is under a warrant, no action of trespass, but only an action on the case lies, and the latter cannot be sustained unless the plaintiff can show, that the charge was without probable cause, as well as malicious, and if the magistrate should erroneously issue his warrant, the party accusing will not be liable; (3 Esp. Rep. 166; 3 T. R. 185; *Boote v. Cooper*, 1 T. R. 535; 3 Esp. Rep. 135;) but an arrest, when a warrant ought previously to have been issued, will not be rendered legal by a subsequent issuing of that authority. Bac. Abr. Trespass, D. 3. In the case, however, of a man apprehending a party on hue and cry, or detaining a person offering goods for sale or pawn, where there is reasonable suspicion of their having been stolen, there is an express enactment that he shall be indemnified, though it afterwards appear that no felony was committed. 1 Geo. 2, c. 24, s. 8. And it has been said, that a private person may legally, in the night-time, arrest a suspicious night-walker, though he subsequently prove his innocence of any criminality. 1 East C. P. 303; 3 Taunt. 14.

A private person, who has apprehended another for treason or felony may deliver the prisoner into the hands of a constable, or he may carry him to any jail in the county: but the safer course seems to be, to cause him, as soon as convenience will permit, to be brought before some justice of the peace, by whom the prisoner may be examined and bailed or committed to prison. 1 Hale, 589; 2 Id. 77, 81; Hawk. b. 2, c. 13, s. 7, and b. 2, c. 16, s. 3. Where a private person has apprehended another assisting in an affray, he may lawfully detain him till the heat is over, and then deliver him to the constable. Hawk. b. 2, c. 13, s. 8. If a man be found attempting to commit a felony in the night, any one may apprehend him, and detain him, until he be carried before a magistrate. 1 Ry. & M. C. C. 93. See Waterman's Criminal Law, tit. Arrest.

and apprehend such offender upon such land, or, in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of the peace officer, in order to his being conveyed before two justices of the peace.(a) The offender, however, to come within this clause of the act, must have by night, (that is, from the expiration of the first hour after sunset, until the beginning of the last hour before sunrise,) unlawfully taken or destroyed game or rabbits, in any land, whether open or inclosed, or have by night unlawfully entered into or been in any land, whether open or inclosed, with any gun, net, engine, or other instrument for the purpose of destroying game.(b) So, if any person by night shall take or destroy game or rabbits on a public road or foot path, or the sides thereof, or at the openings, outlets, or gates from land into such road or path, the owner or occupier of any land adjoining either side of that part of such road or path where the offender shall be, and the gamekeeper or servant of such owner or occupier, and any person assisting such gamekeeper or servant, and for all the persons authorized by stat. 9 G. 4, c. 69, s. 2, to apprehend any person offending against the provisions of that act, may seize and apprehend any offender against the provisions of this act.(c) But if the poachers are not found upon the land or road committing the offence, but are met by the gamekeeper on the road, on their return after committing it, he has no right to apprehend them under these statutes.(d) It may be necessary to mention, that a person appointed as a watcher, is within the meaning of these clauses.(e) But the gamekeeper of a person who is not himself the owner or occupier of the land, but has merely the permission of the owner to shoot over it and to preserve the game there, cannot apprehend poachers under the above statutes.(g)

So, by the statute for the protection of works of art, and scientific and literary collections,(h) \*it is enacted that any person [\*23] found committing any offence against that act, may be immediately apprehended, without a warrant by any other person, and forthwith taken before some neighboring justice of the peace, to be dealt with according to law.

Also, by the recent statute for the prevention of offences,(i) it is enacted by sect. 10, that it shall be lawful for any person whatsoever to apprehend any person who shall be found committing any offence against the provisions of that Act, and to convey him or deliver him to some constable or other peace officer, in order to his being convey-

(a) See *R. v. Ball*, R. & M. 330.

(b) See 9 G. 4, c. 69, s. 1. *R. v. Tomlinson*, 7 Car. & P. 183.

(c) 7 & 8 Vict. c. 29, s. 2.

(d) *R. v. Meadham*, 2 Car. & K. 633.

(e) *R. v. Price*, 7 Car. & P. 178. *R. v. Fielding*, 2 Car. & K. 621.

(g) *R. v. Addis*, 6 Car. & P. 388.

(h) 8 & 9 Vict. c. 44, s. 3.

(i) 14 & 15 Vict. c. 19.

ed as soon as conveniently may be before a justice of the peace, to be dealt with according to law. And the offences within the act are—being found at night armed with any dangerous weapon or instrument, with intent to break and enter a dwelling house or building, to commit a felony therein,—or being found by night, having in his possession any picklock key, crow, Jack, bit, or other implement of house-breaking,—or being found by night, with his face blackened or otherwise disguised, with intent, to commit a felony,—or being found by night in any dwelling house or building, with intent to commit a felony therein;(a)—using chloroform, laudanum, or other stupifying drug, &c., with intent to enable or assist the offender or others to commit a felony;(b)—inflicting grievous bodily harm with or without a weapon or instrument, or cutting, stabbing or wounding any person;(c)—malicious injuries to railways, with intent to obstruct, upset, or injure any engine, carriage, or truck, or to endanger the safety of any person traveling or being on the railway;—or maliciously casting or letting fall any wood, stone, &c., upon a railway carriage, engine, &c., with intent to endanger any person in such carriage, or on such engine, &c.;(d) maliciously setting fire to a railway station or building, or goods therein.(e)

And lastly, by the last-mentioned act,(g) reciting that doubts had been entertained as to the authority to apprehend persons found committing indictable offences in the night, it is enacted, that it shall be lawful for any person whatsoever, to apprehend any person who shall be found committing any indictable offence by night, and to convey him or to deliver him to some constable or peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law.[1] Night here means the

(a) 14 & 15 Vict. c. 19, s. 1.

(b) Id. s. 3.

(c) Id. s. 4.

(d) Id. s. 7.

(e) Id. s. 8.

(g) Id. s. 11.

[1] The authority to arrest and imprison is greater in cases of felony than in matters of mere misdemeanor; and least of all in civil suits.

If a felony be committed, and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavors to prevent an escape; and in such cases, if fresh suit be made, and *a fortiori*, if hue and cry be levied, all who join in aid of those, who began the suit, will be under the same protection of the law; and the same rule holds, if a felon, after arrest, break away as he is being carried to jail, and his pursuers cannot retake him without killing him. 1 Hale, 489, 490; 1 Hawk. P. C. c. 28, s. 11; Post. 309; 1 East, P. C. c. 5, s. 67, p. 298. Thus, where upon a robbery committed by several, the party robbed raised hue and cry, and the country pursued the robbers, and one of the pursuers was killed by one of the robbers, it was held that this was murder, because the country, upon hue and cry levied, are authorized by law to pursue and apprehend the malefactors; and that, although there were no warrant of a justice of the peace, to raise hue and cry, nor any constable in the pursuit, yet the hue and cry was a good warrant in law for the pursuers to apprehend the felons; and that, therefore, the killing of any of the pursuers was murder. *Jackson's case*, 1 Hale, 464.

same as in burglary ;(a) namely, it commences at nine o'clock in the evening, and ends at six in the morning.(b)

(a) 14 & 15 Vict. c. 19, s. 13.

(b) 1 Vict. c. 86, s. 4.

But where private persons use their endeavors to bring felons to justice, some cautions ought to be observed. In the first place, it should be ascertained that a felony has actually been committed, or that an actual attempt to commit a felony is being made by the party arrested; for if that be not the case, no suspicion, however well grounded, will bring the person so interposing within the protection which the law extends to persons acting with proper authority. 2 Inst. 52, 172; *Fost.* 318; *Samuel v. Payne*, Dougl. 359. And in *Coze v. Wirral*, Cro. Jac. 193, it was holden, that, without a fact, suspicion is no cause of arrest; and 8 Ed. 4, 3; 5 Hen. 7, 5; 7 Hen. 4, 35, are cited. If it is clear that a felony has been committed, the next consideration will be, whether it was committed by the person intended to be pursued or arrested; for supposing a felony to have been actually committed, but not by the person arrested or pursued upon suspicion, this suspicion, though probably well founded, will not bring the person endeavoring to arrest or imprison within the protection of the law, so far as to excuse him from the guilt of manslaughter, if he should kill, or on the other hand, to make the killing of him amount to murder. It seems that, in either case, it would only be manslaughter; the one not having used due diligence to be apprised of the truth of the fact, the other not having submitted and rendered himself to justice. 1 Hale, 490; *Fost.* 318. See *State v. Rutherford*, 1 Hawk's N. C. Rep. 457.

Upon an indictment for wounding it appeared that the prisoner had asked leave to take a basket of ashes from the prosecutor's ash-pit, which he was permitted to do; as he was carrying away the ashes the prosecutor's apprentice saw the spout of a new tea-kettle, which had stood on a shelf near the ash-pit, among the ashes, and having given the alarm, the prosecutor seized the prisoner to detain him while a constable was sent for; the prisoner resisted, and in the struggle both fell, and the prisoner cut the prosecutor with a knife: a rattle of copper had been heard while the prisoner was at the ash-pit: it was objected that the prosecutor had no right to detain the prisoner. Alderson, B., "That will depend on whether the jury are satisfied that the prisoner had in fact stolen the tea-kettle. If he had stolen the tea-kettle, the prosecutor had a right to detain him, and this wounding will be felony." *Reg. v. Price*, S. C. & P. 282, Alderson, B.

In a late case, where Headley, being called up in the night by one of his servants, found that his stable had been attempted, and the door cut in such a manner that the bolt was exposed, and found the prisoner and another person concealed in the yard; and a steel instrument was also found, by which the door of the stable appeared to have been cut, and some house-breaking instruments were also found near the spot where the prisoner and his companion were concealed, and under these circumstances they had been apprehended and detained by Headley and his servant, and during such detention, and in the course of the same night, the prisoner had cut Headley's servant with a knife, a point was made that such cutting was not within the 43 Geo. 3, c. 58, on the ground that the prisoner was not lawfully in custody, there being no warrant, and an attempt to commit a felony being only a misdemeanor. But the judges held that the prisoner being detected in the night attempting to commit a felony, might be lawfully detained without a warrant, until he could be carried before a magistrate. *Rex v. Hunt*, East. T. 1825; *Ry. & Mood*, Cr. C. 93. See *Rex v. Howard*, R. & M. C. C. R. 207. In *Ex parte Krans*, 1 B. & C. 261, Abbott, C. J., said, "it is lawful for any person to take into custody a man charged with felony, and keep him until he can be taken before a magistrate."

These distinctions between officers and private persons proceed upon the principle of discouraging persons from proceeding to extremities upon their own private suspicion or authority. And upon this principle, it appears to have been considered, that a private person is not bound to arrest any one standing indicted for felony, against whom no warrant can be produced at the time; and therefore, the law does not hold out the same indemnity

(b) *In case of riots.*

A private person may lawfully endeavour to prevent those whom he sees engaged in a riot or rout, from executing their purpose, [\*24] and he may stop those whom he shall \*see coming to join them,<sup>(a)</sup> and may arrest those he sees engaged in it. And for this purpose, he may lawfully arm himself, and may make use of his arms, in suppressing the riot; but it is not prudent or advisable for private persons thus to use arms, of their own authority, in ordinary cases, as under pretence of keeping the peace, they may be guilty of or cause enormous breaches of it; it is only in case of riots, which savour of rebellion, that such violent methods seem proper.

And what may thus be done by a private person, may also be done by the military, even although they be not at the time acting under the orders of a justice of peace. But they must be cautious not to use their arms in such a case, where there is no actual necessity, except indeed in their own defence in case they should be attacked.

Constables and other peace officers also, not only may do, but it is one of the duties of their office to do, all that in them lies, for the suppressing of the riot, [and the arrest of the rioters;] and they may command all other persons to assist them in doing so.<sup>(b)</sup>[1]

(a) 1 Hawk, c. 65, s. 11.

(b) 1 Hawk. c. 65, s. 11.

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to such person, as it does to constables and other officers, who are *ex officio*, not merely permitted, but enjoined by law, to arrest the parties, as well on probable suspicion of felony, as in case of felony actually committed; and who may therefore well arrest upon the finding of the fact by the grand inquest on oath, which is suspicion grounded on high authority. 2 Hale, 84, 85, 87, 91, 93, *sed vide*, 1 Hale, 489, 490. Hawkins, in alluding to the power of arrest by officers in this case, gives as a reason that there is a charge against the party on record. 1 Hawk. P. C. c. 28, s. 12. But upon this, it is remarked, that it does not readily occur why officers only can take notice of the charge on record. 1 East, P. C. c. 5, s. 68, p. 300. In this case, however, it might perhaps be well contended, that a person arresting another with the knowledge of the indictment having been found, cannot properly be considered as acting upon his own private suspicion or authority; and ought, therefore, to have the same protection as the officers of justice. And it seems agreed, that the indictment found is a good cause of arrest by private persons, if it may be made without the death of the felon: (Dalt. c. 170, s. 5; 1 East, P. C. c. 5, s. 68, p. 301;) but it is said, that, if he be killed, their justification must depend upon the fact of the party's guilt, which it will be incumbent on them to make out: otherwise, they will be guilty of manslaughter. 2 Hale, 54, 92; and see 1 East, P. C. c. 5, s. 68, p. 301, where it is said, that if the fact of the guilt of the party be necessary for their complete justification, it is conceived, that the bill of indictment found by the grand jury would, for that purpose, be *prima facie* evidence of the fact. Certainly not. See *Rex v. Turner*, R. & M. O. C. R. 347.

[1] The office of constable is either ministerial, in obeying warrants and precepts of justices, coroners and sheriffs, and the charge of private individuals, or is original, as a conservator of the peace at common law, or by virtue of particular statutes. See 2 Hale, 88 to 97.

By the original and inherent power which he possesses, he may, for treason, felony, breach of the peace, and some misdemeanors less than felony, committed in his view, apprehend the supposed offender, *virtute officii*, without any warrant. 1 Hale, 587; 1 East, P. C. 303;

So, justices of the peace, by stat. 34 Ed. 3, c. 1, have power to restrain rioters, and to pursue, arrest, take, and chastise them, according

Selw. N. P. 3d ed. 830, n. y.; *Churchill v. Matthews and others*, Dick. J. Arrest, II. See *U. S. v. Hart*, 1 Peters' C. C. R. 390; *Mayo v. Wilson*, 1 N. Hamp. R. 53. A constable may, *ex officio*, and without warrant, arrest a breaker of the peace, and bring him before the justice. *Taylor v. Strong*, 3 Wend. 384. This should be done within a reasonable time after the affray. *Ib.*; see the case of *Wakely v. Hart*, 6 Binn. (Penn.) Rep. 316. In general, when an affray takes place in his presence, he may either keep the parties in custody till it is over, or he may carry them immediately before a magistrate. Selw. N. P. 3d ed. 830. He has, at least, an equal power to apprehend with any individual, and the chief difference between his power and duty and that of a private person, seems to be, that the former has greater authority to demand the assistance of others, and is liable to a severer fine for any neglect of duty, and that he ought to bring the party suspected before a justice of the peace, in order to be examined. Hawk. b. 2, c. 13, s. 7. Another difference seems to be, that a private individual cannot, of his own accord, arrest a person, except upon his own suspicion, and not upon report, or the suspicion of another, (Hawk. b. 2, c. 12, s. 15; Cald. 293; 1 East P. C. 300, 1,) whereas, a constable, or other peace officer, may, if a felony has been committed by some one, lawfully apprehend a supposed offender upon the information of others, without any positive charge, or his own knowledge of the circumstances on which the suspicion is founded. Cald. 291; 1 East P. C. 301; Selw. N. P. 2d ed. 830; 4 Esp. 80; 6 T. R. 315. And a constable may justify an imprisonment, without warrant, on a reasonable charge of felony made to him, although he afterwards discharges the prisoner without taking him before a magistrate, and although it turn out that no felony was committed by any one. Holt C. N. P. 478; Cald. 291. In general, however, a constable cannot, any more than a private person, of his own accord, and without an express charge or warrant, justify the arrest of a supposed offender, upon suspicion of his guilt, unless he can show that a felony was committed by some person as well as the reasonableness of the suspicion that the party imprisoned is guilty. 4 Esp. Rep. 80; Holt C. N. P. 478; Hawk. b. 2, c. 12, s. 16; 2 Hale, 92, 87, n. f.; Cald. 291. There are, however, authorities in favor of an exception to this rule in the case of night-walkers, and persons reasonably suspected in the night, of felony. 3 Taunt. 14; 1 East P. C. 303; Hawk. b. 2, c. 12, s. 20; 2 Hale, 89; 5 Edw. 3, c. 14; 2 Inst. 52; Bac. Ab. tit. Constable, G.

Constables are bound, upon a direct charge of a felony, and reasonable grounds of suspicion laid before them, to apprehend the party accused, (2 Hale, 91, 92; 1 East P. C. 301; Holt C. N. P. 478;) and if upon a charge of burglary, or other felony, he be required to apprehend the offender, or to make hue and cry, and neglect so to do, he may be indicted. Cro. Eliz. 654; 2 Hale, 90, 91. And a peace officer, upon a reasonable charge of felony, may justify an arrest without a warrant, although no felony has been committed, (Doug. 360; 4 Esp. Rep. 80; Cald. 291; 3 Campb. 420; 2 Esp. Rep. 540; Selw. N. P. 3d ed. 830; 1 East P. C. 301,) because, as observed by Lord Hale, (2 Hale, 91, 92,) the constable cannot judge whether the party be guilty or not, till he come to his trial, which cannot be till after his arrest; and, as observed by Lord Mansfield, in *Samuel v. Payne*, if a man charges another with a felony, and requires an officer to take him into custody, and carry him before a magistrate, it would be most mischievous that the officer should be bound to try, and, at his peril, exercise his judgment on the truth of the charge; he that makes the charge should alone be answerable; the officer does his duty in conveying the accused before a magistrate, who is authorized to examine, and commit, or discharge. Dougl. 360. Killing an officer will be murder, though he has no warrant, and was not present when the felony was committed, but takes the party upon a charge only; and though that charge does not, in terms, specify all the particulars necessary to constitute the felony. Russ. & Ry. C. C. 329. And, it should seem, that even upon a charge of a breach of the peace not committed in the view of the constable, if he arrest the party, and no breach of the peace was committed, the person who preferred the charge alone is liable, (3 Campb. 420; 2 Hale, 90; 6 T. R. 315, but quere, see 1 East P. C. 305,) though it has been held, that a constable cannot arrest for

to their trespass and offence, and to cause to be imprisoned and duly punished according to the law and custom of the realm.

If any justice of peace, therefore, find persons riotously assembled, he may not only arrest the offenders himself, and bind them over to keep the peace, and be of good behaviour, or imprison them until they

an affray or breach of the peace, not committed in his view. *Cro. Eliz.* 375; 2 *Esp. Rep.* 540; *Hawk. b. 2, c. 13, a. 8*; *Bac. Ab. Constable, C.*; 1 *East P. C.* 395. See on this head, 1 *Russ.* 273, 274, 506; *Roscoe's Dig. Cr. Ev.* 614. Suspicion that a party has on a former occasion committed a misdemeanor, is no justification for giving him in charge to a constable, without a justice's warrant, and there is no distinction in this respect, between one kind of misdemeanor and another, as breach of the peace and fraud. *Fox v. Gaunt*, 3 *Barn. & Adol.* 798. And it seems that a constable is not justified in apprehending and imprisoning a person on suspicion of having received stolen goods, on the mere assertion of one of the principal felons. 2 *Stark.* 167. It seems preferable, in all cases not requiring immediate interference, for a constable to act under a warrant, because, if he does not, he will not be entitled to the benefit of the provision in the statute 24 *Geo. 2, c. 44*, which protects him, on granting a copy for every thing done in obedience to a warrant. 3 *Esp. Rep.* 226.

A constable may break open doors to take a felon, if he be in the house, and entry denied after demand, and notice given that he is a constable, (see *Roscoe's Dig. Cr. Ev.* 629, 630. In reference to the notice requisite in such cases, see 1 *Russ.* 517, 518; *Roscoe's Dig. Cr. Ev.* 525, 526; *State v. Caldwell*, 2 *Tyler's (Verm.) Rep.* 214,) and if, in such attempt, the constable, or any in his assistance be killed, after competent notice of his office, it is murder; and if the felon resist and cannot be taken, whether it be after or before the arrest, the killing of the felon, who cannot otherwise be taken, is no felony, because the law enjoins a constable to take a felon, and if he omits his duty he is indictable, and subject to fine and imprisonment. 2 *Hale*, 90, 91, &c. So, where a felony has been committed by some one, and there be reasonable ground to suspect that a person be the offender, a constable has a similar power of breaking open doors to apprehend him. *Id.* 92. Doors also may be broken by a constable where a felony is not yet committed, but likely to be so, in order to prevent it. *Id.* 94, 95; 2 *B. & P.* 260. Attempting, illegally, to arrest a man, is sufficient to reduce killing the person making the attempt, to manslaughter, though the arrest was not actually made, and though the prisoner had armed himself with a deadly weapon to resist such attempt, if the prisoner was in such a situation that he could not have escaped from the arrest; and it is not necessary that he should have given warning to the person attempting to arrest him, before he struck the blow. *Ry. & M. C. C.* 80.

A constable having arrested the offender, may, in case of an affray, put him in the stocks, or otherwise confine him, till the heat of his passion or intemperance is over, or till he can bring him before a justice of the peace, and, in case of any offence for which the party suspected may be apprehended, a constable may convey him to the sheriff or jailer of the county or franchise: but the safest and best course is said to be, in all cases, to carry the offender before a justice of the peace, as soon as circumstances will permit. 2 *Hale*, 95; 6 *Selw. N. P.* 3d ed. 830, n. y. But where the parish clerk refused to read in church, a notice presented to him for that purpose, and the person presenting it read it himself, at a time when no part of the church service was going on; it was held, that though a constable might be justified in removing him from the church, and detaining him until the service was over, yet he could not legally detain him afterwards to take him before a magistrate. 2 *B. & C.* 699. And a constable arresting a man on suspicion of felony, must take him before a justice to be examined, as soon as he reasonably can: and, it seems, a constable cannot justify handcuffing a prisoner, unless it be necessary to prevent his escape. 4 *B. & C.* 596. See *Right v. Court*, 6 *Dowl. & Ry.* 623; *Taylor v. Strong*, 3 *Wend.* 384. Under the revised laws of New York, a constable may detain a prisoner twelve hours to find a magistrate to hear the cause. Before this provision in the revised laws, he might detain him a reasonable time if he acted *bona fide* for that purpose. *Arnold v. Steeves*, 10 *Wend.* 514.

find bail, but he may also authorize others to arrest them, by a mere verbal command without warrant; and the persons so commanded may pursue and arrest the offenders, as well in his absence as in his presence.(a) And if justices fall in their duty in this respect, it is a high misdemeanor, and punishable upon indictment or information with fine or imprisonment, or both.(b)[2]

And by stat. 13 H. 4, c. 7, if any riot, assembly, or rout of people, against the law, be made in the realm, [whether in the presence of justices of the peace or in their absence,](c) the justices of the peace, three or two of them at the least, and the sheriff or under-sheriff of the county where such riot shall be made, shall come with the power of the county, if need be, to arrest them, and shall arrest them; and the same justices and sheriff or under-sheriff shall have power to record what they shall find so done in their presence against the law, and by that record such trespassers and offenders shall be convicted, in the manner and form contained in the statute of forcible entries.(d)[3]

As to the power of the county, or *posse comitatus*, above \*men- [\*25] tioned, it is enacted by stat. 2 H. 5, c. 8, s. 2, that the king's liege people (not being clergymen, women, persons, decrepit, or infants

(a) 1 Hawk. c. 65, s. 16.

(b) See *R. v. Pinney*, 3 B. & Ad. 947.

(c) 1 Hawk, c. 65, s. 22.

(d) See 1 Arch. J. P. 467.

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[2] Justices of the peace have a double power in relation to the arrest of wrongdoers, the first branch of which authority may be personally exercised on the commission of a felony or breach of the peace in their presence, the second, by issuing a warrant on the evidence and complaint of another. And if a justice of the peace see a felony or breach of the peace committed, he may either himself arrest the parties offending, or verbally command any person to take them into custody. And it seems, that in order to prevent the riotous consequences of a tumultuous assembly, he may command his servants or others to arrest the affrayers, though, in general, if an offence be committed in his absence, he must grant his warrant in writing to apprehend the offender. 2 Hale, 86, 87; 2 Wils. 151, 158; Cro. Jac. 81; Hawk. b. 2, c. 13, s. 13: Bac. Ab. Justices of Peace, E. 5, and Trespass, D. 13; Dick. Just. tit. Arrest, II. It is laid down (Dalt. Just. c. 171; Dick. Just. 114,) that any justice or the sheriff may take of the county any number that he shall think meet, to pursue, arrest, and imprison traitors and felons, or such as break, or go about to break, or disturb the king's peace, and that every man being required, ought to assist and aid them on pain of fine and imprisonment.

The law requires active conduct from a magistrate in suppressing riots, and if he finds persons riotously assembled, he may not only arrest the offenders, but require others to do so, by a bare verbal command. 1 Yeates Rep. 418.

[3] Where the magistrate is not present when a crime has been committed, he ought not, upon mere discretion, to send the party accused to prison, but upon due consideration of evidence adduced before him. It was well observed by Ch. J. Pratt (2 Wils. 158, and see Comb. 359,) that in case a magistrate has notice, or a particular knowledge, that a person has been guilty of an offence, yet it is not a sufficient ground for him to commit the criminal, but in that case he is rather a witness than a magistrate, and ought to make oath of the fact, before some other magistrate, who should thereupon act the official part, by granting a warrant to apprehend the offender, it being more fit that the accuser should appear as a witness than act as a magistrate.



under the age of fifteen,) being sufficient to travel, shall be assistants to such justices, upon reasonable warning, to ride with them in aid to resist such riots, routs, and assemblies, on pain of imprisonment, and to make fine and ransom to the king. And it has been holden, that those who thus attend the justices, in order to suppress a riot, may take with them such weapons as shall be necessary to enable them effectually to do it; and that they may justify beating, wounding, or even killing such rioters as shall resist, or refuse to surrender themselves.<sup>(a)</sup>[1]

(a) 1 Hawk. c. 65, s. 21.

[1] Justices of the peace whose existence as a part of the judiciary, is provided in most of the constitutions of the United States derive their powers as "conservators of the peace" from the common law, more or less extended or restrained in the different states by statutory enactment. In *New York*, it is said that their duty and authority are derived in some degree from the common law; but they depend principally upon the several statutes which have created objects of their jurisdiction, defined their powers or imposed duties upon them. See *Waterman's Treatise*, Ch. 1. In *Massachusetts* Mr. Justice Sewall says: "The office of justice of the peace was introduced by our forefathers at their migration; and in all particulars then applicable or which have since become applicable to this jurisdiction may be considered as possessing here the general character and functions allowed to it in England by force of the statutes which had there created and regulated this ancient and important office. The statutes since enacted, have enumerated the powers and duties of justices of the peace, both in civil and criminal matters; so that now there is little if any occasion to recur to the English statutes for the powers of this office, and perhaps the enumeration itself precludes such recurrence. The office therefore, exists here principally if not entirely according to our statutes." *Com. v. Foster*, 1 Mass. Rep. 489. In *Pennsylvania* the power of a justice of the peace in criminal matters as at common law is almost untouched by statute. In *Arkansas* the constitution of the state provides that "Justices of the peace shall in no case have jurisdiction to try and determine any criminal case or penal offence against statute, but may sit as examining courts; and commit, discharge or recognize, to the court having jurisdiction for further trial, offenders against the peace. For the foregoing purposes they shall have power to issue all necessary process. They shall also have power to bind to keep the peace or for good behaviour." And by statute, power is given them, "to cause to be kept all laws made for the preservation of the public peace." &c.

When a magistrate acts in his office with a partial, malicious or corrupt motive he is guilty, of a misdemeanor and may be proceeded against by indictment or criminal information. *R. v. Cosens*, 2 Doug. 426. But he will never be punished criminally for a mere error in judgment nor in any case unless he appears to have acted from an oppressive, dishonest or corrupt motive, under which fear and favor are included. *In re Fentiman*, 4 Nev. & M. 128; 1 Ad. & El. 127. Justices are also liable civilly, when they act *ministerially*; but the party shall not have both remedies, and before the court will grant an information they will require the relinquishment of the civil action, if such has been begun; and even where an indictment has actually been found, the attorney general will grant a *nolle prosequi*, if it appear that the prosecutor is determined to carry on a civil action at the same time. *R. v. Fielding*, 2 Burr. 719. When a justice of the peace in or out of sessions has *jurisdiction* and acts *judicially* he is not liable to an action, however erroneous the conclusion at which he arrives or corrupt his motives in coming to it; in such case the only remedy is by information. '2 Hawk. ch. 13; *Ackerly v. Parkinson*, 3 M. & S. 425; *Bassett v. Goodscall*, 3 Wils. 121; *Griffiths v. Harris*, 2 M. & W. 335; *Wilkins v. Hemsworth*, 3 N. & P. 55; *Garnett v. Ferrand*, 6 B. & C. 611; *State v. Campbell*, 2 Tyler, 177; *Ambler v. Church*, 1 Root, 211; *Reid v. Hood*, 2 Nott & McCord, 168; *Holcomb v. Cornish*, 8 Conn. 375; *State v. Porter*, Const. Reps. 694;

As to rioters remaining together after the riot act, or rather proclamation to disperse, has been read, and which is made a felony by statute 1 G. 1, st. 2, c. 5, s. 1, it is enacted by sec. 3 of that statute, that if such persons, so unlawfully, riotously, and tumultuously assembled, or twelve or more of them, after proclamation made in manner aforesaid, shall continue together and not disperse themselves within one hour, then it shall and may be lawful to and for every justice of the peace, sheriff, or under-sheriff of the county where such assembly shall be,—and also to and for every high and petty constable and other peace officer within such county,—and to and for also every mayor, justice of the peace, sheriff, bailiff, and other head officer, high or petty constable and other peace officer of any city or town corporate, where such assembly shall be,—and to and for such other person and persons as shall be commanded to be assisting unto any such justice of the peace, sheriff, &c., (who are hereby authorized and empowered to command all His Majesty's subjects of age and ability, to be assisting to them therein,) to seize and apprehend, and they are hereby required to seize and apprehend, such persons so unlawfully, riotously, and tumultuously continuing together after proclamation made as aforesaid, and forthwith to carry the persons so apprehended before one or more of His Majesty's justices of the peace of the county or place where such person shall be

*Lining v. Bentham*, 2 Bay, 1; *Gregory v. Brown*, 4 Blbb, 28; *Walker v. Floyd*, ib. 237. When a criminal information is applied for against magistrates, the question for the court is not whether their acts be found upon investigation to be strictly right or not, but whether they were influenced by corrupt, oppressive or partial motives; or acted in error and from mistake only. In the latter case the court will not grant the rule. *R. v. Badger*, 12 Law J. N. S. M. C. 68; 7 Jur. 216, Q. B. See *R. v. Arrowsmith*, 2 Dowl. N. S. 704; *Ex parte Beauclerk*, 7 Jur. 373; *Ex parte Lee*, ib. 441; *Ex parte Marlborough*, 1 New Sess. Cas. 195; 13 Law J. N. S. 105; *R. v. Harris*, ib. 162. But he is liable to an action for exercising authority where he has none. *Ely v. Thompson*, 3 A. K. Marsh, 70. An information was granted against a justice for not actively assisting in suppressing a riot; the law requires from a justice an active conduct in suppressing riots; and if he finds persons riotously assembled, he may not only arrest offenders, but authorize others to arrest them by a bare verbal command without other warrant. *Respub. v. Montgomery*, 1 Yeates, 419.

The jurisdiction of a justice of the peace is limited; and when that is exceeded responsibility attaches, and every thing done is void; and this, whether such want of jurisdiction apply to the subject matter or the person. *Wise v. Withers*, 3 Cranch, 331; *Hall v. Rogers*, 2 Blackf. 429. If a justice issues a warrant contrary to the provisions of the constitution, or in a matter over which he has no jurisdiction, and the party is arrested, the justice is answerable in an action of trespass. *Johnson v. Tompkins*, Baldwin's Rep. 588.

A conviction and judgment for felony against a justice of the peace, is a forfeiture of his office; nor does a pardon restore his capacity. *Fregate's case*, 2 Leigh, 724.

Whenever a new power is conferred on a justice, he must proceed in the mode prescribed by the statute. *Digelow v. Stearns*, 19 Johns. 36; *State v. Barrow*, 3 Murphy, 121. Any general authority by justices to constables, to fill up or alter process, would be void and highly improper. *Pierce v. Hubbard*, 18 Johns. 405. Acts done by a justice in a judicial capacity, who was not duly qualified, are not absolutely void. *Margate Co. v. Hamman*, 3 B. & A. 266. In judicial acts by justices, all things shall be intended regular till the contrary appear: *aliter* of ministerial acts, for there all must appear to be right. *R. v. Venables*, 8 Mod. 578.

so apprehended, in order to their being proceeded against for such their offences according to law.(a)[2]

(c) *After offence committed.*

Upon a strong case of suspicion, a private person may justify the apprehension of another for felony, if in fact a felony was committed.(b) But a suspicion that a man has committed a misdemeanor on a former occasion, will not justify a private person in giving him in charge to a constable; and there is no distinction in this respect between [\*26] one kind of misdemeanor and another.(c) And even \*in cases of felony, it is often imprudent in a private person to arrest for an offence formerly committed, at least unless he was present at the time the party committed it, and there is danger of his otherwise escaping. It is better for a private person to disclose his suspicion to the constable, and let him take upon himself the responsibility of arresting the suspected party, or to a justice of the peace, who may grant a warrant to a constable to apprehend him.[1]

(a) 1 G. 1, st. 2, c. 5, s. 3.

(c) *Fox v. Gaunt*, 3 B. & Ad. 798; and see

(b) See *Beckwith v. Philby*, 6 B. & C. 635.

*Matthews v. Biddulph*, 11 Law J. 13m.

[2] An unlawful assembly may be dispersed by a magistrate, whenever he finds a state of things existing calling for an interference, in order to the preservation of the public peace. He need not postpone his action until the unlawful assembly ripens into an actual riot. "It is better to anticipate more dangerous results by energetic intervention at the inception of a breach of the peace, than by delay to permit the tumult to acquire such strength as to demand for its suppression those urgent measures which should be reserved for great extremities. The justice may not only arrest the offenders and bind them to their good behavior, or imprison them if they do not offer adequate bail; but he may authorize others to arrest them by a bare verbal command, without any other warrant; and all citizens present whom he may invoke to his aid, are bound promptly to respond to his requisition, and support him in maintaining the peace. A justice of the peace either present or called on such an occasion, who neglects or refuses to do his utmost for the suppression of such unlawful assemblies, subjects himself to indictment and conviction for a criminal misdemeanor." Wharton's Cr. L. p. 728, citing *State v. Littlejohn*, 1 Bay, 316.

But where an unlawful assembly becomes an actual riot, more decisive measures should be adopted. Citizens may, of their own authority, lawfully endeavor to suppress the riot, and for that purpose may even arm themselves. See Waterman's Crim. Law, tit. *Riot*.

[1] PENNSYLVANIA.—"The provisions of the state constitution, (Art. 9, sec. 8,) so far as it concerns warrants, only guards against their abuse, &c. But it is no where said there shall be no arrest without warrant. To have said so would have endangered the safety of society. The felon who is seen to commit murder, or robbery, must be arrested upon the spot, or suffered to escape. So, though not seen, yet if known to have committed felony, and pursued, he may be arrested, with or without warrant, by any person. And even where there is only probable cause of suspicion, any person may without warrant at his peril make an arrest; for nothing short of proving the felony will justify the arrest. These are principles of common law essential to the welfare of society, and not intended to be altered or impaired by the constitution." Opinion of C. J. Tilghman. 6 Binn. Rep. 318.

A private person, in order to justify an arrest, without process, must show not only a reasonable cause for suspicion, but in addition to such cause that a felony was actually commit-

And if a reasonable charge of felony against a person be made to a constable, the constable will be justified in arresting him without warrant, although it afterwards turn out that the person was perfectly innocent, or that no felony in fact had been committed.(a) But it has been holden that a constable is not justified in apprehending a person as a receiver of stolen goods, on the mere assertion of the principal felon.(b) Nor is a constable justified in taking a person into custody for a mere assault, without a warrant, unless he himself was present at the time the assault was committed,(c) or there be a reasonable ground for apprehending a continuance or renewal of it;(d) and the same as to all breaches of peace out of his view.(e)[2]

Or if a constable have a reasonable suspicion that a man has committed felony, he may apprehend him.(g) So may a private individual,

(a) *Samuel v. Payne et al.*, Doug. 359;  
*Hobbs v. Branscomb*, 3 Camp. 420; *Davis v.*  
*Russell*, 5 Bing. 354; *Cowles v. Dunbar*,

Moody & M. 37; *R. v. Ford*, R. & Ry. 329.

(b) *Isaacs v. Brand*, 2 Stark, 167.

(c) *Coupey v. Henley*, 2 Esp. 540.

(d) *Baynes v. Brewster*, 11 Law J. 5m.

(e) 2 Hawk. c. 13, s. 8; Id. c. 12, s. 20.

(g) *Ledwith v. Catchpole*, Cald. 291; *Law-*  
*rence v. Hedger*, 3 Taunt. 14; *Nicolson v.*  
*Hardwick*, 5 Car. & P. 495; *Beckwith v.*  
*Philby*, 6 B. & C. 635.

ted; and in this respect he does not stand on as favorable ground as a constable, who may justify an arrest, for a reasonable cause of suspicion alone. 8 Watts & S. 308.

Probable cause is the same as reasonable grounds for belief of guilt. 1 Barr's State Rep. 234.

[2] As a public peace officer, a constable is authorized, and it is his duty to make arrests, also, without a warrant of a magistrate, in many cases.

In general it is the duty of a constable to arrest, without a warrant, persons committing a felony, or guilty of a riot, affray, or breach of the peace, in his presence, and to take them before a proper magistrate.

A constable may, without a warrant, apprehend a person for violent and disorderly acts, and threats, in his presence, which are cause for demanding of the party sureties to keep the peace, or be of good behaviour.

A constable may arrest one in the act of exhibiting publicly an obscene picture, of exposing his naked body, or of committing the like offences against public decency and morality.

When any breach of the criminal law is committed in the presence of a constable, he must arrest the offender and take him before a justice of the peace. Swan's Jus. p. 474.

A constable may arrest without warrant a person accused of petit larceny, or any crime punishable by imprisonment in the penitentiary, whether there is time to obtain a warrant or not. In Ohio. Swan's Justice. p. 475.

The mere fact of arresting, without a warrant, when there is a direct charge made to the officer by a citizen, or reasonable suspicion before his eyes, does not oblige him to continue the detention of the person till he brought before a magistrate. The charge may be retracted, or his suspicions may vanish in the way; and as these, in such cases, are the only grounds for the arrest, so the absence of them is a sufficient reason for the release of the accused. His duty is merely that of a zealous and faithful servant of the law. 3 Eng. Comm. L. Rep. 163: Swan's Justice. p. 475.

A constable may without warrant arrest a person on suspicion of larceny, and justify it, in an action against him, by proving that there was probable ground for believing him to be guilty. 6 Binn. 318.

It would seem, that a constable may make an arrest without warrant for such a misdemeanor as receiving stolen goods, knowing them to have been stolen. 6 Binn. Rep. 318.

as above mentioned. The difference between the authority of the constable and the private person in this respect is, that the latter is justified only in case it turn out that a felony was in fact committed, but the constable may justify the arrest and detention, whether in fact a felony was committed or not.(a) And the ordinary grounds of justifiable suspicion are thus enumerated by Hawkins:—First, the common fame of the country; second, living a vagrant, idle, disorderly life, without any visible means to support it; third, being in company with known offenders at the time the offence was committed, or at other times; fourth, being found under circumstances inducing a strong presumption of guilt, as for instance, having stolen goods in his possession, and not being able to give an account of his having come honestly by them, or the like; fifth, behaving in such a way as to betray a consciousness of guilt, as by making no answer when charged with the offence, or absconding or the like.(b)

[\*27]

(d) \**In prevention of offences.*

If a private person see another on the point of committing treason or felony, or doing an act which would manifestly endanger the life of another, he may lay hold on him and detain him until it may be presumed that he has changed his purpose.(c) So may a constable.[1] And by stat. 8 & 9 Vict. c. 25, relating to the destroying or damaging of houses with gunpowder or other explosive substances, or burning, disabling, or disfiguring persons with the like, it is enacted by sect. 13, that it shall be lawful for any constable or peace officer, to take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed or being about to commit any felony under this act, and to detain such

(a) *Beckwith v. Philby*, *supra*, per Lord 8 & 9 Vict. c. 25, s. 13, *infra*.  
Tenterden, C. J.

(c) 2 Hawk. c. 12, s. 19.

(b) 2 Hawk. c. 12, s. 9-14; and see stat.

[1] A constable may arrest and detain a person, whom he sees on the point of doing an act of violence, through mischief or malice, dangerous to the life or person of another, or manifestly tending to disturb the peace. So he may take up a lunatic, or madman, doing injury to others, or a drunken person, behaving in a disorderly manner, to the disturbances of the public peace.

In all cases in which, as stated under the last head, arrests may be made by private persons, for offences and breaches of the peace, committed in their view or presence, it may be done by constables or other peace officers.

There is a class of misdemeanors, for which, when committed in the presence of constables, they are specially required by statute to make arrests: as blasphemy, profaneness, drunkenness, gambling, horse-racing, Sabbath-breaking, and the like.

person until he can be brought before a justice of the peace to be dealt with according to law.

(e) *By constable.*

I have nearly exhausted this subject in the foregoing observations. It is clear that a constable may do all that a private person can legally do, without warrant, in apprehending offenders, or persons about to commit crimes; the principal difference being, that the private person must deliver the party apprehended into the custody of a constable, unless otherwise directed by statute, and the constable must convey, as well those whom he apprehends, as those who are delivered to him by private persons, before a justice of the peace, there to be dealt with as shall hereafter be explained, and in the meantime he must provide for their safe custody, by lodging them in a station-house in cities or towns, or in a lockup-house in the country or otherwise.(a)

Constables may interfere to prevent an affray, in their presence, in the same manner as a private person, and it is more particularly their duty to do so.(b) But after the affray is over, they cannot, any more than a private person, apprehend the affrayers without warrant.(c) And the same as to all breaches of the peace,(d) or any other misdemeanors,(e) committed out of their view.[2]

There is one peculiarity in the constable's interference, namely, that he may demand the assistance of any person present, to enable him to

(a) 2 Hawk. c. 13, s. 7.

(b) Id. s. 8.

(c) Id.

(d) 2 Hawk. c. 13, s. 8.

(e) See *Fox v. Gaunt*, 3 B. & Ad. 798.

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[2] A police officer of the city of Boston, with all the powers of a constable, except that of serving civil process, who arrests an intoxicated person, while guilty of disorderly conduct, and releases him on his promise to go directly home, may lawfully retake him on his going into a bar-room before he is out of the officer's sight. 9 Met. Rep. 259.

Watchmen have authority at common law to arrest and detain in custody for examination before a competent magistrate, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, though there is no proof of a felony having been actually committed. While on duty, they have the same power as constables to apprehend persons suspected of felony. A watchman having apprehended a party, may discharge himself from liability for an escape, by delivering him to a constable, or he may himself take him before a magistrate 1 Chitty's Crim. Law, p. 24.

Watchmen are not only authorized to arrest for offences and acts in violation of the ordinances or by-laws of the city or borough; but as peace officers, they have while on duty the same power as constables to apprehend persons for felonies, breach of the peace, and other offences against the general laws of the state. Their powers and duties are regulated by the ordinances of the city or borough, or the statutes of the state. McKinney's American Magistrate, 214.

execute his duty ;(a) and if such person refuse his assistance, he may be indicted and punished as for a misdemeanor at common law.(b)

(f) *By magistrates.*

I have already stated the duties of a magistrate in the case of [\*28] a riot. In other respects, he may do \*everything which a constable or private person may do, in respect of apprehending offenders without warrant.(c) So, he may lawfully, by word of mouth, authorize any one to arrest a person, who is guilty of a felony or an actual breach of the peace in his presence ;(d) and such command is a good warrant without writing.(e)[1]

(g) *On hue and cry.*

Upon hue and cry raised or levied, a private person may arrest the alleged offender,(g) although no other circumstance of suspicion attach to him.(h)

Hue and cry was the ancient mode of pursuing an offender from town

(g) 2 Hawk. c. 13, s. 7; and see *R. v. Phelps et al.*, Car. & M. 180.

(b) See *R. v. Brown*, Car. & M. 314.

(c) 2 Hawk. c. 13, s. 13.

(d) 2 Hawk. c. 13, s. 14; 2 Hale, 86.

(e) 2 Hale, 86.

(g) 2 Hawk. c. 12, s. 4.

(h) 2 Inst. 52.

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[1] An unlawful assembly may be dispersed by a magistrate whenever he finds a state of things existing, calling for an interference in order to the preservation of the public peace. He is not required to postpone his action until the unlawful assembly ripens into an actual riot. For it is better to anticipate more dangerous results, by energetic intervention at the inception of a threatened breach of the peace, than by delay to permit the tumult to acquire such strength as to demand for its suppression those urgent measures which should be reserved for great extremities. The magistrate has not only the power to arrest the offenders, and bind them to their good behaviour, or imprison them if they do not offer adequate bail, but he may authorize others to arrest them by a bare verbal command, without any other warrant; and all citizens present whom he may invoke to his aid are bound promptly to respond to his requisition, and support him in maintaining the peace. 1 Hawk. P. C. c. 63, s. 16; Lamb. 173; Dalt. Co.; 4 Penn. Law J. 31. A justice of the peace either present or called on such an occasion, who neglects or refuses to do his utmost for the suppression of such unlawful assemblies, subjects himself to indictment and conviction for a criminal misdemeanor. *State v. Littlejohn*, 1 Bay, 316. Where, however, as was laid down in the Lord George Gordon riots by Lord Loughborough, and as has been held in this country, in cases of late occurrence, (Annual Register, 1780, 277; 3 Penn. Law Jour. 345; 4 *ibid.* 31,) an unlawful assembly assumes a more dangerous form, and becomes an actual riot, particularly when life or property is threatened by the insurgents, measures more decisive should be adopted. Citizens may, of their own authority, lawfully endeavor to suppress the riot, and for that purpose may even arm themselves; and whatever is honestly done by them in the execution of that object will be supported and justified by the common law. It is the duty of every citizen to make such endeavor, and when the rioters are engaged in treasonable practices, the law protects other persons in repelling them by force. *Respublica v. Montgomery*, 1 Yea. 419; Wharton's Cr. Law, 528, 529.

to town, until he was taken.(a) It might be raised by any person present when a felony was committed, or dangerous wound given, by going to the constable of the next town, informing him of it, describing the offender, and stating which way he had gone.(b) It was the duty of the constable then immediately to raise his own town, and search for the offender, and, upon not finding him, to send the like notice to the constables of all the neighboring towns, who ought in like manner to search for the offender, and also to give notice to their neighboring constables, and they to the next, until the offender was taken.(c) Sometimes there was a justices warrant for levying the hue and cry; but the constable might levy it without warrant. If a constable fail to levy a hue and cry when he ought, or if others do not pursue it when required, they are punishable upon indictment with fine or imprisonment, or both.(d)[2]

(a) 2 Hawk. c. 12, s. 5.

(c) 2 Hawk. c. 12, s. 6.

(b) Id. ss. 4, 5.

(d) 3 Inst. 117; 3 Ed. 1. c. 9.

[2] Hue and cry is the old and common law mode of pursuing, "with horn and voice," persons suspected of felony, or having inflicted a wound from which death is likely to ensue. 3 Inst. 116; 2 Hale, 98; 4 Bla. Com. 293, 294. This practice seems to have arisen in the earliest times, (Bracton, lib. 3, ch. 1,) and was distinctly recognized in the institution of *hundreds* by Alfred. It is laid down by Lord Coke, (3 Inst. 116,) that where a felony has been committed, or dangerous wound given, the party grieved may resort to the constable, acquaint him with the circumstance, describe the offender, point out which way he is gone, and demand hue and cry to be made. Upon this, it becomes the duty of the officer to raise hue and cry within his district; and if the offender be not there taken, he must give immediate notice to the next constable, and he to the next, till the delinquent be secured. This power has been further confirmed by several statutes. The 3 Ed. I. c. 9, compels all persons to arm and assist the constable on pain of severe penalties. By the 13 Ed. I., st. 2, ch. 1, *fresh suit* must be made immediately after the felon, from town to town, and from county to county, which is said to be the life of this practice. 3 Inst. 117. And the statute 27 Ed. c. 13, s. 10, enacts, that the hue and cry must be by horse as well as foot, or it will be invalid. In order to enforce this practice, which was found highly beneficial in the infancy of the police, the 13 Ed. I., c. 3, makes the hundred liable to answer for the damage sustained by the robbery, unless the felon is secured; and by a more recent enactment, (8 Geo. II. c. 16,) the officer refusing to make hue and cry is liable to a forfeiture of 5*l*.

At the present day, hue and cry may be raised either by the precept of a justice of the peace, by a peace officer, or by any private man who is aware that a felony has been committed. 4 Bla. Com. 294; 2 Hale, 100; Hawk. b. 2, c. 12, s. 6. It may be raised by the warrant of a justice, from his general power to apprehend. Upon constables, headboroughs, and other peace officers, it is especially incumbent, because, as we have seen, they are finable if they neglect it, and their presence gives more weight and authority to the proceeding. 1 Hale, 100. However, it is clear that the hue and cry may be made by private individuals, in the absence of the constable, and it has therefore been sometimes termed in the old books, *cry de pais*. 2 Hale, 100; 2 Inst. 117. Nor can any inconvenience result from this liberty; for, any one making hue and cry, or causing it to be made, without due cause, is liable to be punished as a wanton disturber of the peace. Hawk. b. 2, c. 12, s. 5; 2 Hale, 100; 2 Inst. 173.

The party who discovers that a felony has been committed, whether the party grieved, or a third person, should either apply for the warrant of a justice, or immediately give informa-



*(h) When and where.*

An arrest without warrant may be made at any time, even on a Sunday. And it may be made anywhere.[3]

tion to the constable of the vill. The former method is always prudent when circumstances will permit, but, as we have seen, it is by no means necessary, and if the offender be likely to escape is improper from the delay it occasions. 2 Hale, 99. He should then make a full statement of all the facts within his knowledge relative to the offence and the offender; state his name, if known, and if otherwise, describe his person, horse, or other circumstances which may lead to detection. 2 Hale, 100. Should the crime, however, be committed in any manner, or at any time which prevents him from obtaining any of these clues to discovery, he may require the officers to search for all suspicious persons, vagrant in their districts, in order that they may be examined. 2 Hale, 101, 103. He may then claim the assistance of all the inhabitants of the vill, and all neighboring villa, who are to pursue by horse and foot, till the felon is secured, or they are liable to be punished for their neglect. 2 Hale, 101; 3 Inst. 116. And by this means, a constable who has obtained a warrant against a felon, may procure him to be apprehended in a different county from that in which it was granted; by following him with hue and cry, and so, without backing the warrant, cause him at once to be arrested. 2 Hale, 115.

Hue and cry being thus levied, we are now to inquire what may be done on the pursuit. It is clear, that when once it is commenced, those who join will be protected, even though it should ultimately appear that no felony has been committed; and the reasons for this are evident, because the constable cannot examine on oath as to the truth of the statement, and the nature of the proceeding requires the utmost promptitude, because officers are punishable if they neglect to observe it; and because he who without cause set it on foot, is punishable by fine and imprisonment, for the disturbance he has occasioned. 2 Hale, 102; 2 Inst. 173; Hawk. b. 2, c. 12. And thus it is, that arrest upon hue and cry differs from arrest upon mere suspicion; in the latter case, it is necessary to aver in justification that a crime was committed, and that fact may be put in issue; whereas, in the latter case, no such allegation is necessary, nor is it ever stated in pleading. 2 Hale, 101. In short, this proceeding arms all persons with the same authority as a warrant gives to the party to whom it is directed; they are not answerable for the propriety of the cry itself, but only for the regularity of their own conduct when acting under it.

If, therefore, hue and cry be made against a suspected person, he may be arrested and taken to the common jail, though he ultimately establish his innocence, and though, in fact, the crime is altogether fictitious. 2 Hale, 102. And so, where, upon a description of the offender, whose name is unknown, the wrong person is apprehended by mistake, the party arresting is clearly justified. 2 Hale, 103. If any of the pursuers be killed by the party flying, this will be murder, and if, on the other hand, the latter be killed, when he cannot otherwise be taken, the pursuers will be protected. *Jackson's case*, cited 7 East, P. C. 292; 2 Hale, 100; Fost. 271, 272.

The pursuers under hue and cry, if the party suspected is actually in a house, have an unquestionable right to break open the outer door to secure him, on previous demand of admittance. 2 Hale, 103. They must, however, ascertain that fact, as if he be not found, they will be trespassers. Id.; 3 B. & P. 233; 1 Marsh. 565. But they may search all suspected places which they can enter without forcing an outer door, whether they succeed or fail. 2 Hale, 103.

Although suspicious persons neither named nor described, may be taken, it will lie on the parties arresting to show that they had reasonable ground to suspect them, either from their being vagrants, not rendering a good account of themselves, or other similar circumstances, for otherwise this proceeding would be more dangerous than even general warrants. 2 Hale, 104.

[3] An arrest may be made at any time in the day or night. Smythe, 207; 1 Nun. &

(1) *How.*

An arrest is usually made by laying hands on the party and detaining him. But if the officer or other person say to him "I arrest you," and the party acquiesce and go with him, this will be a good arrest; (a) although it would be otherwise, if instead of submitting he had escaped. (b) If the arrest be by a constable, it is sufficient for him to state merely that he arrests the party in the Queen's name; (c) but a private person, it should seem, if required, must state to the party arrested the cause of the arrest. [4]

If the party to be arrested be in a house, and the doors be fastened, then, according to Hawkins, the doors may be broken open to arrest him (after first demanding admittance and being refused,) in the following cases:—First, upon a *capias* on an indictment; second, where, one, known to have committed treason or felony, or to have given another a dangerous \*wound, is pursued by a constable or private person, with or without warrant; third, where an affray is made in a house, in the view or hearing of a constable, or where affrayers

(a) See *Russon v. Lucas*, 1 Car. & P. 153.

(c) 1 Hale, 589.

(b) *Id.*

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Walsh, 102. It may be made in the *night*, as well as in the day time, in order to prevent the escape of the party. 9 Co. 66; 1 Chit. Cr. L. 49; 1 East's P. C. 324; 3 Taunt. 14; 5 Bing. 354. But in this case, it is said a more especial notification of the officer's authority is necessary. 1 Hale, 461. So an arrest may be made on *Sunday*; for though in civil matters this is prohibited, yet the statute expressly excepts the cases of breach of the peace, or apprehended breach of the peace, and the apprehension of persons charged with crimes and misdemeanors. 1 R. S. 675, s. 69; 1 Nun. & Welsh, 100; Stat. 7 Will. III. ch. 17, s. 7; 16 Moo. & Wels. 172. Under a similar statute in England, it seems to have been considered that a contempt of court is a breach of the peace, within the exception of the statute. Willes, 460; 1 Atk. 58; 1 T. R. 265. And it has been decided that a person may be apprehended on *Sunday* on an attachment for a rescue, (*Id.* 459;) or under an escape warrant, where the original arrest was in a civil case. 2 Ld. Raym. 1028. So, if the party has wrongfully escaped, he may be re-taken on *Sunday* without a warrant. *Ib.*; 5 T. R. 25. And an arrest on a criminal charge may be made in any place. Bao. Abr. Tres. (D. 3.) For no place affords protection to the person who has violated the criminal law. 1 Nun. & Walsh, 99; Smythe, 207.

[4] To constitute an arrest, the party must be actually touched by the officer, or confined in a room, or submit himself, by words or actions, to be in custody. The mere giving charge or causing him voluntarily to appear before a magistrate, without the person's being taken into actual custody, will not amount to an arrest; for bare words in this respect will not be of any avail. 1 Chit. Cr. L. 48; Davis' Just. 64; 1 East's P. C. 330. But no manual touching of the body, or actual force, is necessary, in order to constitute an arrest. It is sufficient if the party is within the power of the officer, and submits to the arrest. 1 Wend. 215; Roscoe's Cr. Ev. 356; 1 Carr. & Payne, 153; Ry. & Moo. 26; 3 Carr. & Payne, 464; Moo. & Mal. 244; 6 Barn. & Cr. 528; 6 Moore, 111. Yet is said to be better, in all cases, to touch the prisoner's person, in order to complete the arrest: taking care at the same time, to use no greater force or constraint than is necessary for his safe custody: the degree of which will depend upon the particular circumstances of the case, as the character of the party the nature of the offence charged, the state of the country, &c. 1 Nun. & Walsh. 203.

fly to a house and are immediately pursued by a constable; fourth where a person lawfully arrested, escapes and flies to a house: in these several cases the door of the house may be broken open, to arrest the party or suppress the affray, if upon demand made for the purpose the parties within refuse to open it.<sup>(a)</sup> And the same, upon a warrant on a charge or suspicion of felony.<sup>(b)</sup>

So, where a private person, without warrant, broke open the door of a house, and imprisoned the occupier, to prevent him from murdering his wife, he was holden to be justified.<sup>(c)</sup>

And it is immaterial whether it be the party's own house, or the house of a stranger, except that in the latter case the officer is justified only in case the party he seeks be actually in the house at the time.<sup>(d)</sup>[1]

(a) 2 Hawk. c. 14, ss. 1-9.

(c) *Hancock v. Baker*, 2 Bos. & P. 260.

(b) 2 Hale, 117.

(d) 2 Hale, 117.

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[1] In general, a man's own house is regarded as his castle, which is only to be violated when absolute necessity compels the disregard of smaller rights, in order to secure public benefit; and therefore, in all cases where the law is silent, and express principles do not apply, this extreme violence is illegal. 3 Bla. Com. 288; 14 East, 79, 116, 17, 18, 154, 5; 5 Co. 91; Cowp. 1. There seems some doubt as to the distinction which may exist between the power of constables and private individuals in this respect; for it is said, that the former being enjoined by law, on a reasonable charge, to apprehend the party suspected, may be justified in breaking open doors to apprehend him on mere suspicion of felony, and will be executed, though it appear that the suspicion was groundless; but a private individual acts at his own peril, and would, if the party were innocent, be liable to an action of trespass for breaking open doors without a warrant. 2 Hale, 82, 92; 2 B. & P. 260; Dick. J. Arrest, III. But when it is *certain* that a treason or felony has been committed, or a dangerous wound given, and the offender being pursued, take refuge in his own house, either a constable, or private individual, without distinction, may without any warrant break open his doors after proper demand of admittance. 1 Hale, 588, 589; Hawk. b. 2, c. 14, s. 7; 4 Bla. C. 292; 2 Hale, 82, 3, 88, 96; 14 East, 157, 8; Barl. J. Arrests. And when an affray is made in a house, in the view of hearing of a constable, he may break open the outer door in order to suppress it. 2 Hale, 95; Hawk. b. 1, c. 63; Hawk. b. 2, c. 14; Dick. J. Arrest, III. So, in some extreme cases, it has been holden lawful even for a private individual to break and enter the house of another in order to prevent him from murdering another who cries out for assistance. 2 B. & P. 260. Authors, however, differ on the point whether the same power be invested in the officer or private person when felony is only *suspected*, and has not been committed *within the view*, of the party arresting. It is, indeed, certain that a constable may break open doors, upon the positive information of another who was actually a witness to the felony, (1 Hale, 589; 2 Hale, 92; Dick. J. Arrest, III.) and one material distinction between the power of officers and private individuals, is, that the latter can act only on their own knowledge, while the former may proceed on the information of others. Cald 291; Dougl. 359. We may, therefore, take it as settled, that a private person may break doors after a proper demand and notice, where he is certain a felony has been committed, and that a constable may do the same upon the information of the party in whom the knowledge or reasonable suspicion exists.

But it is clear, that, in the case of criminal process for a *misdemeanor*, it is necessary to demand admittance before the breaking open an outer door, even if it be not necessary in case of felony. 2 Bar. & A. 592; 14 East, 163.

As to how far doors may be broken open, upon *suspicion of felony*, Lord Coke (4 Inst. 117;

If the officer or other person, in endeavoring to make a legal arrest, be resisted, and in opposing force to force he happen to kill the party, the homicide is justifiable ;(a) and the officer or other person need not retreat, as in the ordinary case of *se defendendo* ;(b) but if the arrest would have been illegal, the killing would amount to manslaughter.(c)

So when a party may lawfully be arrested for felony, and he, knowing the cause, flies, so that he cannot be taken otherwise than by killing him, the constable pursuing him will be justified in killing him ; or a private person will in like manner be justified, if he can prove that the deceased was actually guilty of a felony ;(d) but where the arrest is for a misdemeanor only, even a constable will not be justified in killing in pursuit ; and if in such a case he kill with a deadly weapon, it will be murder ; if otherwise, manslaughter ;(e) or if he fire at and wound him, he may be indicted for it as for a felony under stat. 1 Vict.

c. 85.(g)

In apprehending or dispersing rioters after proclamation made, as mentioned,(h) it is enacted by stat. 1 G. 1, st. 2, c. 5, s. 3, that if the persons so unlawfully, riotously, and tumultuously assembled, or any of them, shall happen to be killed or hurt, by reason of their resisting

(a) 1 Hale, 494, 481; Fost. 318, 274.

(b) 2 Hale, 218.

(c) See Fost. 318.

(d) 2 Hale, 118, 119; 1 East, P. C. 298, 299.

(e) 2 Hale, 217; Fost. 271; and see *R. v.*

*Longden*, R. & Ry. 228; *R. v. Smith*, 1 Russ. 459.

(g) *R. v. Dodson*, 20 Law J. 57m.

(h) *Ante*. p. 25.

14 East, 155.) seems to imply that this may be done by the party originally suspecting, but by no other unless by the constable in his presence. And therefore he contends that no justice can issue a warrant before indictment, unless the suspicion arise from himself, an idea which constant usage has refuted. And Lord Hale positively lays it down, that doors may be broken open, without warrant, on *suspicion* of felony. 1 Hale, 583. This doctrine is as positively denied by Foster, though his general leaning is against the protection of offenders by the sanctity of private dwellings. According to him a bare suspicion will never authorize an arrest, even though a felony has actually been committed. Fost. 321. And this opinion is the stronger as it proceeds from one who just before had declared, that "no regard ought to be paid to the houses of malefactors which where the dens of thieves and murderers." This opinion is followed by Hawkins, and adopted by Mr. East: the latter author, however, qualifies it by observing that *at least* the party arresting must prove not only that his suspicion was reasonable, but that the person arrested was actually guilty. 1 East P. C. 322; Hawk. b. 2, c. 14, s. 7; Dalt. J. c. 78.

Upon the whole, therefore, it seems to be the better opinion that a private individual, in order to justify breaking open doors without a warrant, must in general prove the actual guilt of the party arrested, and that it will not suffice to show that a felony has actually been committed by another person, or that reasonable ground of suspicion existed; but that an officer, acting *bona fide* on the positive charge of another, will be excused, and the party making the accusation will alone be liable. Dougl. 358; Dick. Just. Arrest, III. But the breaking, an outer door is, in general, so violent, obnoxious and dangerous a proceeding, that it should be adopted only in extreme cases, where an immediate arrest is requisite.

the persons endeavoring to disperse or apprehend them, the latter shall be discharged and indemnified.[2]

[2] This protection of the officer extends to civil as well as criminal cases. 1 Hale, 494 ; 2 id. 118. And the same as to persons acting in his aid. Fost. 318. So if a private person attempts to arrest one who commits a felony in his presence, or interferes to suppress an affray, and being resisted, necessary kills the person resisting, this is also justifiable homicide. 1 Hale, 481, 484 ; Fost. 274. Still there must be an apparent necessity for the killing ; for if the officer or private person were to kill after the resistance had ceased, or if there were no reasonable necessity for the violence used on his part, the killing would be manslaughter at least. Arch. Cr. Pl. 333. Also, in order to justify an officer or private person, in these cases, it is necessary that he should, at the time, be in the act of legally executing a duty imposed upon him by law, and under such circumstances that if the officer or private person were killed it would have been murder ; for if the circumstances of the case were such that it would have been manslaughter only to kill the officer or private person, it would be manslaughter at least in the officer or private person to kill the party resisting. Idem, 334 ; Fost. 318 ; 1 Hale, 490. Therefore, if the warrant is illegal and void upon the face of it, or issued with a blank in it, and the blank afterwards filled up, or issued with an insufficient description of the defendant, as for instance, if it were to take the son of J. S., or attempted to be executed against C. instead of B., the officer or private person would not be justifiable in killing the person resisting. Arch. Cr. Pl. 330.

By the legality of the process, is to be understood only that the process, whether by writ or warrant, must not be defective in the frame of it, and must issue in the ordinary course of justice from a court or magistrate having jurisdiction of the case. Foster, 311 ; Roscoe's Cr. Ev. 620. Therefore, though there may have been error or irregularity in the proceeding previous to the issuing of the process, it will still be a protection to the officer if in executing it a person is necessarily killed while resisting it ; for the officer, at his peril, is bound to pay obedience to it. Id. ib ; 1 Hale, 457. So, though the warrant of a justice of the peace be not in strictness lawful, as if it do not express the cause with sufficient particularity ; yet if the matter be within his jurisdiction, the officer will be justified in killing those who oppose him in executing it. 1 Hale, 459, 460 ; 1 East, 310. It is said, however, that this must be understood of a warrant which has all the essential requisites of one. Id. ib.

It may be observed, also, that in all kinds of process, both civil and criminal, the falsity of the charge contained in such process will not justify a person in resisting the execution of it ; for every man is bound to submit himself to the regular course of justice ; and, therefore, in the case of an escape warrant, the person executing it was held to be under the special protection of the law, though the warrant had been obtained by gross imposition on the magistrate, and by false information as to the matters suggested in it. 1 East, 310 ; Fost. 135, 312. Barbour's Cr. Law, 35, 36.

In cases of felony actually committed, if the offender will not suffer himself to be arrested but stands upon his own defence, or flies, so that he cannot possibly be apprehended alive by those who pursue him, whether public officers or private persons, with or without a warrant, he may lawfully be killed by them. Hawk. P. C. b. 1, ch. 28, § 11 ; Fost. 271. In case an innocent person is indicted for a felony and will not suffer himself to be arrested by the officer who has a warrant for that purpose, he may be lawfully killed by the officer if he cannot otherwise be taken. Id. ib. § 12. Although, strictly speaking, before a man is convicted of a felony, he cannot be called a felon ; yet the word "felon" was undoubtedly used in the statute to designate persons charged with having committed felonies. And in cases where a peace officer attempts, without a warrant, to apprehend a person on suspicion of felony, and the suspected person is killed, the question will be whether the officer had reasonable grounds for supposing him guilty of the charge. If it appear that he had, he should be acquitted, although it turns out that the person he was attempting to arrest was, in fact, innocent of the charge. Although mere suspicion of felony will not justify a peace officer in breaking an outer door to apprehend the offender, unless the officer is armed with a war-

On the other hand, if the constable or any person acting in his aid be killed in endeavoring to execute a magistrate's warrant,—if the warrant be legal and the slayer had notice, either expressly or from circumstances, of the deceased being a constable, and of the intent of the arrest,(a) \*the law in that case implies malice, and the [\*30] slayer will be guilty of murder.(b) And the same, as to killing any other person to whom the warrant is directed. But if the warrant be bad on the face of it, as being too general,(c) or the like, the killing in such a case will be manslaughter only. So, if a constable or other person, without warrant, apprehend, or attempt to apprehend an offender, in a case where by law he may do so, and be killed in so doing, it will be murder;(d) but if it happen in a case where he has no authority by law to apprehend the party, the killing will be manslaughter only.(e) So, if a gamekeeper or his assistant be killed, in attempting to apprehend a poacher, if the arrest would have been lawful, the offence is murder;(g) but if the arrest would have been unlawful, the offence would be manslaughter only.(h)

Even an assault to prevent apprehension, is punishable with imprisonment, with or without hard labor, for not more than two years.(i) Or if, to resist or prevent lawful apprehension, a man shoot at, or attempt to shoot at the party attempting to apprehend him, or shall stab, cut or wound him, it will be a felony, and he will be liable to be transported for life, or for not less than fifteen years, or to be imprisoned with or without hard labor for not more than three years.(k)[1]

- (a) *R. v. Gordon*, 1 East, P. C. 350, 352; *R. v. Phelps et al.*, Car. & M. 180.  
*R. v. Payne*, Ry. & M. 378. (g) *R. v. Warner et al.*, Ry. & M. 380; *R. v. Edwards et al.*, 3 Car. & P. 390; *R. v. Whithorne et al.*, Id. 394; *R. v. Ball*, Ry. & M. 330; *R. v. James Ball*, Id. 333.  
(b) 1 Hale, 457; 1 East, P. C. 298. (h) *R. v. Addie*, 6 Car. & P. 388.  
(c) *R. v. Hood*, Ry. & M. 281. (i) 9 G. 4, c. 31, s. 35; and see 14 & 15 Vict. c. 19, s. 12.  
(d) 1 East, P. C. 303; *R. v. Ford*, R. & Ry. 329; *R. v. Woolmer & Palmer*, Ry. & M. 334; *R. v. Hems*, 7 Car. & P. 312. (k) 1 Vict. c. 85, s. 4.  
(e) *R. v. Wm. Thompson*, Ry. & M. 80; *R. v. Curran*, Ry. & M. 132; *R. v. Curran*, 3 Car. & P. 397; *R. v. Davis*, 7 Car. & P. 785;

rant: yet, according to Lord Hale, the officer would be justified in killing the party, if he fly, and cannot otherwise be apprehended. 1 Hawk. P. C. ch. 28, § 12; Post. 320; 1 Hale, 481; 2 id. 72, 79, 218. But it is said that this must be understood only of arrests by officers, and does not extend to arrests by private persons of their own authority. 2 Hale, 84; 1, Russ. on Cr. 547. It seems that a constable or other peace officer is bound to arrest a person indicted for felony, *without a warrant*, and that, therefore, if it be not possible otherwise to arrest him, he will be justified in killing him, although he have no warrant. See 1 East's P. C. 300.

Where a private person lends his assistance to an officer, whether commanded to do so or not, he is under the same protection as the officer himself. Post. 309. Barbour's Cr. Law 38.

[1] Such are the modes by which arrests may be made without waiting for any legal authority from a public magistrate to sanction the proceedings. This summary course is

## SECTION II.

## APPREHENSION OF THE OFFENDER UNDER A WARRANT.

*(a) Warrant, in what cases and how.*

WHERE a charge or complaint is made before a justice of the peace, that a person who has committed, or is suspected to have committed any treason, felony, or indictable misdemeanor, or any other indictable offence whatsoever, either within the justice's jurisdiction or elsewhere, is residing or being, or is suspected to reside or be within the limits of such jurisdiction,—the justice may at once issue his warrant to apprehend such person, and to cause him to be brought before him or some other justice for the same county, riding, division, liberty, city, [\*31] borough, or \*place, to answer to the charge.(a) This warrant may be issued on a Sunday, as well as any other day.(b) It must be under the hand and seal of the justice issuing it; and it may be directed—either to a constable or other person by name,—or generally to the constable of the parish or other district within which it is to be executed, without naming him,—or to such constable and all other constables or peace officers, in the county or other district within which the justice issuing the warrant has jurisdiction,—or generally to all constables or peace officers within such county or district.(c)[1]

(a) 11 &amp; 12 Vict. c. 42, s. 1.

(c) 11 &amp; 12 Vict. c. 42, s. 10.

(b) *Id.* s. 4.

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necessary when there is an imminent danger of an escape, or when, from other circumstances, the utmost promptitude is requisite. When however, the case will admit, it is more prudent to obtain the authority of a magistrate, to give greater security to the parties by whom the arrest is to be effected. The mode, nature, and effect, of this course of proceeding, will next demand the reader's attention.

[1] The party who knows or suspects that an indictable offence has been committed, usually goes before a justice of the peace, accompanied by any other witnesses whom he may be able to procure, and gives the magistrate his information and that of his companions, stating the grounds of suspicion on which his application is grounded. They are sworn, if Christians, on the four Evangelists; if Jews, on the Old Testament, as follows: "You shall true answer make to such questions, as shall be demanded of you, So help you God." The magistrate then interrogates the accuser, and sometimes his witnesses, and takes down the substance of their replies in the following form, "The information of, &c. of, &c. who saith that, &c." stating the facts sworn to. This paper is then read to the parties, who have given evidence, and, if they adhere to the statement, they confirm it by their signature. Upon this the justice usually issues his warrant or summons, according to the magnitude of the charge, or the apparent weight of the evidence by which it is supported.

The information of the complainant alone, may be sufficient, in the exercise of the magistrate's judgment, to authorize him to proceed in the case, by issuing process therein. If in reference to the creditability of the complainant, and to all the matters stated by him, there

The following is the form of the

*Information or Complaint for an Indictable Offence.*

——— } The information and complaint of C. D., of ——, [*yeo-*  
to wit: } *man,*] taken this——day of ——, in the year of our Lord,  
185—, before the undersigned, [*one*] of her majesty's justices of the

are, according to the understanding of the magistrate, reasonable grounds for supposing the accused to be guilty, the complaint may be entertained as the foundation, without other evidence, of further action in the case, in the order hereinafter mentioned. Under such circumstances, it is not requisite, in this stage of the proceedings, that any other witness for the prosecution should be examined. Indeed it would seem proper, in such a state of things, that they should not then be heard; but rather that their testimony should be taken, if necessary, afterwards, in the presence of the accused, when he has appeared, or been brought before the magistrate, to answer the charge. The magistrate is to exercise his discretion, as to the necessity of his hearing other testimony, besides the information, on the part of the prosecution, and at what time it is to be given. *M'Kinney's Am. Mag.* 172, 173.

As to the amount of evidence which the examination should present, in order to authorize the magistrate to grant his warrant, no very definite rule has been or can be laid down. The rule that where there is a *doubt*, as to the defendant's guilt, he is entitled to the benefit of it, does not apply to these preliminary examinations. It is sufficient if the testimony shows a probable case of guilt on the part of the prisoner. At common law, it seems a magistrate might issue his warrant upon a general oath of *suspicion* merely. This was on the ground that the complainant was a competent judge of the matters upon which his suspicion rested. 4 *Black. Com.* 290. But our statute is framed so as to exclude, in a great measure, the abuses to which such a practice might lead; and undoubtedly was designed to throw the duty of judging, in this respect, entirely upon the magistrate. He should not regard mere allegations of suspicion, but the *grounds* of the suspicion—the *facts and circumstances* must be laid before him; and these should be sufficient to make it appear that a crime has been actually committed, and that there is probable cause for charging the individual complained of therewith. See 1 *Chit. Cr. L.* 33; 1 *Hale's P. C.* 582; 2 *id.* 210; 4 *Black. Com.* 290; 2 *Hawk. P. C. c.* 13, § 18; *Dick. Just. Warrant*, 1. And it is the duty of the magistrate well to consider what is sworn to, and not to grant any warrant groundlessly or maliciously, without such reasonable cause as might lead a discreet and impartial man to suspect the party to be guilty. 1 *Chit. Cr. L.* 34; 2 *Hawk. P. C. c.* 13, § 18.

But when such cause is shown, he ought to be prompt and fearless in the discharge of his duty. We have known warrants refused in many instances where they ought to have issued, because of some vague apprehension on the part of the magistrate that he might render himself liable to a prosecution, in the event of its being ascertained that the accused was innocent. It is indeed true that should he issue his warrant when there was no complaint or information on oath whatever, and no cause of arrest, he would be punishable for it. 2 *T. R.* 225; 1 *Chit. Cr. L.* 34; 2 *Wils.* 158; 2 *Hawk. P. C. c.* 13, § 18; *Comb.* 359. The reason is, that under such circumstances, he has no jurisdiction whatever. Where, however, the magistrate has observed the preliminaries required to obtain jurisdiction, and consequently where he has a right to adjudicate upon the question as to the propriety of issuing the warrant, no mere error of opinion or judgment will render him liable. He is bound to decide in such case, and unless he acts corruptly, it would be against both policy and justice, if the law should allow him to be punished because he did not decide rightly. See 2 *Stark. Ev.* 427, 8; 2 *Mod.* 218, 220, 1; 1 *Brod. & Bing.* 137; 5 *John. R.* 287; 9 *id.* 394; 3 *Caines' R.* 170; 17 *John. R.* 145; 7 *Wend.* 200. Where the magistrate acts in bad faith, and grants a warrant against an innocent man, upon an oath of facts and circumstances affording no rational ground of suspicion whatever, he will doubtless subject himself to an action. 1 *Chit. Cr. L.* 34; 2 *Hawk. P. C. c.* 13, § 18. *Barb. Cr. Law*, 522, 523.



peace, in and for the said [county] of —, who saith that [*&c.*, *stating the offence.*]

Sworn before [*me*] the day and year first before mentioned, at—  
J. S.

This information is required to be on oath, where it is intended to issue a warrant in the first instance.(a)[2]

(a) 11 & 12 Vict. c. 42, s. 8.

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[2] The New York Revised Statutes do not require that there should be either a written complaint or a written examination of the complainant and his witnesses prior to the issuing of the warrant. And in South Carolina, a magistrate may commit for an offence without information either on oath or in writing, if satisfied that there is reasonable ground for suspicion. *State v. Kellett*, 2 Bailey Rep. 289.

It is laid down, however, by several writers, that it is the duty of the magistrate, independent of any statutory provision, to take all charges, of whatsoever kind or complexion they may be, in writing. 1 Chit. Cr. L. 34; Lofft, 240; 2 Har. Dig. 1378; 1 Nun. & Walsh, 167. This practice is recommended by a variety of considerations; among which are the following: It will ensure greater system and accuracy in the subsequent proceedings—enabling the justice, in case the complainant or any of the witnesses are prosecuted for their doings in the matter, to show distinctly what they testify to—and further, if the justice himself is prosecuted, it will facilitate his defence, by enabling him to exhibit, at once, an information on oath authorizing the warrant, and giving him jurisdiction. See 2 Stark. Ev. 429, note a; 2 Strange, 710; 8 East's R. 113; 2 T. R. 225.

Where the object is to obtain a warrant against a person accused of the commission of a crime, a complaint, separate and distinct from the examination, seems to be unnecessary. They may be combined in the same instrument.

Where the complaint is required by statute to be in writing, that form must be observed; and this is usually directed where power is given to apprehend the offender in the first instance. But, as before observed, unless it is so directed, expressly, it is not necessary the complaint should be in writing. Stone's Prac. Pet. Sess. 28; Paley, 15, 16. But if a complaint in writing is resorted to, being the substratum of the magistrate's jurisdiction, and in the nature of an indictment, it should contain a complete statement of the offence; for the evidence given upon the trial can only support the original charge, but can by no means extend or supply what is wanting in the complaint. Paley on Conv. 65; 2 Salk. 680; Doug. 232. The complaint must also contain a direct and positive charge against the defendant, and not merely facts amounting to a presumption of guilt; however sufficient such facts may be as *prima facie* evidence against him. 10 Mod. 155; Paley, 96. In a complaint for feloniously taking property, *the value of the property* and *the place where the offence arose* should be stated; otherwise the conviction will be erroneous. 2 Hill, 281.

*The duty of the magistrate.*] In general, the first duty of the magistrate, on a complainant offering himself, is to examine him, and his witness, if any, on oath; and determine whether there is probable cause for proceeding in the matter. 2 R. S. 706, § 2. And the same course is to be pursued in proceedings under the act respecting fugitives from justice. See Laws of 1839, p. 323.

It is hardly necessary to observe that the magistrate, in this preliminary stage of the proceedings, should sedulously endeavor to inform himself of the true nature of the case. If he entertains suspicions of the integrity of the persons sworn, his diligence should be proportionably increased. Instances will arise where the application for criminal process is made from motives of a reprehensible character; in order, perhaps, to gratify revengeful feelings, or to procure the conviction of some person of an infamous crime, who is likely to be a witness against the complainant, and thus to disqualify him from giving testimony.

The following is the form of the

*Warrant to apprehend the Offender.*

To the constable of —, and to other peace officers in the said [county] of —.

Whereas, A. B., [laborer] hath this day been charged upon oath before the undersigned, [one] of her majesty's justices of the peace in and for the said county of —, for that he, on —, at —, did [&c., stating shortly the offence:] These are therefore to command you, in her majesty's name, forthwith to apprehend the said A. B., and to bring him before [me,] or some other of her majesty's justices of the peace

The examination, in these and kindred cases, should be of the most searching character; lest the public be subjected to the expense of a groundless prosecution, and the process of the law be prostituted to the purposes of fraud and oppression.

The oath should be administered to the prosecutor and his witnesses, by the magistrate, previous to the commencement of the examination. 4 Dow. & Ryl. 734. This is required in order that the witness shall be under the solemn obligation of an oath while he is giving his evidence. Otherwise he may inadvertently, or perhaps wilfully, state some particulars erroneously in the first instance, which, when afterwards put to the test of an oath, a sense of shame may prevent him from retracting. The parties should also be sworn or affirmed to tell the whole truth; as it is obvious that a witness may answer every question correctly, which may have been put to him, and very properly swear to the truth of the statement so taken down, as far as it goes, and yet such evidence may not contain the whole truth, and the most important part of the transaction may thus remain unknown. 1 Nun & Walsh, 168.

The magistrate will frequently save much time and labor, by examining the complainant and his witnesses before attempting to reduce any portion of the testimony to writing; for in this way, perhaps, he may be led to see at once that some portion of the testimony is irrelevant, or that there is no ground whatever for the complaint.

In respect to the mode of taking down the testimony, the magistrate should pursue, as near as may be, the language of the witnesses. 8 Dow & Ryl. 8. The practice of taking depositions, however, in the precise words of a statute creating or defining the offence, has been strongly reprobated, because such can hardly ever resemble the language of the persons examined. 6 Bing. 85. But informations of this character will, notwithstanding, protect the magistrate, where enough appears to give him jurisdiction, provided it be not shown that he acted corruptly. Ibid.: 2 Stark, Ev. 426, n. 1. And it is, in all cases, sufficient to reduce the substance of the testimony to writing.

When the complaint has thus been committed to writing, it should be read over by, or to, the complainant, or witness, carefully and deliberately, so that he may perfectly comprehend it, and have an opportunity of correcting whatever he conceives to be erroneous. And if the complainant be illiterate, the magistrate should be especially careful to read and explain it, or to have it read, so as to satisfy himself that it is perfectly understood by the complainant. If this be not done the witness cannot afterwards be convicted of perjury. 1 Nun & Walsh, 182. If the witness adheres to the statement in the complaint, he should then be desired to sign it. If he be unable to read, or to write his name, there should be subjoined, at the foot of the complaint, after it has been read over to him, "having been first truly read by me to the above named —." The complaint should then be signed by the justice on the left side, at the foot thereof. Id. 183.

If it be necessary to use the intervention of an interpreter, he should also be sworn to interpret well and faithfully, and the jurat to the complaint modified accordingly. Id. 184. Barb. Cr. Law, p. 519, 520, 521.

31—3 APPREHENSION OF OFFENDER UNDER A WARRANT.

in and for the said [county,] to answer unto the said charge, and to be further dealt with according to law.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.

J. S. [L. S.]

(b) *Or summons and warrant.*

The justice, however, instead of issuing a warrant in the first instance, may, if he think fit, issue a summons; and if that be disobeyed, [\*32] he may then issue his warrant.(a) In the case of a \*summons, it is not necessary that the information should be upon oath; it need not even be in writing.(b)[1]

The following is the form of a

*Summons to a Person charged with an Indictable Offence.*

To A. B., of —, [laborer.]

Whereas you have this day been charged before the undersigned, [one] of Her Majesty's justices of the peace in and for the said [county] of —, for that you, on —, at —, [etc., stating shortly the offence.] These are therefore to command you, in Her Majesty's name, to be and appear before me on —, at — o'clock in the forenoon, at —, or

(a) 11 & 12 Vict. c. 42, ss. 1, 9.

(b) 11 & 12 Vict. c. 42, s. 8.

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[2] When the offence is between party and party, and not of an aggravated nature, and the supposed offender is not likely to abscond, a summons is recommended, as the preferable process to procure his attendance, and this seems necessary, where there is no oath of the offence having been committed. 2 T. R. 225; Comb. 359; 2 Barn. 34, 77, 101. But where there is an accusation on oath, of an offence of a higher nature, as treason or felony, it is proper to issue a warrant, in the first instance, if there appear any reasonable ground for the charge. But although there be a positive charge on oath, yet if the justice sees that no credit is to be given to it, he may decline issuing a warrant. Dick. J. 458, 459; Hawk. b. 2, c. 3, s. 18. For petty assaults, though justices are authorized to issue a warrant on complaint, on oath of the accuser, yet a summons is more advisable, as in many cases it is found that the accusation is frivolous, or without sufficient foundation. Dick. J. 458, 559. It is always safest to issue a summons. See 2 Bing. 63. A summons should be signed by the magistrate who issues it, (2 East, 367,) and may either be directed to the party himself, or to a constable requiring him to summon or give notice to the party, whose attendance is required. And it is usual in the summons, not only to fix the day, but a particular hour, for the appearance of the suspected individual; but the accused is bound to wait until the magistrate can attend to the complaint. In general, a summons may be granted without the oath of the complaining party; but in some cases, by particular enactment, an oath is absolutely requisite. If the complaint is on oath, it should be so stated, (Burn, J. Summons and Warrant, I; Bac. Abr. Just. of Peace, c. 5; 2 Barnard. 34, 77, 101; Toone, 41, 246, 400, 449; 2 T. R. 225; sed quere, for this is not necessary in case of warrant,) and a copy of the summons should be served upon, or left at the residence of the accused, (Ibid. ;) but, in a criminal prosecution against the wife, there is no occasion to summon the husband. Burr. 1681.

before such other justice or justices of the peace for the same [county] as may then be there, to answer to the said charge, and to be further dealt with according to law. Herein fail not.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.

J. S. [L. s.]

This summons, it will be perceived, is directed to the party himself, who is charged by the information. It must be served by a constable or other peace officer, either by delivering it to the party personally, or, if he cannot conveniently be met with, by leaving it with some person for him at his last or most usual place of abode.(a)

If the party fail to attend at the time and place mentioned in the summons, then, upon oath made of the service of the summons, the justice may issue his warrant;(b) or if he see any necessity for it, as if he be informed that the party is likely to abscond, or the like, he may issue his warrant before the day of attendance mentioned in the summons.(c)

The following is the form of the

*Warrant where the Summons is disobeyed.*

To the constable of —, and to all other peace officers in the said [county] of —.

Whereas on the — last past, A. B. of —, [laborer,] was charged before the undersigned, [one] of Her Majesty's justices of the peace in and for the said [county] of —, for that [etc., as in the summons:] And whereas [I] then issued [my] summons to the said A. B., commanding him, \*in Her Majesty's name, to be and appear [\*33] before [me] on —, at — o'clock in the forenoon, at —, or before such other justice or justices of the peace for the same [county] as might then be there, to answer to the said charge, and to be further dealt with according to law: and whereas the said A. B. hath neglected to be or appear at the time and place appointed in and by the said summons, although it hath now been proved to me upon oath that the summons was duly served upon the said A. B.: These are therefore to command you, in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before me, or some other of Her Majesty's justices of the peace in and for the said [county,] to answer to the said charge, and to be further dealt with according to law.

(a) 11 & 12 Vict. c. 42, s. 9.

(c) 11 & 12 Vict. c. 42, s. 1.

(b) Id.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the county aforesaid.

J. S. [L. s.][1]

[1] The warrant may be under seal, or not. At common law, it has been said a seal was necessary. 4 Black. Com. 290; 2 Hawk. P. C. c. 13, s. 21; 1 Hale's P. C. 577. But such does not seem to be the case. Willes' R. 411; Bull. N. P. C. 83; 1 Chit. Cr. L. 38. In this state, by the express provision of the statute, the warrant may be either with or without seal. 2 R. S. 706, s. 3.

It should not be general, to apprehend all persons suspected, but should direct the officer to apprehend some particular individual; otherwise it will be void. 4 Black. Com. 291; 1 Hale's P. C. 580; 1 Chit. Cr. L. 41, 42.

A general warrant to apprehend all persons suspected or guilty of a particular crime, without naming or describing any particular person, is illegal and void for uncertainty: for it is not fit that it should be left to the officer to judge of the ground of suspicion. The magistrate is to judge of this: and it is his duty to give certain and precise directions to the person who is to execute the warrant. 1 Nun & Walsh, 190; 3 Burr. 1766.

The name of the person to be apprehended, should be accurately stated, if known; and must not be left in blank, to be filled up afterwards. 1 Chit. Cr. L. 39; 2 Hale's P. C. 114; Fost. 312. If the name inserted be not the right one, or be fictitious, merely, the arrest cannot be justified, even though the person arrested be the one intended; unless, indeed, he is known as well by the name in the warrant as by his true name. 8 East, 328; 6 Cow. 456; 7 id. 332; 3 Wend. 350; 4 id. 555; 9 id. 320; 2 Taunt. R. 400. But if the name of the party be unknown, the warrant may be issued against him by the best description the nature of the case will allow: as—"the body of a man whose name is unknown, but whose person is well known, and who is employed as the driver of cattle, wears a white hat, and has lost his right eye." 1 Chit. Cr. L. 39, 40; 1 Hale's P. C. 577. Yet, a warrant to apprehend "— Hood, [omitting his christian name] of B. in the parish of F., by whatsoever name he may be called or known, the son of Samuel Hood, to answer," &c. was held defective, as omitting the christian name, and assigning no reason for the omission, nor giving any distinguishing particulars of the individual. *Rex v. Hood*, 1 M. & M. 281.

The warrant must recite the accusation made by the complaint. This is required by statute. 2 R. S. 706, s. 3. At common law, it was deemed rather discretionary than necessary to set out the accusation in the warrant, but the practice of doing so has been universally recommended. See 1 Chit. Cr. L. 41; 2 Hale's P. C. 111; 1 id. 580; Cro. Jac. 81; 2 Willes, 158. It is stated in the marginal note to *Atkinson v. Spencer*, (9 Wend. 62,) by way *semble*, "that in no case is it *indispensable* that a warrant issued by a magistrate upon a criminal complaint, should state upon its face, the offence charged." The decision there, however, was made under the act of 1813, for suppressing immorality, and the section in virtue of which the warrant spoken of was issued, is entirely silent respecting its form. See 2 R. L. 1813, 196, s. 9. The court were consequently only called upon to declare and apply the common law, which is undoubtedly as stated. But the language of the revised statutes is, "the justice shall issue his warrant, &c., *reciting the accusation*." In all warrants, therefore, issued for the apprehension of persons under that provision, it is undoubtedly the only safe course; and in the absence of authority, we venture the opinion that it is indispensable to the validity of the warrant, that it should contain a recital of the accusation, or something equivalent to it. Not that the evidence given on the examination need be stated at length; but enough should appear on the face of it to inform the accused of the specific offence with which he stands charged, and the place where it was committed, so that he may know what preparations to make in order to meet it. See 1 Chit. Cr. L. 42; 2 Wils. 158.

That this is the true construction of the statute appears, moreover, we think, by a subsequent provision, which requires, in respect to trials before courts of special sessions, that after the court are organized, "the charge made against the defendant, as stated in the war-

(c) *Warrant, how and where executed.*

The arrest, as we have already seen, is usually made by actually laying hands on the party, and detaining him. But if the officer or

rant of arrest or commitment, shall be distinctly read to such defendant, who shall be required to *plead thereto*." If no charge is stated in the warrant, it would seem that the court, in that case, could not require the defendant to plead, and consequently would not be able to proceed.

In case the warrant is executed out of the county in which the magistrate resides, and where the offender may be bailed by a magistrate other than the one who issued it, if the offence be not punishable with death or imprisonment in the state prison, most clearly the warrant must show the nature of the offence, and the county or place where it was committed. For, in determining whether the offence is bailable, such magistrate is, by the express terms of the statute, to be guided by the offence as "charged in the warrant." 2 R. S. 706, s. 7. And how, except by what shall appear on the face of the warrant, is he to ascertain, under the next section, (Id. s. 8,) "the county where the offence shall be alleged to have been committed," so as to recognize the accused accordingly?

But a warrant need not contain the facts on which the charge made is predicated. It is sufficient, in this respect, if the nature of the offence be clearly specified. 1 Hill, 377.

Where a person was convicted before a court of special sessions, on a complaint for feloniously taking property, and neither the complaint nor warrant of arrest stated the value of the property, nor the place where the offence arose, it was held that the conviction was erroneous. 2 id. 281.

The warrant must be properly directed. It may be directed to the sheriff exclusively, or to the constables of the county or of a particular town. So it may be directed to the sheriff, and at the same time to any constable. 1 East's P. C. 320; 1 Chit. Cr. L. 49. A warrant not directed to any particular person in office, is bad. Addis. 376. It has been decided, however, in Pennsylvania, that a warrant directed by a justice of the peace to "—— constable," is well directed if it is directed by the proper constable of the district. 6 Binn. 123.

It is usual, and perhaps in strictness, the most regular, for a justice of the peace to direct his warrant to a constable instead of the sheriff; for constables are, by the common law, regarded as the proper and known officers of a justice. 1 alk. 381. And Mr. Chitty has laid it down that in England, if an act of parliament direct that a justice shall issue a warrant, and do not state to whom it shall be directed, it must be directed to the constable, and not to the sheriff, unless such power be given by the act. 1 Chit. Cr. L. 38; 2 Id. Raym. 1192; 1 Salk. 381, S. C.

The warrant may, moreover, be directed to some indifferent person, by name, who is no officer; for a justice may authorize any one to be his officer whom he pleases to make such; but no private person can be *compelled* to execute it, and hence it is better, in general, to direct it to an officer. 2 Hawk. P. C. ch. 13, s. 27; 1 Chit. Cr. L. 38; 1 Hale's P. C. 581; 2 id. 110, 111; 1 Salk. 347; 3 Wend. 350.

But in no case is the warrant to be directed to the party interested to execute it; and if the justice should so direct it, he would act contrary to his oath of office. 1 Nun & Walsh, 188.

In England, much nicety was formerly required in the direction of warrants. Until the time of Geo. 4th, constables there could not act for the whole county, but were regarded as mere parish officers, and were confined, in the execution of process, to the particular precincts for which they were respectively appointed. Hence, though a warrant might be directed to the constables of a county, yet no constable could execute it out of his own parish. And if a warrant was directed to a constable of a given parish, by his name of office, he could not execute in out of his parish. But if it were directed to him by his personal name, then he took an authority co-extensive in point of territory with that of him who conferred it. 1 Barn. & Cress. 288; 2 Dow. & Ryl. 444; 1 Salk. 176; 1 Chit. Cr. L. 38; 1 Burns' J.

other person say to him "I arrest you," and the party acquiesce and go with him, this will be a good arrest;(a) although it would be otherwise, if, instead of submitting, he had escaped;(b) and merely showing him the warrant, and his then voluntarily accompanying the officer to a magistrate, would not be in law an arrest.(c) If the party arrested demand to see the warrant, the constable, if he be a known officer, and acting within his precinct, is not in strictness bound to show it to him; but otherwise, where the arrest is by a constable out of his precinct, or by a private person;(d) and where the arrest is without warrant, it is sufficient for a constable to state merely that he arrests the party in the queen's name;(e) but a private person, if required, must, it should seem, state to the party the cause of the arrest. As to breaking open doors,

(a) See *Russen v. Lucas*, 1 Car. & P. 153. Rep. 211.

(b) Id.

(d) 2 Hawk. c. 13, s. 28.

(c) *Arrowsmith v. Le Mesurier*, 2 New

(e) 1 Hale, 589.

105; 2 Ld. Raym. 1296. But in this state it is otherwise; and if a warrant be directed to any constable of the county, it may be executed by a constable of any town in any part of the county. So if it be directed to the constables of a particular town, they are compellable to serve it in any other part of the county. For constables, under our law, can hardly be said to be town officers, except as regards their tenure of office. They have the same right to execute process in every part of the county as in the town in which they were chosen and where they reside. In this respect, their territorial jurisdiction is co-extensive with that of the sheriff. 6 Cowen, 647, 648; 9 Wend. 319, 323.

The warrant of a magistrate is not returnable at any particular time; and it continues in force until it is fully executed and obeyed. Peake's Rep. 234. It does not state any precise time when the party is to be brought before the magistrate for examination. This is never done in any warrant whatever. Nor is it possible to do it without manifest injury to the party; for if a distant or any period should be limited, he must remain in custody during all the time between the issuing of the warrant and the day limited for its return; whereas, he is entitled to be discharged the first day, if he is innocent. Davis' Just. 27. The law has fixed a time, for by statute, the warrant must be made returnable *forthwith*. 2 R. S. 706, s. 3. The officer is therefore bound to carry the party accused before the magistrate *immediately*; and if he delay so to do, it is contrary to the duties of his office. 1 Chit. Cr. L. 40; 8 T. R. 110; Fost. 143; 4 Black. Com. 291, n.

The warrant must command the officer to whom it is directed, to bring the accused before the magistrate who issued it, to be dealt with according to law. 2 R. S. 706, s. 3. If the warrant be to obtain sureties of the peace, the command must be to bring the party before the magistrate who issued it, omitting the words, *to be dealt with according to law*. Id. 704, s. 3. At common law, the warrant might be *general*, to bring the party before any justice of the peace of the county, or *special*, to bring him before the justice who granted it. If it were general, the election of the magistrate before whom the accused should be taken, lay with the arresting officer exclusively. 1 Chit. Cr. L. 39; 2 Hawk. P. C. c. 13, s. 26; 1 Hale's P. C. 582; 2 id. 112; 4 Black. Com. 291.

The warrant must not be left in blank, to be afterwards filled up by the officer or party. And if the name of the party or of the officer be inserted without authority, after the issuing of the warrant, the arrest will be illegal, and the person executing it will not be protected in proceeding under it. 1 Nun & Walsh, 195; 2 Hale, 114. But it may be filled by the justice himself, after he has signed it, before he delivers it over to the officer. 8 T. R. 455; 1 East's P. C. 324, n. (a). Barb. Cr. Law, 524—527.

for the purpose of making an arrest,<sup>(a)</sup> and as to the death of, or injury to either party,—the party arresting or arrested,—in the endeavor to make or avoid the arrest.<sup>(b)</sup>[2]

(a) See *ante*, p. 28.

(b) See *ante*, p. 29.

[2] As to the arrest of persons who have committed crimes in a foreign country: The common law consider crimes as altogether local and cognizable and punishable exclusively in the country where they are committed. Story's Conf. of Laws, 516, *et seq.*; *Commonwealth v. Green*, 17 Mass. 515, 545, 546, *et seq.*; *Wolff v. Oxholm*, 6 Maule and Sel. 99; *Scoville v. Canfield*, 14 Johns. 338, 340; *State v. Knight*, Taylor, 65; Rutherf. Inst. B. 2, ch. 9, s. 12; Marten's Law of Nations, B. 3, c. 3, s. 22, 23, 24, 25. And Lord Coke expressly maintains, that the sovereign is not bound to surrender up fugitive criminals from other countries, who have sought a refuge in his dominions. 3 Co. Inst. 180. See also *Commonwealth v. Deacon*, 10 Serg. & Rawle, 125; 3 Story on Const. 675, 676; *Rex v. Ball*, 1 Amer. Jurist, 297. *Case of Jose Ferreira Dos Santos*, 2 Brock. 493. The constitution of the United States provides that "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." Const. of U. S. Art. 4, sec. 2, s. 2; 3 Story on Const. 675—677. See *State v. Howell*, Charlton, 120.

It appears that jurists have expressed doubts, and the decisions of courts, both in this country and in foreign countries, have been different, whether, upon principles of international law, and independent of treaty or statute, any court of justice is authorized to surrender a fugitive from justice. Kent's Com. 36; 3 Story's Com. on the Const. 675, 676; Story's Com. on the Conflict of Laws, 520—522.

The United States have no jurisdiction in such cases, except under a treaty provision. The duty of surrendering, on due demand from the foreign government, and on due preliminary proof of the crime charged, is part of the common law of the land, founded on the law of nations, as part of that law; and the state executive is to cause that law to be executed, and he is to be assisted by judicial process, if necessary. The statute of New York is decisive evidence of the sense of that state, and it was in every respect an expedient, just and wise provision, in no way repugnant to the constitution or law of the United States, for it was no "agreement or compact with a foreign power." The whole subject is a proper matter of state concern, under the guidance of municipal law, (stipulations in national treaties always excepted,) and if there be no express statutory provision, the exercise of the power must rest upon sound legal discretion, as to the nature of the crime and the sufficiency of the proof. The law of nations is not sufficiently precise to dispense with the exercise of that discretion. 1 Kent's Com. 37.

The subject has been a matter of agreement between the government of the United States and several nations, and provision has been made for the mutual surrender of fugitive criminals. The following article is contained in the treaty between our government and Great Britain, made at Washington, the 9th of August, 1842:

"Art. 10. It is agreed that the United States and her British majesty shall, upon mutual requisition by them, or their ministers, officers or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, committed within the jurisdiction of either, shall seek an asylum, or be found within the territories of the other; provided, that this shall only be done on such evidence of criminality as, according to the law of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person charged, that he may be brought before such judge or other magistrate, respectively, to the



33—4 APPREHENSION OF OFFENDER UNDER A WARRANT.

. If the person against whom the warrant has issued, be not found within the jurisdiction of the justice who issued it, or if he shall escape,

and that the evidence of crime may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of the fugitive. The expenses of such application and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive."

In the circuit court of the United States for the Massachusetts district, it was held by Justice Woodbury, that state magistrates might, but were not compellable by the United States, to entertain jurisdiction of an application under the treaty of extradition with Great Britain, to surrender fugitives from that nation. *The British Prisoners*, 1 Woodbury & Min. C. C. R. 66.

The convention for the surrender of criminals, between the United States of America and his majesty king of the French, concluded at Washington, the 9th of November, 1843, contains these articles:

"Art. 1. It is agreed that the high contracting parties shall, on requisitions made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of crimes enumerated in the next following article, committed within the jurisdiction of the requiring party, shall seek an asylum or shall be found within the territories of the other: Provided, that this shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country, in which the fugitive or the person so accused shall be found, would justify his or her apprehension or commitment for trial, if the crime had been there committed.

"Art. 2. Persons shall be so delivered up who shall be charged, according to the provisions of this convention, with any of the following crimes, to wit: murder, (comprehending the crimes designated in the French penal code by the terms assassination, parricide, infanticide, and poisoning,) or with an attempt to commit murder, or with rape, or with forgery, or with arson, or with embezzlement by public officers, when the same is punishable with infamous punishment.

"Art. 3. On the part of the French government, the surrender shall be made only by authority of the keeper of the seals, or minister of justice; and on the part of the government of the United States, the surrender shall be made only by authority of the executive thereof.

"Art. 4. The expenses of any detention and delivery, effected in virtue of the preceding provisions, shall be borne and defrayed by the government in whose name the requisition shall have been made.

"Art. 5. The provisions of the present convention shall not be applied in any manner to the crimes enumerated in the second article, committed anterior to the date thereof, nor to any crime or offence of a purely political character.

"Art. 6. This convention shall continue in force until it shall be abrogated by the contracting parties, or one of them; but it shall not be abrogated except by mutual consent, unless the party desiring to abrogate it shall give six months' previous notice of his intention to do so.

"*Additional Article.* The crime of robbery, defining the same to be the felonious and forcible taking from the person of another, of goods or money to any value, by violence, or putting him in fear; and the crime of burglary, defining the same to be breaking and entering by night into a mansion-house of another, with intent to commit felony; and the corresponding crimes included under the French law in the words *vol. qualifié crime*, not being embraced in the second article of the convention of extradition, concluded between the United States of America and France, on the 9th of November, 1843; it is agreed by the present article, between the high contracting parties, that persons charged with those crimes shall be respectively delivered up, in conformity with the first article of the said convention; and the present article, when ratified by the parties, shall constitute a part of the said convention, and shall have the same force as if originally inserted in the same."

go into, reside, or be, or be supposed or suspected to be in any place in England or Wales, the constable, on taking the warrant to any justice of the peace there, and making oath as to the handwriting of the justice to the warrant, the justice to whom he shall present it, will back the warrant, that is, he will indorse on it an authority for the constable \*and all other peace officers to execute the warrant [\*34] within his jurisdiction.(a)[1]

(a) 11 & 12 Vict. c. 42, s. 11.

The statutes of New York give facility to the surrender of fugitives, by authorizing the Governor, in his discretion, on requisition from a foreign government, to surrender up fugitives charged with murder, forgery, larceny, or other crimes, which by the laws of the State of New York are punishable with death or imprisonment in the state prison; provided the evidence of criminality is sufficient, by our laws, to detain the party for trial on a like charge. Such a legislative provision was requisite, for the judicial power can do no more than cause the fugitives to be arrested and detained, until sufficient means and opportunity have been afforded, for the discharge of this duty, to the proper organ of communication with the power that makes the demand. 1 Kent's Comm. 36—37.

It is the law and usage of nations to deliver up offenders, charged with felony or other high crimes, and who have fled from the country in which the crime was committed. In New York. 4 Johns. Ch. Rep. 108.

And for that purpose the civil magistrate may commit him for a reasonable time. Therefore where a person charged with having committed a felony in Canada, fled thence to New York, the Chancellor held that, if sufficient evidence of the commission of the crime appeared, he might be detained. Ibid.

A fugitive from a foreign country cannot be arrested in Pennsylvania by a magistrate on a charge, by a private person, of having committed murder in such foreign country, in order to afford an opportunity to the Executive of the United States to deliver him up to the government of that country. Quære, whether the Executive of the United States, or of Pennsylvania, has a right to apply to a magistrate to arrest a fugitive criminal for such a purpose. 10 Sergt. & R. 125.

In the spring of the year 1839, George Holmes, being charged with murder committed in Lower Canada, fled into the State of Vermont, and the Governor-General of Canada demanded his surrender. Application was made by authority, in Vermont, to the President of the United States, who declined to act, through an alleged want of power, and the case came back to the Governor of Vermont; and he decided that it was his duty to surrender the fugitive. The case was afterwards, and before any actual surrender, carried up before Supreme Court of that State, upon *habeas corpus*, and elaborately argued, and the decision of the Governor affirmed. The case was taken up to the Supreme Court of the United States, and the Court ordered that they had not jurisdiction of the case. 1 Kent's Comm. 36, in note.

But a majority of that Court having expressed the opinion that the power to surrender to a foreign State did not reside in any of the States of the Union; that it belonged to the federal government, to be exercised by treaty, or otherwise, as may be deemed most for the public interest in the regulation of our foreign intercourse; the Supreme Court of Vermont afterwards directed the discharge of Holmes. 14 Peters, 574; 1 Wheat. C. C. 434; Lewis' *Crim. Law*, 260.

[1] In most of the states, the practice of backing warrants is regulated by statute.

In Ohio, a common state warrant, authorizes the officer to whom it is directed, to pursue the accused into any county within the state.

In Pennsylvania, the act of Assembly provides that an alderman or justice of the peace of the city or county where the person may be, against whom a warrant may be issued,

The following may be the form of the

*Indorsement in Backing a Warrant.*

— } Whereas proof upon oath hath this day been made before me,  
to wit. } one of her majesty's justices of the peace for the said county  
of —, that the name of J. S., to the within warrant subscribed, is of  
the handwriting of the justice of the peace within mentioned: I do  
therefore hereby authorize W. T., who bringeth to me this warrant, and  
all other persons to whom this warrant was originally directed, or by

shall, upon proof being made upon oath or affirmation of the handwriting of the alderman or justice granting the warrant, endorse his name thereon; upon which the accused may be apprehended and taken before the alderman or justice so endorsing, or to any other alderman or justice of the city or county where the warrant was endorsed, and, if the offence be bailable, he is to bail the party, for his appearance at the next proper court to be held for the city or county where the offence was committed, and to deliver the recognizance and other proceedings to the clerk of the said court; and if the offence be not bailable, or bail be not offered, then the constable is to take the accused before some alderman or justice of the peace of the city or county, where the offence was committed, there to be dealt with according to law. And the act provides that no action or prosecution shall be brought against the alderman or justice of the peace who endorsed the warrant; but that the justice who originally granted it shall be liable at law. See the act of Assembly, of April 16, 1827, in M'Kinney's Digest, title *Justice of the Peace*. Pamph. Laws of Penn., for the year 1827.

In New York, warrants issued by either of the officers who are authorized by statute, (2 R. S. 706, § 1; Id. 704, § 1), to issue warrants of arrest, may be executed in any part of the state; except such as are issued by an assistant justice in New York, or by an alderman or justice of the peace. Warrants issued by any such assistant justice, alderman, or justice cannot be executed out of the county within which they are officers, unless indorsed in the following manner:

If the person against whom any warrant granted by any such alderman or justice shall be issued, shall escape, or be in any other county out of the jurisdiction of such alderman or justice, it shall be the duty of any justice of the peace or other officer above named, within the county where such offender shall be, or shall be suspected to be, upon proof of the handwriting of the magistrate issuing the warrant, to indorse his name on the same; and thereupon the person bringing the warrant, or any other officer to whom it may have been directed, may arrest the offender in the county where the warrant was indorsed. Ibid. §§ 4, 5.

The statute requires that the magistrate, in backing a warrant, shall merely *indorse his name* on the same. Within the strict letter of the statute, therefore, it does not seem necessary that the justice should write any thing upon the warrant except his *name*—not even his addition of justice of the peace. Upon principle, however, and in analogy to the formalities required in issuing original process, an indorsement of this nature, which is to give the process new vitality, ought to show upon its face that it was made by a person having authority to make it; in order to justify the officer in executing it. And for the same reason, as well as for the sake of convenience, and to avoid mistakes, it would doubtless be advisable for the justice to write a short indorsement upon the warrant, reciting that proof had been made to him on oath, that the name of the justice subscribed to the warrant is the handwriting of the person issuing the same; and authorizing the proper officers to execute such warrant within his county.

No magistrate is liable to any indictment, or action, for having indorsed any warrant pursuant to the above provisions of the statute, although it should afterwards appear that such warrant was illegally or improperly issued. 2 R. S. 707, § 6.

whom it may lawfully be executed, and also all other constables and other peace officers of the said [county] of —, to execute the same within the said last-mentioned county; [and the justice, if he think fit, may add] — and to bring the said A. B., if apprehended within the said county, before me, or some other justice or justices of the peace of the same county, to be dealt with according to law.

Given under my hand, this — day of —, 185—.

J. L.

In like manner, English warrants may be backed in Ireland,<sup>(a)</sup> or Scotland, or the Isle of Man,<sup>(b)</sup> or in the Islands of Guernsey, Jersey, Alderney, or Sark.<sup>(c)</sup>

In the case of search warrant, the warrant, after directing the constable to search for the goods in the dwelling-house, &c., of A. B., orders him that if same or any part thereof be found upon such search, to bring the goods so found, as also the body of the said A. B., before the justice issuing the warrant, or some other justice or justices of the peace for the county, to be disposed of and dealt with according to law.<sup>(e)</sup> Accordingly, if the constable find the goods, he arrests the party as directed.<sup>[2]</sup>

(a) 11 & 12 Vict. c. 42, s. 12.

(b) *Id.* s. 14.

(c) *Id.* s. 13.

(d) 11 & 12 Vict. c. 42, s. 13: and 14 & 15 Vict. c. 55, s. 18.

(e) See 2 Arch. J. P. 445, 446.

[2] For form of search warrant, see Barb. Cr. Law, page 651. The following observations, though somewhat extended, seem to be authorized by the importance of the subject:

Formerly, according to Lord Coke, (4 Inst. 176,) such warrants were contrary to law, and Lord Camden (11 State Tr. 321; Hawk. b. 2, c. 13, s. 17, n. 6) said, that they had crept into the law, by imperceptible practice; but Lord Hale clearly establishes their legality, on the ground that without them, felons would frequently escape detection, (2 Hale, 113; 2 Wils. 149, 291; 11 Harg. State Tr. 321; 1 D. & R. 97; Burn, J. and Williams, J. Search Warrant; Dick. J. Warrant, I.) and by the statute 22 Geo. 3, c. 58, s. 2, (see also 30 Geo. 2, c. 24, s. 9.) it is made lawful for any one justice of the peace, upon complaint made before him, upon oath, that there is reason to suspect that stolen goods are knowingly concealed in any dwelling house, or other place, by warrant under his hand and seal, to cause every such place to be searched in the *day-time*; and the person knowingly concealing the stolen goods, or in whose custody the same shall be found, being privy thereto, shall be deemed guilty of a misdemeanor, and shall be brought before any justice of the peace for the district, and made amenable to answer the same by like warrant of any such justice.

But a search warrant for libels and other papers of a suspected party is illegal, (2 Wils. 752; 11 St. Tr. 313, 321); for, as observed by Lord Camden (11 State Tr. 321), the difference between seizing stolen goods and private papers of the party accused is apparent. In the one, I am permitted to seize my own goods which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the party's own property would be seized before, and without conviction, and he have no power to reclaim the goods, even after his innocence is cleared by acquittal.

The search warrant is not to be granted without *oath*, made before the justice, that the party complaining has probable cause to suspect his property has been stolen, or is concealed in such a place, and showing his reasons for such suspicion. 2 Hale, 113, 150; 2

When the party is arrested, the constable should take him before a justice of the peace, as soon as it is possible for him to do so,<sup>(a)</sup> and in

(a) See Wright & Court, 4 B. & C. 596.

Wils. 283, 291, 2; 11 State Tr. 321. The oath need not positively and directly aver that the property has been stolen. 1 D. & R. 97. The *warrant* should direct the search to be made in the day-time (2 Hale, 113, 150; 22 G. 3, c. 58, s. 1.) though it is said that where there is more than probable suspicion, the process may be executed in the night. Shaw, J. Barl, J. Burn, J. Williams, J. Search Warrant. It ought to be directed to a constable or other public officer, and not to a private person, though it is fit that the party complaining should be present, and assisting, because he will be able to identify the property he has lost. 2 Hale, 150; 11 State Tr. 321. It should also command, that the goods found, together with the party in whose custody they are taken, be brought before some justice of the peace, to the end that, upon further examination of the fact, the goods and the prisoner may be disposed of as the law directs. 2 Hale, 150, 151.

But it is not necessary for an officer in order to justify the execution of a search warrant from a magistrate having jurisdiction over the subject, to show that it was founded on a complaint under oath, provided the warrant itself contains an allegation of the fact. *Sanford v. Nichols*, 13 Mass. 236.

NEW YORK.—A search warrant issued by a justice of the peace, reciting information on oath, that goods described therein had been stolen by A. and B. and were concealed in the house of C. and commanding the officer to enter the house in the day-time and search for the articles stolen, and to bring them with C. or the person in whose custody the goods should be found, before the justice, is a legal and valid warrant; and the officer in executing it, if the door be shut, may, after demand and refusal to open it, break open the outer or other door of the house. *Bell v. Clapp*, 10 Johns. 263. See 2 N. Y. Rev. Stat. 746. As to the sufficiency and requisites of search warrants, see further in *Grumon v. Raymond*, 1 Conn. 40. *Sanford v. Nichols*, 13 Mass. 286. If a search warrant, and the complaint on which it is issued on the same paper, and the things to be searched for be properly designated and described in the complaint, and the warrant direct the officer to search for the things "mentioned in the above complaint," the process is legal and sufficient, without any farther designation or description of the things in the warrant itself. *Commonwealth v. Dana*, 2 Metcalf, 329.

The house or place where lottery tickets, &c. are believed to be concealed, is sufficiently designated and described in a search warrant, according to the provisions of Mass. Rev. Stat. ch. 142, § 3, by denominating it the office of D., "and truly stating the number thereof and the street, in which it is situate, although A. occupies the office with D." *Commonwealth v. Dana*, 2 Metcalf, 329. If the house be described as the house of a company, such description will not authorize the searching of the house of an individual member of the company. *Sanford v. Nichols*, 13 Mass. 286. And if goods be described in general terms, as goods, wares, and merchandize, without any specification of their character, quality, number or weight or any other circumstance tending to distinguish them, it is not such a particular description as the constitution requires. *Sanford v. Nichols*, 13 Mass. 286.

The revised statutes of New York, authorize a magistrate to grant a search warrant only in the case of property capable of being "stolen or embezzled." 2 N. Y. Rev. Stat. 746.

In Pennsylvania, the issuing of a warrant to search for stolen goods is recognized, and the manner of disposing of goods found thereon, and supposed to be stolen, regulated by the Act of Assembly of the 23d of Sept. 1791. 3 Smith's Laws of Penn. p. 120; M'Kinney's Digest, title "Robbery and Larceny."

The act provides that where there is probable cause, supported by oath or affirmation, to suspect that other goods, besides those described in the warrant, which may be discovered on the search thereupon, are stolen, the magistrate may direct the said goods to be seized, and secure the same in his own custody, unless the person in whose possession they were

the mean time he should keep or lodge him in safe custody.(a)[3] And the same, where the arrest is by a private person under a warrant.

(a) 2 Hale, 120.

found shall give security to produce the same at the time of his trial; that the magistrate shall cause the same to be publicly advertised, and shall return an inventory of them into the proper court; and directs in what manner they shall be finally disposed of. The Act is given at length, under the title "Robbery and Larceny," head "Pennsylvania," in Part II, of M'Kinney's Am. Mag.

In Pennsylvania, by the above act of assembly, where a magistrate issues a search warrant, to apprehend a person charged with robbery, burglary or larceny, and to seize stolen goods, the goods described may be searched for, and seized, "in the custody or possession of such person, or in the custody or possession of any other person or persons for his use."

Independently of any act of assembly, it seems, that a search warrant will not authorize the officer to search for or seize the goods described, in the possession of *another* person than the accused, unless such possession be for his use, or by a person who conceals them, or who

[3] When the officer has made his arrest, he is, as soon as is possible, to bring the party to the jail or to the justice, according to the import of the warrant; and if he be guilty of unnecessary delay, it is a breach of duty. Fortes. 143; 2 Hale, 119. But if the time be unseasonable, as in or near the night, whereby he cannot attend the justice, or if there be danger of a rescue, or the party be ill, and unable at present to be brought, he may, as the case shall require, secure him in the stocks, or in case the quality of the prisoner, or his indisposition so require, detain him in a house till the next day, or until it may be reasonable to bring him. 2 Hale, 119, 120, 95, 96. It is said that where an arrest has been made without warrant, the constable may, in some cases, take the party's word for his appearance before a magistrate. 1 Esp. Rep. 295; 2 New Rep. 211. And this is usually done where the charge is for an assault of a trifling nature, and the defendant is of good repute, and there is no probability of his absconding. But if a constable, having arrested a party under a warrant, suffer him to go at large, upon his promise to come again and find sureties, it has been doubted whether he can afterwards be arrested upon the same process, though it should seem, that as the public are interested in the offender's being brought to justice, there is no well founded objection to such second arrest. Hawk. b. 2, c. 13, s. 9, c. 19, s. 12; Bac. Ab. Constable, D.; Dick. J. Arrest, III. and see Peake's Rep. 234; Gow's Rep. C. P. 99; 2 B. & C. 699; 4 B. & C. 596. And it is certain, that if the escape be made without the concurrence of the officer, the defendant may be retaken as often as he flies, upon fresh suit, although he were out of view, or had reached another county or district. Dalt. J. c. 169; Dick. J. Arrest, III. It is also clear, that if, after a departure by the permission of the constable, the party return into his custody, he may lawfully detain him, in pursuance of his original warrant. Hawk. b. 2, c. 13; Dick. Just. Arrest, III. A jailer will be protected in receiving a party into custody, although it appear that he was wrongfully taken under the warrant, because it is the duty of a jailer to receive persons brought by a proper officer without inquiring into the legality of the arrest: and if the officer has taken the wrong party, he alone can be sued. Sir T. Jones, 214; Cowp. 279; 1 T. R. 62, 63; 3 Campb. 420; Dougl. 359, 360; Accord; 3 Campb. 35, cont. If the warrant be to bring the party before the justice who issued it, then the officer is bound to bring him before the same justice, but if the warrant be to bring him before any justice, then the power of election is vested in the officer, and not in the prisoner, and the former may proceed to any magistrate who has jurisdiction within the county. 5 Co. 59, b; 1 Hale, 582; 2 Hale, 112. And it is even said, that where a warrant directs a person to be brought before a particular magistrate, he may be taken before another, especially if nearer. Fortes. 143. When the prisoner is brought before the justice, he is still considered to be in the custody of the officer, until he has been either discharged, bailed, or committed to prison. 2 Hale, 120.

But if the arrest be by a private person without warrant, he may deliver the party to a constable, or he may take him before a justice of the peace.<sup>(a)</sup>

(a) 1 Hale, 589.

received them, knowing them to be stolen. And a warrant cannot be issued to search for, and seize, goods charged to be stolen, in the possession of a person who obtained them innocently, without any knowledge of their being stolen. A sale, however, of stolen goods does not change the property in them, and they may be recovered of the purchaser by the owner in a civil suit.

Where a magistrate, before committing a person for forgery, took from his person a sum of money in good notes, which was not asserted to be the property of any one but the prisoner, the court on motion made an order on the magistrate to restore the money to the prisoner. 4 Wash. C. C. Rep. 710; Whart. Dig. title Crim. Law.

The constitution of the United States, (4th art. of the Amend.) provides, that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized. See 3 Story on the Constit. 748, 750; *Sailly v. Smith*, 11 Johns, 500; *Ex parte Burford*, 3 Cranch, 447.

By the laws of the United States every custom house officer, who shall have cause to suspect the concealment of any goods subject to duties in any particular dwelling-house, building, or other place, shall upon application to a justice of the peace, be entitled to a warrant to enter such house or place *in the day time only*, to search for such goods, and if such shall be found, to seize and secure the same for trial. Laws of the U. S. 1799, § 68. See 7 Dane Ab. 244, 245.

MASSACHUSETTS.—See Constit. Pt. 1, art. 14; Rev. Stat. pages 774, 775.

Under a warrant in the usual form, or a complaint for larceny, the officer is authorized to break and enter the shop of the accused person and seize the chattel alleged to have been stolen. *Banks v. Farwell*, 21 Pick. 156.

If a precept should direct an officer to break and enter a dwelling-house, without stating any sufficient cause, he could not justify such act under such a precept. *Sandford v. Nichols*, 13 Mass. 286. Still, although, the warrant, in such a case, by reason of its irregularity, be insufficient to justify him, he will nevertheless be permitted to show in mitigation of damages, that no goods were taken, except those, which were proper objects of the search, and that no violence or injury was done but what was necessary to obtain possession of the goods. *Sandford v. Nichols*, 13 Mass. 286.

Trespass will not lie against a party, who has procured a search warrant to search for stolen goods, if the warrant be duly issued and regularly executed. *Beaty v. Perkins*, 6 Wendell, 382. But it seems, that case will lie if the party procuring the warrant has no ground for his proceedings and is actuated by malicious motives. *Beaty v. Perkins*, 6 Wendell, 382. See *Phummer v. Dennett*, 6 Greenl. 421; *Luddington v. Peck*, 2 Conn. 700; *Bell v. Clapp*, 10 John. 263; *Hayden v. Shed*, 11 Mass. 500; *Owens v. Starr*, 2 Litt. 234; *Tanner v. Walker*, 3 Gill & John. 377; *M'Hugh v. Pundt*, 1 Bailey, 441; *Watson v. Watson*, 9 Conn. 141; *Morris v. Scott*, 21 Wendell, 281.

As general warrants, to arrest all persons suspected or guilty of a particular crime, without naming or describing the particular person to be arrested, are illegal, so also general warrants to search all suspected places for stolen goods, are illegal; and even the officer acting under color of their authority will not be justified in executing them. 1 Nun & Walsh, 255. Such warrants are held to be illegal, at common law, (and much more so, under the statute,) because it would be extremely dangerous to leave it to the discretion of a common officer to arrest what persons, or search what houses, he might think fit. The warrant must therefore specify the place to be searched, as well as the person to be apprehended, unless it

And the party arrested should not be treated with any unnecessary harshness, beyond what is actually necessary for his safe custody; and

be founded upon some statute which authorizes a different form. 1 Nun & Walsh, 255; 2 Hale 150; 2 Hawk. ch. 13, §§ 10, 17.

In executing a search warrant the officer must be careful strictly to pursue its directions. As the warrant should distinctly specify the goods to be seized, the officer ought not to take any goods but those specified. Where therefore a warrant was granted expressly to seize stolen sugar, and the officer seized tea, he was held to have exceeded his authority, and to be liable to the party aggrieved, for a trespass. 2 Bos. & Pul. 158; 3 Esp. Rep. 96. So also, where the constable, having a warrant to search for specific articles alleged to have been stolen, found and took away those and certain others supposed to be also stolen, but not mentioned in the warrant, and not likely to be of use in substantiating the charge of stealing the goods that were specified, it was held that the constable was a trespasser. *Crozier v. Cundy*, 9 Dow. & Ry. 224; 6 Barn. & Cress. 332. In this case, however, Abbot, Ch. J. said, "If those articles had been likely to furnish evidence of the identity of the articles stolen, and mentioned in the warrant, there might have been reasonable ground for seizing them, although not specified in the warrant." And he added that he expressed himself thus, to prevent the supposition that a constable seizing articles not mentioned in the warrant, is necessarily a trespasser. 6 Barn. & Cress. 333. So also the houses or places to be searched must be specified with sufficient certainty; and a warrant directing a search in a particular house will not justify a search in another. 1 Nun & Walsh, 258; 2 Hale, 150; 2 Hawk. ch. 13, §§ 10, 17.

If admission be refused, after the usual demand, and notification of his business, by the officer or person executing the warrant, the outer door of the house may be broken open; and so may boxes, after the keys have been demanded and refused. *Ibid.* 2 Hale, 151; 3 Bos. & Pul. 258. And though the goods sought be not found there, the officer will not be responsible if he has acted duly in obedience to the warrant. 3 Esp. Rep. 135; 2 Bos. & Pul. 160; 1 T. R. 535; 1 Chit. Cr. L. 57, 66.

It is to be observed that in this, as in all other cases in which doors may be broken open, there should be a previous notification of the business, accompanied by a demand to enter, on the one hand, and a refusal, on the other, before the officer proceeds to that extremity. 1 Nun & Walsh, 205; *Fost* 320; 2 Hale, 193; 1 Russ. Cr. L. 519. But no precise form of words is required to be used in giving notice. It is sufficient if the party be informed, by the officer, of his business and authority, and apprised that he comes not as a trespasser, but claiming to act under a proper authority. *Fost*. 137.

The constable is to keep the search warrant in his possession; and where officers with a search warrant, at the desire of the party whose premises were searched, handed it to him for perusal, and he refused to return it, it was held that they had a right to take it from him, and even to coerce his person to obtain possession of it, provided they did not use unnecessary violence. 3 Car. & P. 31.

If, on bringing the goods, and the person in whose custody they were found, before the justice, it appears that the goods were not stolen, they are to be restored to the possessor. 1 Nun & Walsh, 260. If it appears that they *were* stolen, they are to be delivered by the justice to the owner, on his paying the expenses. 2 R. S. 74, s. 32.

The party who had the custody of the goods is to be discharged if they were not stolen. If they were stolen, not by him, but by another person, who sold or delivered them to him, and it appears that he was ignorant of the mode in which they were procured, he may be discharged, but bound over to give evidence as a witness against the person suspected of having stolen them. If it appears that he knew them to be stolen, then he should be either committed as for a felony, if the original offence of stealing or taking such goods appears to have been a felony, (2 Hale, 151, 152;) or bailed, and bound over to answer the charge if the case should so require; and so if the original offence were a misdemeanor; or proceeded against summarily, if the original offence be punishable upon summary conviction. 1 Nun. & Walsh, 261.



therefore it has been holden, that a constable has no right to handcuff a person whom he has apprehended on a suspicion of felony, [\*35] unless he have attempted to escape, or it \*be necessary to prevent him from escaping.(a)[1]

(d) *Warrant for offences at sea or abroad.*

In all cases of "indictable crimes or offences of any kind or nature whatsoever, committed on the high seas, or in any creek, haven, or other place in which the Admiralty of England have or claim to have jurisdiction,—and in all cases of crimes or offences committed on land beyond the seas, for which an indictment may legally be preferred in any place within England or Wales," any one or more of Her Majesty's justices of the peace for the county, &c., in which the offender shall reside or be, or shall be supposed or suspected to reside or be, may issue a warrant to apprehend him.(b) The warrant is the same as the form,(c) except that in describing an offence upon the high seas, the warrant states it to have been committed "*on the high seas, out of the body of any county of this realm, and within the jurisdiction of the Admiralty of England;*" and in describing an offence committed abroad, for which the offenders may be indicted in this country, the warrant states it to have been committed "*on land out of the United Kingdom, to wit, at —, in the Kingdom of —,*" or "*at —, in the East Indies,*" or "*in the island of —, in the West Indies,*" as the case may be.(d) The warrant is executed as in ordinary cases.

(a) *Wright v. Court*, *supra*.  
(b) 11 & 12 Vict. c. 42, s. 2.

(c) *Ante*, p. 31.  
(d) *Id.* sched. E.

[1] The prisoner, or person accused, should not be subjected to unnecessary personal restraint. He is to be in the charge of officer or officers who made the arrest; but while his escape is prevented, and his custody secured, he is to be free to speak and act in all matters relative to his answer and defence. Torture, or force of any kind, applied to the person of a defendant, for the purpose of extorting or inducing a confession, is abhorrent to the law.

The magistrate may order that the defendant's person or clothes, or trunk, be searched for the goods alleged to be stolen; or for coin, bank notes, papers, and the like, charged to have been forged or counterfeited by him; and such goods or articles thus found, may be taken from him and kept by the magistrate to be used in evidence on the trial in court, and subsequently disposed of as the court may direct. Similar search may be made for weapons or instruments by which a murder, manslaughter, or aggravated assault and battery was committed; or for implements or utensils by which a burglary, robbery, forgery, or other offence was perpetrated. It seems that search may thus be made for any articles or things connected with the commission of the offence charged, and furnishing evidence of it.

If a constable has taken possession of the property found on the person of the prisoner, the court, on application, will order to be restored to him that portion of it which is not required as means of proof at the trial, or which does not fairly appear to be the produce of the crime with which he stands charged. 2 Taylor on Ev. p. 812; M'Kinney's Am. Mag. p. 245.

## SECTION III.

## THE EXAMINATION AND COMMITMENT, &amp;c.[2]

1. *In cases where the arrest is in the same county, &c., where the offence was committed.*

(a) *Taking the depositions.*

By stat. 11 & 12 Vict. c. 42, s. 17, in all cases where any person shall appear or be brought before any justice of the peace, charged with any indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons, or have been apprehended with or without warrant, or be in custody for the same or any other offence, —such justice, before he shall commit such accused person for trial, or before he shall admit him to bail, shall, in the presence of such accused person (who shall be at liberty to put questions to any witness produced against him,) take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing; and such depositions shall be read over to and signed by the witness, and shall be signed also by \*the justice; and before each witness is examined, the justice shall administer to him the usual oath or affirmation.[1]

[2] There are statutes in most of the states, for the examination and commitment of prisoners by magistrates. See N. Y. Rev. Stat. part IV., c. 2, title 2, s. 14, 15, 16, 26; Laws of New Jersey, Elmer's ed., p. 450; Statutes of Ohio, 35 V. stat. 87, s. 1; Laws of Michigan Territory, p. 215; Laws of Tennessee, Carr. & Nich. Dig. p. 426; North Carolina Rev. Stat. c. 35, s. 1; Laws of Mississippi, Alden & Van Hosen's Dig., c. 70, s. 5, p. 532; Laws of Alabama, Toulman's Dig., tit. 17, c. 3, s. 2, p. 219; Laws of Delaware, Rev. Code of 1829, p. 63; Laws of South Carolina, Brevard's ed., vol. 1, p. 460; Laws of Missouri, Revision of 1835, p. 476; Massachusetts Rev. Stat. c. 85, s. 25.

[1] When the person accused and the witnesses to be examined are duly brought before the magistrate, and everything is in readiness for proceeding, the magistrate is to examine the complainant and the witnesses produced in support of the prosecution, on oath, in the presence of the prisoner, in regard to the offence charged, and in regard to any other matters connected with such charge, which such magistrate may deem pertinent. 1 Nun & Walsh, 305; 3 Hill, 339.

There is no law requiring these examinations to be *public*. The witnesses must be examined in the presence of the prisoner, and he has a right to have the assistance of counsel; but whenever the magistrate thinks it expedient he may doubtless exclude spectators from the room. For in conducting these examinations he acts ministerially, and not judicially. *Id.* 76, 77, 302. It may sometimes be necessary, in order to prevent the imprudent disclosure of evidence, or for other reasons, to conduct the proceedings in private; as in the instance of offences committed by numbers in conjunction, when it is expedient to examine each separately, it may be equally expedient that no one of the confederates shall be informed of

The following may be the form of the

*Depositions.*

——— } The examination of C. D. of —— [*farmer*] and E. F.  
to wit } of —— [*laborer,*] taken on [*oath*] this —— day of ——, in

what has been disclosed during the examination of any other, which object might be frustrated if a stranger had a right to be present, who might convey to the rest information of what passed. 1 Dow. & Ry. 178, 187; 1 Barn. & Cress. 37; 2 D. & R. 86.

If the original complaint and evidence taken before the warrant was issued, contain a complete case, it is the practice, in England, for the magistrate after re-swearing the accuser and witnesses, to read over their former depositions, in their presence and that of the prisoner, and then to state to the latter that he is at liberty to ask the prosecutor and witnesses any questions respecting the charge against him; and if he declines so doing, the examinations are not again gone over, but a fresh jurat is made to them; and this even before a fresh magistrate. The papers are then to be signed by the parties deposing and by the justice by whom they are taken. 1 Chit. Cr. Law, 80; 1 Leach, 458; 2 id. 854.

A fresh jurat is necessary, though nothing additional be elicited from the witnesses, by the prisoner's questions, or though the prisoner declines to examine them, in order that the additional averments of the identity of the prisoner, and that the complaint has been sworn to in his presence and hearing, shall be prefixed or subjoined. 1 Nun & Walsh, 305.

The complainant and his witnesses are to be sworn or re-sworn, and their evidence given in the presence of the accused, in order that he may have the advantage of cross-examining them, and of testing their credit or contradicting their testimony. Id. 306; 2 Leach, 561; 2 Russ. Cr. L. 660. And if any part of the deposition has been taken in the absence of the prisoner, it will not be sufficient merely to read over such part in the presence of the prisoner and the witness; but it is also necessary that the witness shall be re-sworn to the truth of that statement, in the prisoner's presence, and an opportunity given to the latter of cross-examining him upon oath; otherwise such deposition will not afterwards be admissible in evidence. Ibid.; Phil. Ev. 569; 2 Russ. Cr. L. 660; 3 Hill, 289.

Before the statements of the prosecutor and his witnesses are reduced to writing, it is advisable for the magistrate to hear their narrative in the common way of relating events; by which means he will be put in possession of all the circumstances of the case, and will often be enabled to discover, by the manner of the parties, whether they are speaking truth or combining in the assertion of falsehood. Dick. J. Examination. Swearing witnesses after examination taken, is improper and censurable. 4 Dowl. & Ry. 734; 3 Hill, 289. The informant and his witnesses are to be sworn, in one of the methods pointed out by the statute. 2 R. S. 407, 408. An oath in some form or other is absolutely necessary, or the examinations of the informant and his witnesses can not, under any circumstances, be received in evidence. 1 Chit. Cr. L. 78. And if a magistrate were to commit, without an oath made before him, he would be liable to an action if the prisoner were acquitted. 1 Hale's P. C. 586; Dalt. J. c. 164, § 8; 1 Leach, 202, 309.

The next duty of the magistrate is to reduce the examination of each of the deponents, into writing, in a plain and intelligible manner, and as nearly as possible in the language in which the first narration was delivered. 1 Leach, 202, 309; Dick. J. Examination, III; 3 Hill, 289. All the facts and circumstances should be inserted which are necessary to prove the felony; and the *corpus delicti* should appear on the face of the depositions; for if this be properly done, though the commitment should be informal, the prisoner will not be discharged on the ground of the defect in the mittimus. 1 Chit. Cr. L. 79; 3 East's R. 157.

It is absolutely necessary that the testimony of the accuser and his witnesses should be taken in writing, or it will be of no effect. Id. ib.; 1 Leach, 202, 309; Roscoe's Cr. Ev. 52; 1 Moo. C. C. 338; 8 Wend. 598.

All this must be done in the presence of the party accused, in order that he may have the

the year of our Lord —, at —, in the [county] aforesaid, before the undersigned, [one] of Her Majesty's justices of the peace for the said [county,] in the presence and hearing of A. B., who is charged this day before [me,] for that he the said A. B. on —, at — [ &c. describing the offence as in a warrant of commitment.]

This deponent C. D., on his [oath,] saith as follows: [ &c. stating the deposition of the witness as nearly as possible in the words he uses. When his deposition is complete let him sign it.]

And this deponent E. F., upon his oath, saith as follows, [ &c.]

The above depositions of C. D. and E. F. were taken and [sworn] before me at —, on the day and year first above mentioned.

J. S.

(b) Remand.

If, from the absence of witnesses, or from any other reasonable cause, it shall become necessary or advisable to defer the examination or further examination of the witnesses for any time, the justice before whom the accused shall appear or be brought, may by his warrant, from time to time remand the party accused for such time as by such justice in his discretion shall be deemed reasonable, not exceeding eight clear days, to the common jail or house of correction, or other prison, lock-up house or place of security in the county, riding, division, liberty, city, borough, or place for which such justice shall then be acting; or if the remand be for a time not exceeding three clear days, it shall be lawful for the justice verbally to order the constable or other person in whose custody such party accused may then be, or any other constable or person to be named by the said justice in that behalf, to continue to keep such party accused in his custody, and to bring him before the same or such other justice or justices as shall be there acting at the time ap-

advantage of cross-examining the witnesses, and contradicting their testimony, or the examinations cannot be received in evidence as if taken in pursuance of the statute. 1 Leach, 202, 309, 500, 503; 5 Mod. 263, 164.

The statute does not confine the magistrate, in the examination, to questions respecting the offence charged; but he may examine the complainant and his witnesses "in regard to any other matters connected with such charge, which such magistrate may deem pertinent." It is desirable, on many accounts, that the examination of the prosecutor and his witnesses should be of the most searching character; and as the language of the statute is broad enough to give the magistrate ample authority, he ought to continue his inquiries as long as anything of importance can be elicited from the witnesses respecting the guilt of the prisoner, or which may tend to implicate accomplices, or others not yet arrested. This is also important, in order that the witnesses may be tied down to their first narration, and not be left open to those impressions either of pity or revenge, which may affect them between the examination and trial of the accused. 1 Chit. Cr. L. 79.

The magistrate is not to take and certify merely the testimony adduced in support of the charge, but he ought also to return the evidence which tends in favor of the prisoner. Dalt. J. c. 165. See Waterman's Criminal Law, tit. Examination and Commitment.

pointed for continuing such examination : it is provided, however, that the justice may order the accused to be brought before him at any time before the expiration of the time for which such accused party [\*37] shall be so remanded, and the jailer or officer in whose \*custody he shall then be, shall duly obey such order.(a)[1]

(a) 11 & 12 Vict. c. 42, s. 21.

[1] It seems to have been formerly supposed that the law intends three days to be sufficient for the examination, and that a magistrate could not justify the detainer of a party sixteen or twenty days for that purpose. See *Cro. Eliz.* 829; 1 *Hale*, 585, 586; 2 *id.* 120; *Hawk. b.* 2. ch. 16, § 12. But the true and proper course of duty, in these cases, appears to be that pointed out by Mr. Chitty, viz. that the time for the full investigation of the case and final decision of the magistrate, should depend upon the circumstances of each case, and that, as a general rule, he ought not to be restricted to any particular time. For either the prisoner or the accuser may be unable to bring forward his evidence immediately; and the compelling of the magistrate to discharge or commit within a particular time, might be prejudicial to the purposes of justice. 1 *Chit. Cr. L.* 73; 5 *Man. & Ryl.* 58, per Bailey, J. Notwithstanding the ancient opinions to the contrary, it is said to be the present practice in some of the best regulated police offices in England, to detain prisoners much more than twenty days between the time of their being first brought before a justice and their commitment for trial, and to bring them up for examination on several different days during the interval. *Id. ib.*; *Dick. J. Examination*, III.; 3 *Dow's R.* 160, 183, 186.

But it has been decided recently that a warrant of commitment for re-examination for an unreasonable time, as for fourteen days, is wholly void, and that trespass lies against the committing magistrate though he acted without any indirect or improper motive. 5 *Man. & Ryl.* 53; 10 *Barn. & Cr.* 28, S. C. The question what is a reasonable time, is a mixed question of law and fact, depending upon the circumstances of the case; and the judgment of the committing magistrate is not conclusive of that question. *Id.* 59, per Bayley, J. It will be for the jury, if an action is brought against the magistrate, to say what were the facts, and the judge will direct them, upon those facts, whether the time was reasonable or not, as matter of law. What is reasonable, does not rest upon the discretion of the magistrate. There may be cases where three days might not be a reasonable time, and yet there might be cases in which three months might be reasonable. It must depend on the probability of obtaining further evidence. If a material witness had gone on a voyage, the commitment might be for a longer time than if all the witnesses were on the spot. 4 *Car. & Payne*, 134, and note a; 5 *Man. & Ryl.* 60, per Parke, J. The reason of the magistrate's liability in case he commit the party for too long a period is, that as it is his duty to commit only for a reasonable time, if he commits for an unreasonable time, he thereby does an act which he is not authorized by law to do, and the commitment is, therefore, wholly void. 10 *Barn. & Cress.* 38. Fifteen days is an unreasonable time, unless there be circumstances to account for it. And these circumstances it will be incumbent on the magistrate to show. The fact that a letter addressed to the prisoner, (but which was intercepted and was never in his hands,) mentioned the prisoner as a party in the felony, and stated that the writer of it would write again in a fortnight, was held not sufficient to warrant such a commitment. 4 *Car. & Payne*, 134.

As to the manner in which the prisoner is to be detained and kept for examination, it was formerly held that a magistrate ought not to detain such a prisoner in his own house, but should send him to the common jail of the county; and the reason given for this is, that otherwise, when the justices come to deliver the jail, he is not in the jail, and cannot be delivered, and, therefore, may be detained longer than is reasonable. *Cro. Eliz.* 830. This reason seems to be unsatisfactory; for it is to be presumed that the magistrate will complete the examination as soon as the circumstances of the case, and his duty, will per-

The following may be the form of the

*Warrant remanding a Prisoner.*

To the constable of — and to the [keeper of the house of correction] at —, in the said [county] of —.

Whereas A. B. was this day charged before the undersigned, [one] of Her Majesty's justices of the peace in and for the said [county] of —, for that [ &c., as in the warrant to apprehend :] and it appears to me to be necessary to remand the said A. B.: These are therefore to command you the said constable, in Her Majesty's name, forthwith to convey the said A. B. to the [house of correction] at —, in the said [county,] and there deliver him to the keeper thereof, together with this precept; and I hereby command you the said keeper to receive the said A. B. into your custody in the said house of correction, and there safely keep him until the — day of — instant, when I hereby command you to have him at —, at — o'clock in the forenoon of the same day, before me or before such other justice or justices of the peace for the said [county] as may then be there, to answer further to the said charge, and to be further dealt with according to law, unless you shall be otherwise ordered in the meantime.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.

J. S. [L. S.]

mit. If this be done before the justices come to deliver the jail, and the justice orders the prisoner to be committed for trial, he will, in that case, as a matter of course, commit him to the county jail, where the justices who come to deliver it, will find him. If the examination cannot be completed before the justices come for that purpose, the magistrate should not be compelled to proceed in the examination, on that account, because his duty and the circumstances of the prisoner require it. And no other inconvenience can result from allowing the magistrate a reasonable time to complete his examination than that the prisoner will be held to appear and answer, at a subsequent term of the court, in case the magistrate finally decides not to discharge him. And there may be cases in which a magistrate would be extremely unwilling to commit a prisoner to the county jail during the interval of his examination, when he might be kept in safe custody, either in his own house or elsewhere. See Davis' Just. 57. It is probably for these reasons that Lord Hale has laid down a different rule, viz. that because it may be unreasonable to take these examinations presently, or possibly it may take longer time, the prisoner may be continued in the custody of the officer, or may be detained in the justice's house, or committed to some near safe place of custody, till the examination can be taken. 2 Hale's P. C. 120.

When the examination takes place near the place where the jail is situated, it is convenient as well as proper, to commit the prisoner to jail by a written warrant. But when the jail is at an inconvenient distance from the place of examination, the prisoner may be ordered into and kept in the custody of the officer, in any other safe and convenient place. Davis' Just. 58.

When a prisoner has been remanded for further examination, the proceedings, on his being again brought up, should be commenced by reading over all the depositions and examinations before taken, and the additional evidence be then gone into, with the same formalities. 1 Nun & Walsh, 325; Stone's Pet. Sess. 208.

Or, instead of detaining the accused party in custody during the period for which he will be so remanded, any one justice of the peace before whom such accused party shall so appear or be brought as aforesaid may discharge him, upon his entering into a recognizance, with or without a surety or sureties, at the discretion of such justice, conditioned for his appearance at the time and place appointed for the continuance of such examination; and if such accused party shall not afterwards appear at the time and place mentioned in such recognizance, then the said justice, or any other justice of the peace who may then and there be present, upon certifying on the back of the recognizance the non-appearance of such accused party, may transmit such recognizance to the clerk of the peace of the county, riding, division, liberty, city, borough, or place within which such recognizance shall have been taken, to be proceeded upon in like manner as other recognizances, [\*38] and such certificate shall be deemed sufficient *prima facie* \*evidence of such non-appearance of the said accused party.(a)[1]

The following may be the form of the

*Recognizance.*

Be it remembered, that on the — day of —, in the year of our Lord —, A. B. of —, [*laborer,*] L. M., of —, [*grocer,*] and N. O., of —, [*butcher,*] personally came before me, [*one*] of Her Majesty's justices of the peace for the said [*county,*] and severally acknowledged themselves to owe to our lady the Queen the several sums following: that is to say, the said A. B., the sum of —, and the said L. M., and N. O., the sum of — each, of good and lawful money of Great Britain, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said lady the Queen, her heirs and successors, if he the said A. B. fail in the condition indorsed.

Taken and acknowledged, the day and year first above mentioned, at —, before me, J. S.

(a) 11 & 12 Vict. c. 42, s. 21.

[1] A recognizance is a debt of record, entered into before some court, judge, or magistrate having competent authority to take the same. The manner of taking a recognizance is, that the magistrate repeats to the recognizers the obligation into which they are to enter, and the condition of it at large, and asks them if they are content. He makes a short memorandum, which it is not necessary that they should sign; although it has been the custom in some places for the recognizers to sign their names. From this short minute the magistrate may afterwards draw up the recognizance in full form, and certify it to the court. This is the most regular and proper way of proceeding. But the general, and almost universal practice, is to certify either the original or a copy of the short memorandum. Such short minute, if it contain the sum in which the recognizers were bound, and the nature of the condition, if it appear that they were bound to the Commonwealth, is sufficient to support an action on the recognizance. 2 Binn. 341.

*Condition.*

The condition of the within-written recognizance is such, That whereas the within-bounden A. B., was this day, [or on — last past] charged before me, for that [&c., as in the warrant:] And whereas the examination of the witnesses for the prosecution in this behalf is adjourned until the — day of — instant; if therefore the said A. B. shall appear before me on the said — day of instant, at — o'clock in the forenoon, or before such other justice or justices of the peace for the said [county] as may then be there, to answer [further] to the said charge, and to be further dealt with according to law, then the said recognizance to be void or else to stand in full force and virtue.

*Notice of such Recognizance to be given to the Accused and his Sureties.*

Take notice, that you, A. B., of —, are bound in the sum of —, and your sureties L. M. and N. O., in the sum of — each, that you, A. B., appear before me J. S., one of Her Majesty's justices of the peace for the [county] of —, on — the — day of — instant, at — o'clock in the forenoon, at —, or before such other justice or \*justices of the peace for the same [county] as may then be there, [\*39] to answer further to the charge made against you by C. D., and to be further dealt with according to law; and unless you A. B., personally appear accordingly, the recognizances entered into by yourself and sureties will be forthwith levied on you and them. Dated this — day of —, 185—. J. S.

*Certificate of Non-appearance to be endorsed on the Recognizance.*

I hereby certify, that the said A. B. hath not appeared at the time and place in the above condition mentioned, but therein hath made default; by reason whereof the within-written recognizance is forfeited.

J. S.

*(c) Summons of Witness.*

By stat. 11 & 12 Vict. c. 42, s. 16, if it shall be made to appear to any justice of the peace, by the oath or affirmation of any credible person, that any person within the jurisdiction of such justice is likely to give material evidence for the prosecution, and will not voluntarily appear for the purpose of being examined as a witness at the time and place appointed for the examination of the witnesses against the accused, —such justice may and is hereby required to issue his summons to such person, under his hand and seal, requiring him to be and appear at a time and place mentioned in such summons before the said justice, or before such other justice or justices of the peace for the same county, &c.,



as shall then be there, to testify what he shall know concerning the charge made against such accused party; and if any person so summoned shall neglect or refuse to appear at the time and place appointed by the said summons, and no just excuse shall be offered for such neglect or refusal, then (after proof upon oath or affirmation of such summons having been served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode,) it shall be lawful for the justice or justices before whom such person should have appeared to issue a warrant under his or their hands and seals to bring and have such person at a time and place to be therein mentioned before the justice who issued the said summons, or before such other justice or justices of the peace for the same county, &c., as shall then be there, to testify as aforesaid, and which said warrant may, if necessary, be backed as herein-before is mentioned, in order to its being executed out of the jurisdiction of the justice who shall have issued the same; or, if such, justice shall be satisfied by evidence upon oath or affirmation, that it is probable that such person will not attend to give evidence without being compelled so to do, then, instead of issuing such summons, it shall be lawful for him to issue his warrant in the first instance, and which, if necessary, may be backed as aforesaid.[1]

[1] The magistrate having authority to examine into the nature and circumstances of a criminal charge against an offender, has also a power, as incident to his authority, to bring before him all persons who appear, from the oath of the complainant, or from the magistrate's own knowledge, to be material witnesses for the prosecution; and for this purpose may issue his summons directed to a proper officer, requiring him to cause such witnesses to come before him, and give evidence. See Davis' Just. 59; 1 Chit. Cr. L. 76. And upon the reasonable request of the defendant, the magistrate has a similar power to bring before him any witnesses whose testimony may be material on his behalf. *Id. ib.*; 1. R. S. 94, § 14; 1 Chit. Cr. Law, 76; Rosc. Cr. Ev. 87; 12 Wend. 344.

In some states the process for witnesses, the mode of its service, and the proceedings to compel their attendance, are directed by statute.

In the absence of special statutory provisions, the magistrate must adapt his measures for this purpose to the course of the common law, and in analogy to the practice of the superior courts of justice.

At common law, formerly, the witness was summoned by the precept of the magistrate, directed to him; or, on proper grounds, was compelled to attend by the magistrate's warrant, to be served and executed by a constable. By the general practice, now, the process for witnesses is subpoena and attachment.

If a witness, upon the service of a subpoena, refuse or neglect to attend in pursuance of it, the magistrate may issue a warrant or an attachment against him. A warrant or an attachment ought only to be issued on proof by oath of the due service of the subpoena.

It has been said that, at common law, in order to warrant an attachment, the service of the subpoena must be *personal*. In criminal cases, the magistrate ought to be satisfied that the witness had notice, or was informed of the subpoena.

In some states, it is provided by statute, that the justice may fine a person, for not appearing before him in pursuance of a subpoena, unless he was prevented by sickness, or other sufficient cause.

The following is the form of the

*Summons.*

To E. F., of —, [*laborer.*]

Whereas information hath been laid before the undersigned, [*one*] of her majesty's justices of the peace in and for the said [*county*] of —, that A. B. [*&c., as in the summons or warrant against the accused,*] and it hath been made to appear to me upon [*oath*] that you are likely to give material evidence for the [*prosecution* ;] These are therefore to require you to be and to appear before me, on — next, at — o'clock in the forenoon, at —, or before such other justice or justices of the peace for the same county as may then be there, to testify what you

In general, in such cases, the witness may be made to pay the costs on the attachment against him.

In criminal cases a witness cannot decline to be sworn, though he has not been subpoenaed at all. 2 Taylor's Evid. p. 802; 4 Carr. & P. Rep. p. 218.

Where a witness refuses to be sworn, and to testify in answer to lawful questions, the magistrate may commit him to jail. He is to be committed, "until he consent to testify or answer."

PENNSYLVANIA.—In Philadelphia an alderman committed a person for refusing to testify, on a charge before him for selling lottery tickets contrary to the act of Assembly, until the witness should answer; and on a habeas corpus, a judge of the court of common pleas decided that the commitment was proper, and remanded the prisoner.

It seems, that in Ohio, by statute, a justice of the peace can only proceed by imposing a fine on the witness, and enforcing it in the usual way. Swan's Justice, 481, 95. McKinney's Am. Mag. 237, 238.

It is observed in a late English work: "If, indeed, the investigation relate to a charge of felony or misdemeanor, it seems pretty clear that the justices may exercise this power, of summoning the persons whose testimony appears to be material, and in the event of their disobedience to issue a warrant for their apprehension; for although it is not expressly recognized, either by the act of parliament, (7 Geo. IV. ch. 64,) or by the justices' commission, it appears to follow as a necessary consequence from the authority given to committing magistrates to bind over all persons, who know any thing material touching such offences, to appear at the trial. 12 Al. & El. Rep. 55; 4 Perry & Dav. Rep. 59. Still the warrant must be confined to the simple purpose of directing the constable to bring the refractory witness before the justice, in order to give his testimony; and, therefore, where it commanded that the witness should be brought up to find sufficient bail to appear and give evidence at the next assizes, it was held that the justice had exceeded his powers, and that the warrant was bad. 12 Al. & El. Rep. 55; 4 Perry & Dav. Rep. 32.

"In all other cases, where the inquiry does not relate to a charge of felony or misdemeanor, though the ordinary course is to summon the witnesses, yet serious doubts have been entertained, whether, on their neglecting or refusing to attend in pursuance thereof, the justices have, at common law, and where no express power is given by statute, any power to issue a warrant for their apprehension." 2 Taylor on Evid. p. 850.

Though justices may be empowered, at common law, or by the general language of particular statutes, to compel the appearance of witnesses by summons and warrant or attachment, they can only exercise this power within the limits of their own jurisdiction; except where power is expressly given to them, by statute, to issue process beyond their jurisdiction.

shall know concerning the said charge so made against the said A. B. as aforesaid. Herein fail not.

Given under my hand and seal, this— day of —, in the year of our Lord —, at —, in the [county] aforesaid.

J. S. [L. s.][2]

*Warrant where a Witness has not obeyed a Summons.*

To the constable of —, and to all other peace officers in the said [county] of —.

Whereas information having been laid before the undersigned, [one] of her majesty's justices of the peace in and for the said [county] of —, that A. B. [ &c., as in the summons ;] and it having been made to appear to [me] upon oath that E. F. of —, [laborer] was likely to give material evidence for the prosecution, I did duly issue my summons to the said E. F., requiring him to be and appear before me, on —, at —, or before such other justice or justices of the peace for the same county as might then be there, to testify what he should know respecting the said charge so made against the said A. B. as aforesaid : and whereas proof hath this day been made before me upon oath of such summons having been duly served upon the said E. F. : and

whereas the said E. F. hath neglected to appear at the time [\*41] \*and place appointed by the said summons, and no just excuse has been offered for such neglect : these are therefore to command you to bring and have the said E. F., before me on —, at — o'clock in the forenoon, at —, or before such other justice or justices of the peace for the same [county] as may then be there, to testify what he shall know concerning the said charge so made against the said A. B., as aforesaid.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.[1]

J. S. [L. s.]

*Warrant for a Witness in the first instance.*

To the constable of —, and to all other peace officers in the said [county] of —

Whereas information hath been laid before the undersigned, [one] of Her Majesty's justices of the peace in and for the said [county] of —, that [ &c., as in the summons ;] and it having been made to appear to [me] upon oath that E. F., of —, [laborer] is likely to give material evidence for the prosecution, and that it is probable that the said E. F. will not attend to give evidence without being compelled so to do ;

[2] See Barb. Cr. Law, p. 704, 705.

[1] Instead of summoning a witness to appear and testify, the justice may, if it is preferred, issue a *subpoena* to procure his attendance.

these are therefore to command you to bring and have the said E. F., before me on —, at — o'clock in the forenoon, at — or before such other justice or justices of the peace for the same [county] as may then be there, to testify what he shall know concerning the said charge so made against the said A. B. as aforesaid.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.

J. S. [L. S.]

If on the appearance of such person so summoned before the said last-mentioned justice or justices, either in obedience to the said summons, or upon being brought before him or them by virtue of the said warrant, such person shall refuse to be examined upon oath or affirmation concerning the premises, or shall refuse to take such oath or affirmation, or, having taken such oath or affirmation, shall refuse to answer such questions concerning the premises as shall then be put to him, without offering any just excuse for such refusal, any justice of the peace then present, and having there jurisdiction, may by warrant under his hand and seal commit the person so refusing to the common jail or house of correction for the county, riding, division, liberty, city, borough, or place where such person so refusing shall then be, there to remain and be imprisoned for any time not exceeding seven days, unless he \*shall in the meantime consent to be examined [\*42] and to answer concerning the premises.(a)[1]

The following may be the form of the

*Warrant of Commitment of a Witness for refusing to be sworn or to give Evidence.*

To the constable of —, and to the keeper of the [house of correction] at —, in the said [county] of —.

Whereas A. B., was lately charged before the undersigned, [one] of Her Majesty's justices of the peace in and for the said [county] of —, for that [*&c., as in the summons;*] and it having been made to appear to [me] upon oath that E. F., of —, was likely to give material evi-

(a) 11 & 12 Vict. c. 42, s. 16.

[1] In the state of New York among the acts enumerated in the revised statutes as amounting to criminal contempts, is "the contumacious and unlawful refusal of any person to be sworn as a witness; and when so sworn, the like refusal to answer any legal or proper interrogatory. 2 N. Y. Rev. Stat. 278, sec. 10. In such case, the justice may, by warrant, commit the refractory witness to the jail of the county. The warrant must specify the cause for which it is issued, and if it be for refusing to answer any question, such question must be specified therein; and the witness is to be closely confined pursuant to the warrant until he submits to be sworn, or to answer, as the case may be. 2 N. Y. Rev. Stat. 274, secs. 279, 280.

dence for the prosecution, I duly issued my summons to the said E. F., requiring him to be and appear before me, on —, at —, or before such other justice or justices of the peace as should then be there, to testify what he should know concerning the said charge so made against the said A. B., as aforesaid; and the said E. F. now appearing before me [*or being brought before me by virtue of a warrant in that behalf, to testify as aforesaid,*] and being required to make oath or affirmation as a witness in that behalf, hath now refused so to do [*or being duly sworn as a witness doth now refuse to answer certain questions concerning the premises which are here put to him,*] without offering any just excuse for such his refusal: these are therefore to command you the said constable to take the said E. F., and him safely convey to the [*house of correction*] at —, in the county aforesaid, and there deliver him to the said keeper thereof, together with this precept; and I do hereby command you the said keeper of the said [*house of correction*] to receive the said E. F. into your custody in the said [*house of correction*], and him there safely keep for the space of — days for his said contempt, unless he shall in the meantime consent to be examined and to answer concerning the premises; and for your so doing this shall be your sufficient warrant.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [*county*] aforesaid.

J. S. [L. S.]

(d) *Defence*

After the examinations of the witnesses on the part of the prosecution have been completed, the justice of the peace, or one of the justices, by or before whom such examination shall have been so completed, shall read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: "Having heard the evidence, do you wish to say anything in answer [\*43] to the charge? You are not obliged to say anything \*unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" and whatever the prisoner shall then say in answer thereto, shall be taken down in writing, and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards upon the trial of the said accused person, the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same, did not in fact sign the same.(a)

Whatever the prisoner says after being thus cautioned, if it be taken

(a) 11 & 12 Vict. c. 42, s. 18.

down and transmitted with the deposition, may be read against the prisoner at the trial, without further proof.<sup>(a)</sup>[1]

The following is the form of taking down

*The Prisoner's Statement.*

—: A. B. stands charged before the undersigned, [one] of her majesty's justices of the peace in and for the [county] aforesaid, this — day of —, in the year of our Lord —, for that he the said A. B. on —, at —, [*&c., as in the caption of the depositions*;] and the said charge being read to the said A. B., and the witnesses for the prosecution, C. D. and E. F., being severally examined in his presence, the said A. B. is now addressed by me as follows: "Having heard the evidence, do you wish to say anything in answer to the charge? you are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" whereupon the said A. B. saith as follows:

[*Here state whatever the prisoner may say, and in his very words, as nearly as possible. Get him to sign it if he will.*] A. B.

Taken before me at —, the day and year first above mentioned.

(a) *R. v. Sansome*, 19 Law J. 143 m.

[1] It seems that the first authority given by the English law for the examination of the felon, were the statutes of Philip and Mary. For at the common law the maxim that no one is bound to accuse himself, prevailed, in its full strictness. And indeed the examination has been rather considered a privilege in favor of the party accused who may perhaps, clear himself from suspicion.

On the examination, there are three modes of conduct for the defendant to adopt: to disclose his defence; to remain silent; or to confess his guilt. If he has been falsely accused, he may prefer adopting the first course, to being confined in prison until the sitting of the court, or even to calling on his friends to bail him. But if it is doubtful whether his defence would make such an impression as to secure his immediate discharge, it may be prudent to reserve it to the time of trial, and decline answering any questions. Or lastly, if his guilt is manifest, and there is small chance of acquittal, he had better make a frank confession.

Before commencing the examination of the prisoner, the magistrate should inform him of the charge made against him, and allow him a reasonable time to send for, and advise with counsel. If the magistrate refuses this, when requested, the deposition will not be evidence against the prisoner. 3 Hill's Rep. 289. If desired by the prisoner, his counsel may be present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the accused himself. 2 N. Y. Rev. Stat. 708, sec. 14; 3 Hill, 289.

The prisoner's examination after having been reduced to writing, and read to him by the magistrate, should next be tendered to him for his signature; though the statute does not oblige him to sign it; nor is it essentially necessary; but as a matter of convenience it would be well to have him sign it if he is willing to do so. 2 Leach, 625. At all events, it must be signed and certified by the magistrate. If, upon his examination being read to him, he acknowledges it to be true, but refuses to sign it, it is admissible against him at common law; but if he refuse to sign it, and make no such acknowledgment, it cannot be received in evidence. 1 Stark. N. P. Ca. 483; 1 Phil. Ev. 115.

Also, for the purpose of preventing the defendant being misled by any promises or threats which may have been previously holden out to him by the prosecutor, constable, or others, to induce him to make any confession,—it is provided by the same section, that the said justice or justices, before such accused person shall make any statement, shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favor, and nothing to fear from any threat, which may have been holden out to him to induce him to make any admission or confession of his guilt, but that what-  
 [\*44] ever he shall \*then say may be given in evidence against him upon his trial, notwithstanding such promise or threat: provided nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person.(b)[1]

(a) 11 & 12 Vict. c. 42, s. 18.

[1] In practice, when the party is brought before the magistrate, he is generally cautioned that he is not bound to accuse himself, and that any admission may be produced against him at his trial. *Rez v. Green*, 5 Carr. & P. 312. At all events no improper influence, either by threat, promise, or misrepresentation, ought to be employed; for, however slight the inducement may have been, a confession so obtained cannot be received in evidence, on account of the uncertainty and doubt whether it was not made rather from a motive of fear or interest than from a sense of guilt. 1 Leach, 263, 291, 386; 2 Hale, 284; 4 Bla. Com. 357; Phil. Ev. 50, 51, 52; Hawk. b. 2, c. 46, s. 36; *State v. Guild*, 5 Halstead, 163; 2 Stark. Ev. (5th Am. ed.) 27, and n. (g); *Commonwealth v. Knapp*, 10 Pick. 489; *Rez v. Thornton*, 1 Ry. & Moo. C. C. 27; *Rez v. Swatkins*, 4 Carr. & Payne, 550; *Rez v. Dunn*, 4 Carr. & Payne, 543; *Rez v. Davis*, 6 Carr. & Payne, 177; *Rez v. Cooper*, 5 Carr. & Payne, 535; *Rez v. Gilham*, Carr. C. L. 61; 1 Ry. & Moody, 186; *Rez v. Ellis*, 1 Ry. & Mood. 432; *State v. Roberts*, 1 Devereaux, 259.

A confession so obtained is not rejected from a regard to public faith, but, because, when forced from the mind by the flattery of hope, or by the torture of fear, it comes in so questionable a shape that no credit should be given to it by a jury. 2 Leach, 263, 264; Dick. Sess. 211, 212. The justice should also be upon his guard against confessions uttered by collusion. A remarkable instance of this kind deserves to be mentioned, as singularly illustrative of this caution. Two brothers committed a robbery in a dark night, to a large amount, and fled. A younger brother, who was at home, and innocent, in order to favor their escape, contrived to draw suspicion on himself, and when examined, dropped hints amounting to a constructive admission of his guilt, which he refused to subscribe. On this he was committed to prison, and the pursuit of his brothers was discontinued. On the trial he proved an alibi on the clearest evidence, and obtained an easy acquittal. In the mean time, the actual felons had safely arrived in America with their plunder. Dicks' J. Examination, III. If, however, by means of a confession so unduly obtained, other facts are brought to light, they may be proved, though the confession itself is inadmissible. Hawk. b. 2, c. 46, s. 38; 2 Leach, 264, and id. 265, n. a; 2 East, P. C. 658; Phil. Ev. 51; Dick. Sess. 212. See 2 Stark. Ev. (5th Am. ed.) 28; Roscoe's Dig. Cr. Ev. 36, 37; *Commonwealth v. Knapp*, 9 Pick. 496; *State v. Crank*, 2 Bailey, 67; *Jackson's case*, 1 Rogers' Rec. 28; *Stage's case*, 5 ib. 177; 2 Russ. 650. The magistrate is to put all proper questions to the prisoner, taking down his

The only effect of this however is to enable the prosecutor to give in evidence upon the trial any confession of the prisoner made after it,

statement in writing as he proceeds, (Roscoe's Dig. Cr. Ev. 45; 2 Stark. Ev. (5 Am. ed.) 28; 2 Russell, 656; *Bellinger v. People*, 8 Wend. 599,) and, after closing his examination, should read over the whole, and ask him if it be true, and if it contain any admission, should then require him to sign it, and should sign it himself. Dalt. J. c. 164; 2 Russ. 657; 1 Phil. Ev. 107; *Penna v. Stoops*, Addis. 383; *People v. Johnson*, 1 Wheeler's C. C. 193. And an examination thus taken may be given in evidence against the prisoner on his trial, (1 Hale, 586,) though not against any other persons whom he may have incidentally accused. Hawk. b. 2, c. 46, s. 31 to 34. *Morrison v. State*, 5 Ohio, 439.

The examination of the prisoner ought not to be upon oath, (1 Hale, 585; 2 Hale, 52, 120, 284; Bac. Ab. Evidence, L.; Burn, J. Examination; Dick. J. Examination, III.; *Son v. People*, 12 Wend. 346. Where the prisoner, being mistaken for a witness, was sworn, but the mistake being discovered, the deposition which had been commenced, was destroyed, and the prisoner, subsequently, after a caution from the magistrate, made a statement, Garrow, B. received that statement. *Webb's case*, 4 Carr. & Payne, 564; see also, *Harwarth's case*, 4 Carr. & Payne, 254; 2 Stark. Ev. (5th Am. ed.) 29, n. (g), and when thus taken, it has been rejected. Bul. N. P. 242; Hawk. b. 2, c. 46, s. 37; Dick. J. Examination, III.; 1 Stark. R. 242. Where a magistrate returns with the depositions that a prisoner was sworn and made statements, those statements cannot be received in evidence against him, although a witness state that in fact he was not sworn. *Regina v. Pikesley*, 9 Car. & Payne, 124; see *Regina v. Owen*, 9 Car. & Payne, 83.

On first view, it might appear unreasonable to refuse in evidence a confession, made under this sanction, requiring stricter adherence to truth, and which would otherwise have been evidently admissible, (2 Leach, 555; 4 Esp. Rep. 172;) but it must be remembered, that every admission of the prisoner must, in order to render it available, be purely voluntary; and that the dread of perjury, with the apprehension of additional penalties in case he deviates from the truth, may create an influence over his mind, which the law is particularly scrupulous in avoiding. VERMONT.—The confession of a person on trial for a crime, must be submitted to a jury; if extorted by personal suffering, it ought not to weigh in the least; if produced by fear or flattery, the jury must determine whether it is true or not; but, if unsupported by corroborating circumstances, it cannot operate to convict. 2 Tyler, 377.

The prisoner ought, therefore, never to be required to swear: and he ought not to be questioned or examined by the magistrate like a common witness. Holt, C. N. P. 597; but see 2 Stark. Ev. (5th Am. ed.) 29, n. (g); *Jones' case*, 2 Russ. 658; *Ellis' case*, Ry. & Mood. N. P. C. 432; *Thornton's case*, 1 Moody, C. C. 27; *People v. Smith*, 1 Wheeler's C. C. 64; 2 Russ. 649. The statutes are imperative on the magistrate, to take the examination in writing. 1 Leach, 310. What the party accused says in other places, may undoubtedly be received upon *viva voce* testimony, (*Carty's case*, M'Nally on Ev. 45; see also, 16 How. St. Tr. 35;) but as the law requires that his examination shall be reduced into writing, and returned to the court; the particulars of such examination cannot be given in evidence *viva voce*, (*M'Kennon's case*, 5 Rogers' Rec. 4. But it was said by Best, C. J. that his opinion was, that upon clear and satisfactory evidence, it was admissible to prove something said by the prisoner beyond what was taken down by the committing magistrate. *Rowland v. Ashby*, Ry. & Mood. 232; see also, *Harris' case*, 1 Moody's C. C. 343; *Moore's case*, Matthews' Dig. Cr. Law, 157. But where it ought to have been taken down in writing, and was not, Littledale, J. ruled, that it was inadmissible. *Malony's case*, id. Where a written examination was inadmissible on account of the mode of taking it, Tindal, C. J. permitted parol evidence to be given of what the prisoner had said at the time of his examination. *Reed's case*, Moody & Mal. 403,) unless it be clearly proved that in fact such examination never was reduced into writing; for it would be permitting the negligence of the magistrate to operate to the prejudice of the prisoner; as a witness, by selecting only a part of what had been said, might, by using different words, give a different color to the original statements. 2 Leach, 310, note a. It should seem, however, that if it be proved that the examination was not



notwithstanding any promise or threat previously made; the omission of it does not in the slightest degree prevent the prosecutor from giving in evidence a confession made before the justice in the prisoner's statement above mentioned, after the usual cautions,<sup>(a)</sup> or a confession made at any other time, which was not induced by any promise or threat. This subject shall be now more fully treated of hereafter, under the head of evidence.

It is necessary to mention, that no objection shall be taken or allowed to any summons or warrant against a party accused, for any defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution before the justice or justices who shall take the examinations of the witnesses in that behalf, as herein-before mentioned; but if any such variance shall appear to

(a) *R. v. Sansome*, *supra*; *R. v. Bond*, 19 Law J. 138 m.

taken in writing, parol evidence of the prisoner's declaration is admissible, (*State v. Irwin*, 1 Hayw. 112; *Collins' case*, 4 Rogers' Rec. 139; *Hue's case*, 2 Leach, 821;) for otherwise this absurd consequence would follow, that whatever a prisoner says, when not before a magistrate, would be admissible, though depending on memory: but the moment a prisoner was introduced into the presence of a justice, nothing that he might disclose would be admissible, though taken under circumstances of the greatest caution and solemnity. 2 Leach, 310, note a.; id. 639, 552. Therefore, minutes taken by a solicitor for the prosecution, on the examination of a prisoner, at the direction of such magistrate, may be read in evidence on the trial, as a memorandum to refresh the witness' memory, though not signed either by the prisoner or the magistrate. 2 Leach, 673; id. 552; 16 How. St. Tr. 214; Dick, J. Examination, III.; Roscoe's Dig. Cr. Ev. 47, 48; 2 Russ. 658. And the signature of the prisoner, though it is advisable to obtain it, is not essentially requisite. 2 Leach, 552; id. 637; 2 Russ. 657. It is competent, however, for the prisoner to retract before the magistrate his admission of guilt, as to prevent his examination from being read in evidence against him, under the statute 2 & 3 P. & M. c. 10, (2 Leach, 553, note a.;) but still the previous admission may be given in evidence, independently of the statute, as a confession of the offence. 2 Leach, 552. If, after the examination of a prisoner before a magistrate, upon a charge of felony, has been taken down by the magistrate's clerk, and it is read over to him, and he is told that he may sign it or not as he chooses, he declines to sign it, the examination cannot be read in evidence (2 Stark. 483) unless he says it is true. 2 Stark. 483; *Lamb's case*, Leach C. L. 625; see *Dewhurst's case*, Lewin C. C. 47; *Rex v. Pressby*, 6 Carr. & Payne, 183; *Rex v. Tarrant*, id. 182. If the examination is taken down in writing by a constable only, and is not therefore under the statute, yet if the prisoner signs it, the paper itself may be read in evidence. *Swatkin's case*, 4 Carr. & Payne, 550. But private persons have no authority to take the examination under the statute. *Commonwealth v. Boyer*, 2 Wheeler C. C. 150.

If there be more than one person accused, it is of evident importance that all of them should be examined apart; in order that an opportunity may be afforded of detecting any variations in their story. In order, also, to prevent any communication between them previous to the trial, it will be prudent to give special directions to the keepers to confine them in different parts of the prison. Dick, J. Examination, III. If the party accused decline making any defence, the magistrate may proceed to commit him. During the whole of the proceedings, it will be prudent for the justice to have his clerk, or other intelligent person present, in order that no difficulty may arise in proving the identity of the deposition, in case of a refusal to subscribe it by a witness. Dick, J. Examination, III.; Roscoe's Dig. Cr. Ev. 49; *People v. Robinson*, 1 Wheeler C. C. 240; *Richard's case*, 1 Moody & Rob. 396, n.; *Hope's case*, 1 Moody & Rob. 396, n.

such justice or justices to be such that the party charged has been thereby deceived or misled, it shall be lawful for such justice or justices at the request of the party so charged, to adjourn the hearing of the case to some future day, and in the meantime to remand the party so charged, or to admit him to bail, in manner already mentioned.(a)

(e) *Discharge and commitment.*

When all the evidence offered upon the part of the prosecution against the accused party shall have been heard, if the justice shall be of opinion that it is not sufficient to put the accused upon his trial for any indictable offence, he shall forthwith order him, if in custody, to be discharged as to the information then under inquiry; but if in the opinion of the justice such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raise a strong or probable presumption of the guilt of such accused party, then such justice shall, by his warrant, commit him to the common jail or house of correction for the county, riding, division, liberty, city borough, or place to which by law he may now be committed, or, in the case of an indictable offence committed on the high seas, or on land beyond the sea, to the common jail of the county, riding, division, liberty, city, borough, or place within which such justice or justices shall have jurisdiction, \*to be there safely kept until he [\*45] shall be thence delivered by due course of law,—or admit him to bail, as herein-after mentioned.(b)[2]

(a) *Ante*, p. 36, 37; 11 & 12 Vict. c. 42, ss. 9, 10. (b) 11 & 12 Vict. c. 42, s. 25.

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[1] The following observations are taken from M'Kinney's *American Magistrate*, pages 249, 250, 251: "This examination, or primary hearing, before the magistrate, is designed to be an investigation into the truth of the matter, in the particular case, for the purpose of enabling him to determine whether the person accused should be held to answer the charge on final trial in the proper court of justice.

"The true inquiry is, whether the whole evidence has established the guilt of the accused person, or furnished reasonable and probable cause for believing that he is guilty of the alleged crime or offence; in which case he is to be committed to prison, or, in some instances, may be admitted to bail, in order that he might be forthcoming to answer the charge, in due course of law.

"On this question the magistrate is required to act judicially, in the exercise of his understanding and judgment, with a proper consideration of all the evidence adduced, in such examination, and of the law relative to the case.

"To the extent of this inquiry, the magistrate is judge of the law and the facts. On the supposition that certain facts have been proved, as alleged against the defendant, he may decide that they do not constitute any offence at law. And in forming his judgment he may thus determine the construction and meaning of a statute, in respect to its application to the particular case before him. A prudent magistrate, however, will take care that an uncertain doubt on his mind as to a point of law should not operate to the absolute dis-

The following is the form of the

*Warrant of Commitment.*

To the constable of — and to the keeper of the [*house of correction*]  
at —, in the said [*county*] of—.

Whereas A. B., was this day charged before me, J. S., [*one*] of Her

charge of the accused, so as perhaps to cause the escape of a criminal; but he will rather so order his proceeding in the case that the matter may be adjudicated upon by a higher tribunal, in the ordinary forms of law.

"Where a magistrate is convinced that the facts as proved do not furnish probable cause for believing the defendant to be guilty, he ought to discharge him. But on a question of facts entirely, if he should have a reasonable doubt, he ought to commit the defendant, or admit him to bail; as it is in the province of a jury to decide upon matters of fact.

"If the justice be not entirely satisfied that the defendant is guilty, yet if the circumstances proved against the defendant are positively suspicious, and such as render his guilt probable, and the crime be an indictable offence, the justice should require him to enter into recognizance, or commit him to prison. Swan's Justice, p. 482.

"The magistrate or justice has the same jurisdiction over the law, as the facts, in all criminal cases before him. His first duty is to see that the offence charged is an offence, contrary to the statute or common law; and secondly, that the facts present 'a case made out by proof furnishing good reason to believe that the crime alleged has been committed by the party charged.' Decisions of Recorder Vaux, in Philadelphia, p. 94.

"On a primary examination, evidence is sufficient as to its bearing and weight, which would not be on a trial in chief; and proof that absolutely convinces of the guilt of the accused is not necessary.

"Probable cause for commitment must be shown; and probable cause is made out by furnishing good reasons for believing that the alleged crime has been committed by the accused. 1 Burr's Trial, 11, 15; 4 Dall. 112.

"The principles laid down under this head are to govern the magistrate, in the case of a person brought before him for examination and further proceeding, on a warrant for a criminal offence issued by another justice of the peace or magistrate, where the warrant authorizes this to be done.

"If upon the examination of the whole matter, it manifestly appears that either no such crime was committed by any person, or that the suspicion entertained of the prisoner was wholly groundless, it is lawful for the magistrate totally to discharge him, without even requiring bail. But if there be an express charge of felony, on oath, against the prisoner, though his guilt appear doubtful, the justice cannot wholly discharge him, but must bail or commit him. And it is said, that if a person be killed by another, though it be *per infortunium*, or even *se defendendo*, yet the justice ought not to discharge him, for he must undergo his trial; and therefore, must be admitted to bail, or sent to prison. And in modern practice, though exculpatory evidence is received at the instance of the prisoner and certified with the other depositions, unless it appears in the clearest manner, that the charge is malicious as well as groundless, it is not usual for the magistrate to discharge him, even when he believes him to be altogether innocent. 1 Chitty's Crim. Law, 89.

"To warrant a commitment, the proof is not required which would be necessary to convict a person on the trial in chief; but the committing magistrate will require that probable cause be shown. Probable cause is a case made out by proof, furnishing good reason to believe, that the crime alleged has been committed by the person charged. When such cause is shown, it can be done away only by its appearing that no such crime has been committed, or that the suspicion entertained of the prisoner is wholly groundless. *U. S. v. Burr*, Sergeant's Const. Law, 242.

"There is no doubt, that even in cases of homicide, if it appear certainly and beyond

Majesty's justices of the peace in and for the said [county] of —, on the oath of C. D., of —, [farmer,] and others, for that [*&c., stating shortly the offence.*] These are therefore to command you, the said constable of —, to take the said A. B., and him safely to convey to the [house of correction] at — aforesaid, and there to deliver him to the keeper thereof, together with this precept: and I do hereby command you, the said keeper of the said [house of correction,] to receive the said A. B. into your custody in the said [house of correction,] and there safely keep him until he shall be thence delivered by due course of law.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.

J. S. [L. s.]

(f) *Where committed, for trial at the sessions.*

By stat. 5 & 6 W. 4, c. 38, s. 3, it shall be lawful for any justice of the peace to commit for safe custody to any house of correction situate near to the place where the sessions are to be holden, at which the prisoner, is intended to be tried. Formerly they could be committed only to the county jail.[1]

doubt that a person was killed by another accidentally, or in self-defence, or justifiably, the justice ought to discharge him, if brought before him."

The defendant must be discharged if the justice is entirely satisfied of his innocence. 1 Swan's Just. p. 482.

A justice has power, on examination of a charge of suspicion of felony, or having stolen goods, to discharge the accused person, if he was satisfied that there was no ground for suspicion. 2 Johns. Rep. 203.

If the defendant be charged with suspicion only of felony, yet if there be no felony at all proved to be committed, or if the fact charged be in truth no felony in point of law, the justice may discharge him. 2 N. H. 121.

Whenever a person is brought before a justice of the peace, upon an accusation of treason or felony, if it manifestly appear that no such crime was committed, or that the cause for which alone the party was suspected was totally groundless, it is lawful to discharge him without bail. 2 Hawk. ch. 16, s. 1.

Such a discharge by a justice of the peace, will not bar another prosecution for the same offence. Wright's Rep. 450. Ohio.

When a magistrate is satisfied, upon the examination, and on a consideration of all the evidence on both sides, that the accused is guilty of the offence charged, or that there is probable charge of suspicion against him, it is his duty to commit him, that he may answer the charge at the proper court; unless in a bailable case, sufficient bail be given. The same principles apply to the case of a person arrested on a warrant of a justice being brought before another justice. The latter may, on a hearing and examination, in the exercise of his judgment as to the probable guilt of the prisoner, commit him to jail for trial. In short, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county jail by the *mittimus* of the justice, or warrant under his hand and seal containing the cause of commitment; there to abide until delivered by due course of law. 4 Blk. Com. 300.

[2] A commitment by a magistrate for trial at court is, in general, to the county jail.

The New York revised statutes merely require that the defendant should be committed to prison. By this is doubtless intended, as regards every county excepting New York, the common jail or one of the common jails of the county in which the offence was committed;

Also, justices of boroughs or franchises, not having power to hear and determine felonies, instead of being obliged, as formerly to commit all felons for trial at the assizes, may now commit them for trial at the quarter sessions for the county, &c., in which such borough or franchise is situate.(a) And justices of boroughs and franchises, having power to try felonies, may commit the person charged with felony for trial at the quarter sessions of the county, &c., where the offence is within the jurisdiction of the sessions of the county, &c., but not within that of the sessions for the borough or franchise.(b) But where a felony or misdemeanor is committed within a town or franchise having a recorder, and a prison fit for the confinement of prisoners, the magistrates of such town or franchise shall commit the offender to the prison of such town, in all cases where, if the offence had been committed in the county it would be tried at the quarter sessions of the county.(c)

(g) *Where committed for trial at the assizes.*

[\*46] Prisoners intended \*to be tried at the assizes, may be committed to the common jail of the county ; and formerly they could be committed to no other place.(d)

But by stat. 5 & 6 W. 4, c. 38, s. 3, justices may commit for safe custody to any house of correction situate near to the place where the assizes are to be holden at which the prisoner is intended to be tried.

And by stat. 14 & 15 Vict. c. 55, s. 20, justices of the peace, at their general or quarter sessions for any county, riding, or division, may, by

(a) 4 & 5 W. 4, c. 27, s. 1.

(c) 4 & 5 W. 4, c. 27, s. 3.

(b) Id. s. 2.

(d) 5 H. 4, c. 10.

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as there is no other prison (excepting the state prisons,) in which criminals can be imprisoned. Even where the prisoner is arrested out of the county in which the offence was committed, upon an indorsed warrant, we have seen that in case he does not give bail, he is to be carried before a magistrate of the county where the warrant was originally issued, in order that the subsequent proceedings against him may be had in such county. See 1 Chit. Cr. L. 107, 108. In some of the counties of this state, however, (such as are called half-shire counties,) there is more than one jail; and in the city of New York there are several prisons which are used for the confinement of criminals. When the commitment takes place in a county where there is but one common jail, the commitment should be to the common jail of the county generally; but where there is more than one jail or prison in the county, the *mittimus* ought to direct to which of them the prisoner shall be committed; for if the direction be that he shall be committed to either of the jails in the county, the officer who is to convey him to prison and execute the warrant, would be authorized to commit him to the most distant as well as the nearest prison to the place where he was examined. There is no necessity or propriety in given the officer this power; for in general it is proper that the commitment should be to the nearest prison, not only with the object of saving expense, but to prevent the opportunity of escape or rescue. Whenever, through the insufficiency of the nearest jail, or from any other cause, it is expedient to order the commitment to be made to one more distant, the magistrate, and not the officer who is to execute the warrant of commitment, ought to be the judge of this expediency. Many escapes have been effected during the conveyance of prisoners from the place of examination to distant jails, by old offenders, in the custody of inexperienced officers. Davis' Just. 112.

order made for that purpose, declare that any jail or house of correction for such county, &c., is a fit prison for persons committed for trial at the assizes, for such county, &c., which order shall be transmitted to one of Her Majesty's principal secretaries of state; and after the secretary of state shall approve of such order, any justice of the peace or coroner, acting for such county, &c., may commit for safe custody for trial at the next assizes, to such jail or house of correction, any person charged with any offence triable at the assizes for such county, &c., and the commitment shall specify that such person is committed under the authority of this Act; and the recognizances to appear to prosecute and give evidence, shall in all such cases be conditioned for appearance, prosecution, and giving evidence at the court of oyer and terminer and jail delivery for the county.

(h) *Committal from county of a town for the assizes.*

By stat. 14 & 15 Vict. c. 55, s. 19, whenever any justice or justices of the peace, or coroner, acting for any county of a city or county of a town corporate (within which Her Majesty has not been pleased for five years next before the passing of this act to direct a commission of oyer and terminer and jail delivery to be executed, and until Her Majesty shall be pleased to direct a commission of oyer and terminer and jail delivery to be executed within the same,) shall commit for safe custody to the jail or house of correction of such county of a city or town any person charged with any offence committed within the limits of such county of a city or town not triable at the court of quarter sessions of the said county of a city or county of a town,—the commitment shall specify that such person is committed pursuant to this act; and the recognizances to appear to prosecute and give evidence, taken by such justice, justices, or coroner, shall in all such cases be conditioned for appearance, prosecution, and given evidence at the court of oyer and terminer and jail delivery for the next adjoining county. The commitment in such cases will be the same as in ordinary cases, except that after the words "by due course of law," you add, "the said A. B., being hereby committed in pursuance of statute 14 & 15 Vict. c. 55."

And by the same statute, s. 21, the parties so committed \*shall [\*47] afterwards in due time, without writ of *habeas corpus* or other writ for that purpose, be removed by the jailer or keeper of such jail or house of correction, with their commitments and detainers, to the common jail of such county, in order that they may be tried at the assizes to be holden for such county, and such removal shall not be deemed or taken to be an escape.

(i) *The like, from towns, &c., not being counties.*

By stat. 60 G. 3, & 1 G. 4, c. 14 s. 1, the justices of the peace in and

for any town, liberty, soke, or place not being a county, but having an exclusive jurisdiction for the trial of felonies and misdemeanors committed within the same, shall have full powers at their discretion, to commit any person, duly charged before them with a capital felony, to the jail of the county, within which such town &c., shall be situate, there to be tried at the next session of oyer and terminer and jail delivery there to be holden, in the same manner as if the same had been committed within any other part of the county.[1]

[1] Although the form of the commitment or *mittimus*, does not perhaps *require* as much precision as an indictment or complaint, yet it is said by Mr. Chitty to be very important that it should be framed with accuracy, or the party may, though prosecuted for a felony, be discharged out of custody; or if he escape, the officer may not be punishable. 1 Chit. Cr. L. 109; 2 Hawk. ch. 16, § 16. It has been held by our supreme court, however, that though the warrant of commitment be defective, the supreme court will not discharge the prisoner finally for that reason; but if a crime be made out upon the depositions, the course is to discharge the prisoner *pro forma*, but remand him to prison upon a special rule of court. 5 Cowen, 39; and see 3 East, 157.

The following are the formal requisites of a final commitment:

1st. *It must be in writing, and under the hand and seal of the magistrate, and show the time and place of making it.* 2 Hale, 122; 1 Chit. Cr. L. 109; 2 Hawk. P. C. ch. 16, § 13. A magistrate, however, may, by parol, order a party to be detained a reasonable time until he can draw out a formal commitment. 7 East's R. 537; 1 Chitt. Cr. L. 109; 2 Hale, 121. And it is said that though advisable, it is not absolutely necessary to state that the commitment was made by the justice in that character; for though his authority does not appear at the beginning of the *mittimus*, it may be supplied by averment. 2 Hale, 122; Kenyon's Rep. 122. In order, however, to show the jurisdiction of the magistrate to take cognizance of and commit for an offence perpetrated out of his county, when the party has been apprehended there, as in the case of a person arrested in one county for an offence committed in another, it is said to be usual to state the fact in the commitment. 1 Chit. Cr. L. 109.

2d. *The mittimus may be either in the name of the people or that of the justice awarding it; but the latter is the most usual.* Id. ib; Dalt. J. ch. 125; 2 Hawk. ch. 16, § 14; Dick, J. Commit. IV; But see Davis' J. 107; 1 Nun & Walsh, 403.

In case the justice to whom the complaint was made, associates another justice with him, as we have seen he may do, the *mittimus* should be signed by both. See 1 Nun & Walsh, 404.

3d. *The mittimus should be directed to the sheriff or any constable, and to the jailer and keeper of the prison, and be generally to carry the party to prison.* 2 Hawk. ch. 16, § 13; 2 Strange, 934; 1 Ld. Raym. 424. When thus directed it commands the former to convey the prisoner into the custody of the latter, and the latter to receive and keep him. Burns, J. Commit.

4th. *The prisoner should be described by his name, if known; and if not known, then it may be sufficient to describe the person by his age, stature, complexion, color of hair and the like, and to add that he refuses to tell his name.* Ibid. 1 Hale, 577.

5th. *The mittimus ought to state that the party has been charged upon oath.* For although in England, it is said that a commitment for treason, or the suspicion of it, without setting forth any particular accusation or ground of it, is valid, yet in this state a magistrate has no jurisdiction to examine or commit offenders unless there is a complaint on oath; and the commitment ought to show, upon its face, that the magistrate had jurisdiction. There may be an exception to this rule, in cases of commitment made *super visum*, or upon view of the offence, by the committing magistrate, in which cases an oath is not requisite. 1 Leach, 167; 1 Chit. Cr. L. 110. But in all cases of crimes committed upon the view or in the presence of a magistrate, whatever may be his authority to punish them, it is more fit and proper that he should act the part of a witness rather than of a magistrate; and that he should

(k) *Binding by recognizance; transmission of depositions, &c.*

If the accused be committed or bailed, then, by stat. 11 & 12 Vict. c. 42, s. 20, the justice or justices before whom any witness shall be ex-

enter his complaint and procure a process from another justice. 2 Wils. 158. It is not necessary to state, in the commitment, any part of the evidence adduced before the magistrate, or to show the grounds on which he has thought fit to commit the defendant 2 Wils. 158; 1 Chit. Cr. L. 110.

6th. *It is necessary to set forth the particular species of crime alleged against the party, with convenient certainty.* 2 Hawk. ch. 16, § 16; 1 Hale, 584; 2 id. 122; 11 St. Tr. 304, 318, 319; 3 Cranch, 448; 3 Peters, 208; 14 East's Rep. 70. If it be for felony, it must state the species of felony, as "for felony of the death of J. S." or "for burglary in breaking the house of J. S." &c. And the reason is that it may appear to the judges, upon the return of a *habeas corpus*, whether it be felony or not. 2 Wils. 158, 9. It has been decided in Massachusetts, that a mittimus or warrant of commitment from a justice of the peace ought to recite the complaint upon which it is founded. 4 Mass. Rep. 497. And doubtless this is the safer course; and such, in point of fact, is the practice in this state; though it is going farther than the English authorities require. There are many reasons for requiring that the cause of commitment should be distinctly stated. For if no cause be shown and the prisoner escape, it is said that the officer is not punishable. 1 Chit. Cr. L. 111; 2 Inst. 52. It is also said that a mittimus, to answer such things as shall be objected against him, is utterly void and against law. Burns, J. Commit. III; 2 Inst. 591; 1 Hale, 580. If the mittimus does not recite the cause of the commitment, that is, if it do not recite the complaint upon which it is founded, it seems it will not be an offence to assist or enable the prisoner to escape from prison. 1 Leach, 97, 363; 1 Chit. Cr. L. 111. Another reason given why a warrant of commitment should set forth the crime for which the party is committed, is that if he be brought before the court upon a *habeas corpus*, and it does not appear by the return that he is committed for, and charged with a criminal offence, the court will either discharge or bail him. And this rule is said to apply not only where no cause at all is expressed in the mittimus, but also when it is so loosely set forth that the court cannot judge whether it were a reasonable ground of imprisonment. 2 Hawk. P. C. ch. 16, § 16; 1 Chit. Cr. L. 111; 2 Inst. 52; Dalt. J. ch. 166. And therefore if the commitment be for felony, it must not be "for felony" generally; but it must contain the special nature of the felony; (2 Wils. 158, 9; 2 Hale, 122,) though it is said by Hawkins, that there are precedents in good authors, of commitments for felony in general, without stating the specific accusation. 2 Hawk. ch. 16, § 16. In the case of *John Wilkes*, (2 Wils. 153, 159,) which was a commitment for publishing "a most infamous and seditious libel, entitled the North Briton, No. 45, tending to inflame the minds and alienate the affections of the people from his majesty, and to excite them to traitorous insinuations against the government," it was held sufficient, though it was urged that the libel ought to have been set forth, in order that the court, on a *habeas corpus*, might be able to determine the amount of bail. Cases are mentioned in Hawkins of this kind, where one was committed for manifold contumacy to the high commissioned court; or for refusing to answer before them to certain articles; for insolvent behavior, and words spoken at the council board, all of which are very properly said to be not good without stating and showing the specific nature of the offences. 2 Hawk. ch. 16, § 16. And enough should be stated in the commitment to show that the magistrate had jurisdiction.

When the facts of the case will warrant a commitment for felony, (and for the same reason, any other crime,) the mittimus should not be on *suspicion* of felony; for it was said by Lord Mansfield, that on such a commitment, a party has a right to be bailed under the *habeas corpus* act; and that a person who should facilitate the escape of a party so committed, would not be indictable. 1 Leach, 98, note (a.) Id. 97, 363. The correctness of this opinion is not readily perceived; for there is no question that a magistrate, both at common law and by the revised statutes of this state, may arrest and examine a supposed offender upon sus-



amined as aforesaid, may bind by recognizance the prosecutor and every such witness to appear at the next court of oyer and terminer or jail

picion; and if so, it is his duty to commit or bail him; except in cases where a court of special sessions is authorized to try him. If then, the arrest, examination, and consequent commitment be legal, the party is no more entitled to be discharged or bailed upon a *habeas corpus*, because he was committed upon suspicion, than if he had been committed upon an absolute charge; and it should seem that the duty of the court, upon a *habeas corpus*, would be the same in one case as the other; that is, they would exercise their power of bailing, remanding, or discharging the party, as the result of the inquiry upon the *habeas corpus* would justify, whether he were committed upon suspicion or upon a positive accusation. Davis' J. 111.

It is not necessary to allege, in the mittimus that the offence was "feloniously" committed; and it is sufficient, if it may be collected on the face of it, that the charge was for a felony. 1 Chit. Cr. L. 113.

In the case of convictions, it has been decided that though the conviction may be correct, yet if the commitment be for a different offence, or do not disclose any offence at all, the magistrate is liable to an action for the imprisonment, &c. under it. 3 Barn. & Cress. 409; 1 Ry. & Moo. C. C. 129, S. C.

When the offence is created by statute the terms of the statute should be pursued in describing it; for by using other words than those which the legislature has used, it may happen that the offence will not be sufficiently defined. Thus a prisoner who had been committed, for that "with force and arms he made an assault on the prosecutor with intent feloniously to steal, take, and carry away, from the person," &c. was admitted to bail by the king's bench, because the description did not charge him with an offence within the statute 7 Geo. 2, ch. 21, under which he was committed, and which relates to felonious attempts to rob. *Rex v. Remnant*, 5 T. R. 169; 2 Leach, 583. It seems, however, that the addition of the word "violently" to steal, &c. would have been a sufficient description of the offence, within the statute. 2 Leach, 702; 1 Russ. Cr. L. 619. Where the offence described by the statute was setting fire to a cock, mow, or stack of corn, and the charge in the commitment was for setting fire to a parcel of wheat, it was held that this did not sufficiently specify the felony described by the statute, and the prisoner was accordingly admitted to bail. 2 Term Rep. 256; 1 Leach, 484. So where a warrant of commitment under a statute relating to persons riotously destroying houses, &c. stated that the defendant began to pull down "in part" a dwelling-house, the words "in part" not being in the statute, it was held an improper description, and the offender was bailed. 7 Dowl. 538.

The commitment in such cases should also conclude "against the form of the statute in that case made and provided." 1 Nun & Walsh, 408.

7th. *The commitment should point out the place of imprisonment*, and not merely direct that the party should be taken to prison. 2 Strange, 934; 1 Ld. Raym. 424. We have already stated what is the proper prison to which he ought to be conveyed.

8th. *Time and mode of imprisonment*. With respect to the time and mode of imprisonment, it is observed that the commitment should have an apt conclusion. The statute has not prescribed any particular form for this precept. At common law, the words used in the conclusion are, to detain the prisoner "until he shall be discharged by due course of law." 2 Hale, 123; 2 Hawk. ch. 16, § 18. These words are said to be proper only when the party is committed for an offence not bailable; but when he is committed for want of sureties for a bailable offence, it is said to be usual to direct the jailer to "keep the prisoner in his said custody, for want of sureties, or until he shall be discharged by due course of law." The mittimus may command the jailer to keep the party "in safe custody;" for although every jailer be bound by law to keep his prisoner in such custody, there can be no objection to reminding him of his duty in the mittimus. 2 Hawk. P. C. ch. 16, § 15; 1 Stra. 3. If the conclusion be irregular, it will not vitiate the mittimus; and, therefore, if a commitment "till further order," be made by a justice, yet a breach of prison under such a warrant would be

delivery, or superior court of a county palatine, or court of general or quarter sessions of the peace, at which the accused is to be tried, then and

an offence. And if the party were removed by *habeas corpus*, yet if the cause and manner of his commitment be such as to require his detention in custody, or his finding sureties, he shall be bailed or committed accordingly, and not discharged; because the informal conclusion will be rejected. Such a warrant would be a good justification in an action of false imprisonment against the jailer, though the right conclusion be omitted, or the wrong conclusion inserted. It is a lawful warrant, notwithstanding the omission or incongruity of the conclusion, so as to make the voluntary permission of an escape or the breach of prison, a punishable offence. 1 Hale, 584.

No precise mode of introducing the statement of the offence appears to be material. Either of the following forms will answer: "charged with feloniously assaulting," &c. or "with having on," &c. or "charged with a misdemeanor, viz: with having," &c. or "for that he the said A. B., on," &c. and then recite the complaint. Davis' J. 114. The latter is decidedly the preferable form of introducing the statement of the crime for which the party is to be committed. *Id. ib.* If the offence be against a statute, the description should close with the words "contrary to the form of the statute in such case made and provided." This, indeed, will be only continuing the description of the offence in the complaint, if the complaint be properly drawn; for the description in all offences against penal statutes must conclude, "contrary to the form of the statute (or statutes) in such case made and provided." *Id. ib.*

The mittimus should state at the beginning, the style and jurisdiction of the justice, and is directed to the constables of a town named therein, or to the sheriff or his deputy, and to the keeper of the particular jail to which the justice intends the prisoner shall be committed; and commands the sheriff and constables to convey the prisoner into the custody of the jailer, and the jailer to receive and keep him in the said jail until he shall be thence delivered by due course of law. Davis' J. 114, 115.

It is the duty of the jailer to receive the party; and if he refuse, or unlawfully demand any thing for receiving him, it is an indictable offence. Dalt. J. c. 170; 1 Chit. Cr. L. 117; 1 T. R. 60. If the jailer will not receive him, it is said the person who arrested him may, in such case, keep the prisoner in his own house. 1 T. R. 60. The officer to whose custody he was committed on the mittimus may, in such case, keep the prisoner until the jailer can be induced or compelled to receive him. Davis' J. 115.

The constable is not to retain the warrant or commitment. It is to be handed over, with the prisoner, to the jailer, as it is the jailer's authority for keeping him. But it is recommended that the constable should get a receipt for the prisoner, from the jailer, and preserve it; and that he should take and preserve a copy of the warrant. 1 Nun & Walsh, 419; 2 Hawk. c. 16, s. 9.

If the magistrate, acting within the scope of his authority and jurisdiction, but taking an erroneous view of the effect of the evidence, should come to a wrong conclusion, and commit the defendant, and he should be afterwards discharged by the higher court, on a *habeas corpus*, yet the magistrate would not, on that account, be liable to an action of damages. 14 East, 82; 1 Chit. Cr. L. 95. But though the warrant of commitment be defective, the court will not discharge the prisoner finally, on that account. 5 Cowen, 50, 58.

The jailer is protected from liability, though he should receive, by mistake of the constable, a person whom it was not intended to confine. 1 Chit. Cr. L. 60, 117; Cowp. 479.

When a person thus committed by a magistrate is advised that his commitment is illegal, or that he is entitled to be discharged or bailed by a superior jurisdiction, he has a remedy by writ of *habeas corpus*, or *certiorari*, and the proceedings thereon. 3 Black. Com. 131; 1 Chit. Cr. L. 118. Indeed, whenever a person is restrained of his liberty by being confined in a common jail, or by a private person, whether it be for a civil or criminal cause, and it is apprehended that the imprisonment is illegal, he may in general, by *habeas corpus* or *certiorari*, have his body and the proceedings under which he is detained, removed to some su-

there to prosecute, or to prosecute and give evidence, or to give evidence, as the case may be, against the party accused, which said recognizance shall particularly specify the professions, art, mytery, or trade of every such persons entering into or acknowledging the same, together with his christian and surname, and the parish, township, or place of his residence, and if his residence be in a city, town, or borough, the recognizance shall also particularly specify the name of the street, and the number (if any) of the house in which he resides, and whether he is owner or tenant thereof, or a lodger therein,—and the said recognizance, being duly acknowledged by the person so entering into the same, shall be subscribed by the justice or justices before whom the same shall be acknowledged, and a notice thereof, signed by the said justice or justices, shall at the same time be given to the person bound thereby;—and the several recognizances so taken, together with the written information (if any,) the depositions, the statement of the accused, and the recognizances of bail, (if any) in every such case, shall be delivered by the said justice or justices, or he or they shall cause the same

perior jurisdiction having authority to examine into the legality of the commitment; and on the return, he will be either discharged or remanded. 1 Chit. Cr. L. 118; 2 R. S. 563.

It has been said that where the offence is not set forth with sufficient certainty in the warrant, the party will be entitled to be discharged, if brought up by *habeas corpus*. And it seems that this holds, not only where no cause at all is expressed in the commitment, but also where it is so loosely set forth that the court cannot judge whether it forms a reasonable ground for the imprisonment or not. 1 Nun & Walsh, 408; 2 Hawk. ch. 16, § 16; 2 Inst. 52. But when an application is made by a prisoner to be bailed or discharged, it is the practice of the court to look into the complaint and depositions, and not to discharge if these show a sufficient ground for detaining the prisoner, even though the commitment be informal. *Id.* 181, 408; 1 Leach, 270; Cald. 295; 3 East, 157; 1 Barn. & Cress. 258. So, though the word “felony” or “feloniously” be not expressed in the warrant, yet if enough appears from the facts set forth upon the face of the commitment, to show that the offence charged is a felony, the court will deal with the prisoner as on a charge of felony. 2 T. R. 255; 1 Leach, 484; 2 Chit. Rep. 138. But although it is not essential to its validity, where the commitment is for felony, that the words “felony” or “feloniously” shall be inserted in it, if it appears from the facts stated therein to be in law a felony, yet it is convenient, if the offence be a felony, so to state it, in order that the officer to whose charge the prisoner is committed to be conveyed to prison, may be made acquainted with the limits and extent of his powers. 1 Nun & Walsh, 409.

If a party has been improperly committed, the court will not make it a part of the rule for granting a *habeas corpus* that he shall not bring an action against the magistrate. 3 Car. & Payne, 225. See Barb. Cr. Law, page 568. *et seq.*

In reference to the nature and purpose of this writ, see the remarks of Marshall, C. J. *Ex parte Tobias Watkins*, 3 Peters, 201, 202; 3 Story on Const. 206—209; 2 Kent Com. 2d ed. 26—32; *United States Bank v. Jenkins*, 18 John. 305; *case of Yeates*, 4 ib. 364; *Barry v. Mercien*, 3 Hill, 399; *People v. Cassels*, 5 Hill, 635; *Commonwealth v. Harrison*, 11 Mass. 63; *Commonwealth v. Briebett*, 8 Pick. 138; *Randall v. Bridge*, 2 Mass. 553.

Convicts, or those in execution by legal process, civil or criminal, are not entitled to the benefit of *habeas corpus*. *Riley's case*, 2 Pick. 172; *Commonwealth v. Whitney*, 10 Pick. 434. But see *Ex parte Kellogg*, 6 Vermont, 509, as to *habeas corpus* in cases of fugitives from justice. *Ex parte Clarke*, 9 Wendell, 212.

to be delivered, to the proper officer of the court in which the trial is to be had, before or \*at the opening of the said court on [\*48] the first day of the sitting thereof, or at such other time as the judge, recorder, or justice who is to preside in such court at the said trial shall order and appoint:—Provided always, that if any such witness shall refuse to enter into or acknowledge such recognizances as aforesaid, it shall be lawful for such justice or justices of the peace, by his or their warrant, commit him to the common jail or house of correction, for the county, riding, division, liberty, city, borough, or place in which the accused party is to be tried, there to be imprisoned and safely kept until after the trial of such accused party, unless in the meantime such witness shall duly enter into such recognizance as aforesaid before some one justice of the peace for the county, riding, division, liberty, city, borough, or place in which such jail or house of correction shall be situate:—provided nevertheless, that if afterwards, from want of sufficient evidence in that behalf or other cause, the justice or justices before whom such accused party shall have been brought shall not commit him or hold him to bail for the offence with which he is charged, it shall be lawful for such justice or justices, or any other justice or justices of the same county, riding, division, liberty, city, borough, or place, by his or their order in that behalf, to order and direct the keeper of such common jail or house of correction where such witness shall be so in custody to discharge him from the same, and such keeper shall thereupon forthwith discharge him accordingly.[1]

[1] In this country, the recognizance of the prosecutor and witnesses is for his appearance at the proper court to prosecute and give evidence on the part of the state.

In a late case, where a married woman refused to find surety in recognizance for her appearance at the sessions, to give evidence against a felon, and the magistrate committed her, the court of king's bench held that the commitment was legal. 1 Chitty's Crim. Law, p. 91.

Where the witness cannot find sureties, the magistrate ought to take his own recognizance, and it would be illegal to commit the witness. 2 Stark. Evid. 82.

Where the witness was a married woman, and therefore incapable of entering into a recognizance, it was held that the magistrate was justified in committing her on her refusal to give evidence, or to find sureties for her appearance to give evidence. 3 M. & S. 1; Roscoe on Crim. Evid. 87.

The better opinion is, that a justice is not authorized to commit any witness for refusing to find sureties to be bound with him, provided he be willing to enter into his own recognizance. Taylor's Evid. p. 798; 2 Ch. Burn's Just. p. 122; 12 Ad. & Ell. Rep. p. 59.

In the state of New York, if it appears from the examination, that an offence has been committed, and that there is probable cause to believe the prisoner to be guilty thereof, it is the duty of the magistrate to bind by recognizance the prosecutor and all the material witnesses against the prisoner to appear and testify at the next court having cognizance of the offence, and in which the prisoner may be indicted. Whenever the magistrate shall be satisfied, by due proof, that there is good reason to believe that any such witness will not fulfil the condition of such recognizance, unless security be required, he may order such witness to enter into a recognizance, with such sureties as he shall deem meet, for his ap

The following are the forms required by the above section :

*Recognizance to Prosecute or give Evidence.*

—: Be it remembered, that on the — day of —, in the year of our Lord —, C. D. of —, in the township of —, in the said county, [*farmer,*] [or C. D. of No. 2, — street, in the parish of —, in the borough of —, [*surgeon,*] of which said house he is tenant,] personally came before me, one of Her Majesty's justices of the peace for the said county, and acknowledged himself to owe to our sovereign lady the Queen, the sum of £—, of good and lawful money of Great Britain, to be made and levied of his goods and chattels, lands and tenements, to the use of our said lady the Queen, her heirs and successors, if he the said C. D. shall fail in the condition indorsed.

Taken and acknowledged, the day and year first above mentioned, at —, before me. J. S.

*Condition to Prosecute.*

The condition of the within-written recognizance is such, that whereas one A. B. was this day charged before me, J. S., [\*49] \*justice of the peace within mentioned, for that [*&c., as in the caption of the depositions,*] if therefore the said C. D. shall appear at the next court of oyer and terminer or general jail delivery [*or at the next court of general quarter sessions of the peace*] to be holden in and for the [*county*] of —\*, and there prefer or cause to be preferred a bill of indictment for the offence aforesaid against the said A. B., and there also duly prosecute such indictment, then the said recognizance to be void, or else to stand in full force and virtue.

pearance at such court. 2 R. S. 709, §§ 21, 22. Infants and married women being material witnesses, may in like manner be required to procure sureties for their appearance at such court. Id. § 23.

If any witness so required to enter into a recognizance, either with or without sureties, shall refuse to comply with such order, it is the duty of the magistrate to commit him to prison until he shall comply with such order, or be otherwise discharged according to law. 2 R. S. 709, § 24.

A recognizance is an obligation of record entered into before a magistrate duly authorized for that purpose, with condition to appear at some court named therein. Dick. J. Recognizance; 3 Binn. R. 431. Recognizances taken before magistrates under the above provisions of the statute, must be in writing, and subscribed by the parties to be bound thereby. 2 R. S. 746, § 24.

A recognizance, containing the condition required by the statute, that the obligor will appear and testify at the next court having cognizance of the offence, &c. will not be vitiated by the addition of the words "as well to the grand as the petit jury, and not depart the said court without leave." 5 Barb. 511. A recognizance for the appearance of witnesses to testify on the trial of an indictment must contain an acknowledgment of indebtedness to the people, and mention the offence charged; or no action can be maintained upon it. 6 Hill, 506.

*Condition to prosecute and give evidence.*

Same as the last form to the asterisk,\* and then thus;—"and there prefer or cause to be preferred a bill of indictment against the said A. B., for the offence aforesaid, and duly prosecute such indictment, and give evidence thereon as well to the jurors who shall then inquire of the said offence, as also to them who shall pass upon the trial of the said A. B., then the said recognizance to be void, or else to stand in full force and virtue."

*Condition to give Evidence.*

Same as to the last form but one to the asterisk,\* and then thus:—and there give such evidence as he knoweth upon a bill of indictment to be then and there preferred against the said A. B. for the offence aforesaid, as well to the jurors who shall there inquire of the said offence, as also to the jurors who shall pass upon the trial of the said A. B., if the said bill shall be found a true bill, then the said recognizance to be void, or else to stand in full force and virtue."

*Notice of the said Recognizance to be given to the Prosecutor and his Witnesses.*

——— } Take notice, that you C. D., of ——, are bound in the sum  
to wit: } of ——, to appear at the next court of [*general quarter sessions of the peace*] in and for the county of ——, to be holden at ——, in the said county, and then and there [*prosecute and*] give evidence against A. B.; and unless you then appear there, and [*prosecute and*] give evidence accordingly, the recognizance entered into by you will be forthwith levied on you. Dated this —— day of ——, 185—.

J. S.[1]

*\* Commitment of Witness for refusing to enter into the Recognizance. [50]*

To the constable of —— and to the keeper of the [*house of correction*] at——, in the said [*county*] of ——.

Whereas A. B. was lately charged before the undersigned, [*one*] of her majesty's justices of the peace in and for the said [*county*] of ——,

[1] All recognizances for the appearance of the prosecutor and witnesses, and of the defendant at the proper court, must be certified and returned, by the magistrate taking them, to the court at its then present or next term or session.

The recognizances are generally delivered by the magistrate to the clerk of the court; or, it may be, to the attorney general of the state, or his assistant or deputy, or the prosecuting attorney of the county.

If the magistrate refuses or neglects to return to the proper court any such recognizance, he may be compelled, by rule of court, forthwith to return the same. And in case of disobedience to such rule, he may be proceeded against by attachment, as for a contempt of court. See N. Y. R. S. vol. 2, p. 709. s. 26 and 27; ib. p. 534, s. 1, sub. 7.

for that [*&c.*, as in the summons to the witness,] and it having been made to appear to [me] upon oath, that E. F., of —, was likely to give material evidence for the prosecution, [I] duly issued [my summons to the said E. F., requiring him to be and appear] before [me] on —, at —, or before such other justice or justices of the peace as should then be there to testify what he should know concerning the said charge so made against the said A. B., as aforesaid; and the said E. F. now appearing before [me,] [or being brought before [me] by virtue of a warrant in that behalf to testify as aforesaid,] hath been now examined by [me] touching the premises, but being by [me] required to enter into a recognizance conditioned to give evidence against the said A. B., hath now refused so to do: these are therefore to command you the said constable to take the said E. F., and him safely to convey to the [house of correction] at —, in the [county] aforesaid, and there deliver him to the said keeper thereof, together with this precept; and I do hereby command you the said keeper of the said [house of correction] to receive the said E. F. into your custody in the said [house of correction,] there to imprison and safely keep him until after the trial of the said A. B. for the offence aforesaid, unless in the meantime such E. F. shall duly enter into such recognizance as aforesaid, in the sum of — pounds, before some one justice of the peace for the said [county,] conditioned in the usual form to appear at the next court of [oyer and terminer or general jail delivery, or general quarter sessions of the peace,] to be holden in and for the [county] of —, and there to give evidence before the grand jury upon any bill of indictment which may then and there be preferred against the said A. B. for the offence aforesaid, and also to give evidence upon the trial of the said A. B., for the said offence, if a true bill should be found against him for the same.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.

*Subsequent Order to discharge the Witness.*

To the keeper of the [house of correction] at —, in the [county] of —.

Whereas, by, [my] order dated the — day of —, [instant,]  
 [\*51] \*reciting that A. B. was lately before then charged before [me] for a certain offence therein mentioned, and that E. F. having appeared before [me,] and being examined as a witness for the prosecution in that behalf, refused to enter into a recognizance to give evidence against the said A. B., and [I] therefore thereby committed the said E. F. to your custody, and required you safely to keep him until after the trial of the said A. B. for the offence aforesaid, unless in the meantime he should enter into such recognizance as aforesaid; and whereas, for want of sufficient evidence against the said A. B. the said

A. B. has not been committed or holden to bail for the said offence, but on the contrary thereof has been since discharged, and it is therefore not necessary that the said E. F. should be detained longer in your custody: these are therefore to order and direct you the said keeper to discharge the said E. F. out of your custody as to the said commitment, and suffer him to go at large.

Given under [my] hand and seal, this — day of —, in the year of our Lord —, at —, in the county aforesaid.

J. S. [L. S.]

*(k) Copy of depositions for defendant.*

At any time after all the examinations have been completed, and before the first day of the assizes or sessions or other first sitting of the court at which a person committed to prison or admitted to bail is to be tried, such person may require and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three-halfpence for each folio of ninety words.[1]

*2. Examination and Commitment where the Arrest is in a different County from that in which the Offence was committed.*

*(a) Warrant, if evidence prove the charge.*

Whenever a person shall appear or shall be brought before a justice of the peace, charged with an offence alleged to have been committed by him in any county or place within England or Wales wherein such justice shall not have jurisdiction, it shall be lawful for such justice, and he is hereby required, to examine such witnesses, and receive such evidence in proof of such charge as shall be produced before him; and if in his opinion such testimony and evidence shall be sufficient proof of the charge made against such accused party, such justice shall thereupon commit him to the common jail or house of \*correc- [\*52] tion for the county, riding, division, liberty, city, borough, or place where the offence is alleged to have been committed, or shall admit him to bail, as herein-after mentioned, and shall bind over the prosecutor (if he have appeared before him or them) and the witnesses by recognizance accordingly, as is herein-before mentioned.(a)[2]

(a) 11 & 12 Vict. c. 42, s. 22.

[1] According to Mr. Chitty, the party accused has not, in cases of treason and felony, a right to demand a copy of the depositions. 1 Chitty's Cr. Law, p. 87. He may, however, compel their production, by serving the magistrate with a subpoena to produce them.

[2] Criminal prosecutions are local in their nature, and at common law must be tried in



(b) *Warrant, if evidence do not prove the charge.*

But if such testimony and evidence shall not in the opinion of such justice be sufficient to put the accused party upon his trial for the offence with which he is so charged, then such justice shall bind over such witnesses as he shall have examined, by recognizance, to give evidence, as hereinbefore is mentioned, and such justice shall, by warrant under his hand and seal, order such accused party to be taken before some justice of the peace in and for the county, riding, division, liberty, city, borough, or place where, and near unto the place where, the offence is alleged to have been committed, and shall at the same time deliver the information and complaint, and also the depositions and recognizances so taken by him to the constable who shall have the

the county where they are committed. Generally, the prosecution for an offence can only be before a court or magistrate whose jurisdiction extends over the place where it was committed, as it is only before such a court that it can be tried and punished. Even at common law, however, justices of the peace might cause to be apprehended in their proper counties, and on examination to be committed to jail there, persons guilty of offences done in another county, to which they might be afterwards removed by *habeas corpus* for trial. But a particular mode of proceeding, in such cases, has been provided by statute, in the several states; either by authorizing warrants issued in one county to be backed by magistrates in another county, and to be executed there, and directing what course shall be pursued thereon; or by allowing the process to be executed anywhere in the state.

So far as the nature of the offence is concerned, the jurisdiction of a justice, for the purpose of receiving complaints and issuing warrants to apprehend offenders, is without limit. 2 R. S. 590, s. 1, *et seq.* And this is the doctrine of the common law. 4 Black. Com. 290; 1 Chit. Cr. L. 34, 35. And if the offender is brought before the justice, he has a right, both at common law (see 4 Black. Com. 290; 1 Chit. Cr. L. 75,) and by statute, (2 R. S. 590, 591, 592,) to examine, and in a proper case, to commit him. He may issue process for the arrest of offenders, where the crime was committed in his county, although the criminal may have escaped into another county. 2 R. S. 706, s. 1 to 5. In *The People v. Cassels*, (5 Hill, 169,) Bronson, J. says, "and possibly he may issue process when the offender is in his county, although the crime was committed elsewhere; we are, however, inclined to a different opinion. But it is not now necessary to settle that question." The opinion thus intimated by the learned judge seems contrary to the doctrine generally laid down by English writers. For although it be generally true that a justice has no jurisdiction over offences committed out of his county, yet there are cases where the presence of an offender within his county gives him authority, at common law, to proceed against such offender; and there are also numerous cases in which, by the special provisions of particular statutes, the justice has jurisdiction respecting the offences therein specified, though committed out of his county. 1 Nun & Walsh, 49. Thus, it has been long settled that if a man commit a *felony* in one county, and go into another county, a justice of the latter county may, upon information given, issue a warrant to apprehend him, and take his examination, and the information against him; and may commit him to the jail of such latter county, and bind over the witnesses to give evidence at the trial, and in short may proceed as if the offence had been committed within his jurisdiction. 1 Nun & Walsh, 50; 1 Hale, 580; 3 Burn, 553. Upon the same principle, it has been decided that a justice may proceed with respect to a man coming into his county, after having committed a felony on the high seas; and may commit such person for trial at the next oyer and terminer to be held for the jurisdiction of the admiralty, &c. *Rez v. Muilman*, Park. 241; 2 Hawk. P. C. c. 8, s. 33, note; 3 Burn, 553; Chit. Cr. L. 94; Com. Dig. Justices of Peace, B. 1.

execution of such last-mentioned warrant, to be by him delivered to the justice or justices before whom he shall take the accused in obedience to the said warrant; and which said depositions and recognizances shall be deemed to be taken in the case, and shall be treated to all intents and purposes as if they had been taken by or before the said last-mentioned justice, and shall, together with such depositions and recognizances as such last-mentioned justice shall take in the matter of such charge against the said accused party, be transmitted to the clerk of the court where the said accused party is to be tried, in the manner and at the time herein-before mentioned, if such accused party shall be committed for trial upon the said charge, or shall be admitted to bail.(a)

The following is the form of the

*Warrant to convey the Accused before the Justice of the County, &c., in which the Offence was committed.*

To W. T., constable of —, and to all other peace officers in the said [county] of —.

Whereas A. B., of —, [laborer,] hath this day been charged before the undersigned, [one] of Her Majesty's justices of the peace in and for the said county of —, for that [ &c., as in the warrant to apprehend : ] and whereas [I] have taken the deposition of C. D., a witness examined by [me] in this behalf; but in as much as [I] am informed that the principal witnesses to prove the said offence, against the \*said A. B., reside in the [county] of C., where the said offence [\*53] is alleged to have been committed: these are therefore to command you the said constable, in Her Majesty's name, forthwith to take and convey the said A. B. to the said [county] of C., and there carry him before some justice or justices of the peace in and for that [county,] and near unto the [parish of D.,] where the offence is alleged to have been committed, to answer further to the said charge before him or them, and to be further dealt with according to law: and [I] hereby further command you the said constable to deliver to the said justice or justices the information in this behalf, and also the said deposition of C. D., now given into your possession for that purpose, together with this precept.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.

J. S. [L. s.]

(c) *Costs of Constable.*

In case such accused party shall be taken before the justice last

(a) 11 & 12 Vict. c. 42, s. 22.

aforesaid by virtue of the said last-mentioned warrant, the constable or other person to whom the said warrant shall have been directed, and who shall have conveyed such accused party before such last-mentioned justice, shall be entitled to be paid his costs and expenses of conveying the said accused party before the said justice; and upon the said constable or other person producing the said accused party before such justice, and delivering him into the custody of such person as the said justice shall direct or name in that behalf, and upon the said constable delivering to the said justice the warrant, information (if any,) depositions, and recognizances aforesaid, and proving by oath the handwriting of the justice who shall have subscribed the same, such justice to whom the said accused party is so produced shall thereupon forthwith ascertain the sum which ought to be paid to such constable or other person for conveying such accused party and taking him before such justice, as also his reasonable costs and expenses of returning, and thereupon such justice or justices shall make an order upon the treasurer of the county, riding, division, or liberty, city, borough, or place, or if such city, borough, or place shall be contributory to the county rate of any county, riding, division, or liberty, then upon the treasurer of such county, riding, division, or liberty respectively to which it is contributory, for payment to such constable or other person of the sum so ascertained to be payable to him in that behalf, and the said treasurer, upon such order being produced to him, shall pay the amount to the said constable, or other person producing the same, or to any person who shall present the same to him for payment: provided always, that if such last-mentioned justice shall not think the evidence against [\*54] such accused party sufficient to put him upon his trial, \*and shall discharge him without holding him to bail, every such recognizance so taken by the said first-mentioned justice or justices as aforesaid shall be null and void.(a)

The following is the form of the

*Order for Payment of the Constable's Expenses.*

To R. W. esquire, treasurer of the county of —.

Whereas W. T., constable of —, in the county of —, hath by virtue of and in obedience to a certain warrant of J. S. esquire, [one] of Her Majesty's justices of the peace in and for the said county of —, taken and conveyed one A. B., charged before the said J. S., with having [&c., stating shortly the offence,] from —, in the said county of —, to —, in the said county of —, a distance of — miles, and produced the said A. B. before me S. P., one of Her Ma-

(a) 11 & 12 Vict. c. 42, s. 22.

jesty's justices of the peace in and for the said county of —, and delivered him into the custody of — by [my] direction, to answer to the said charge, and further to be dealt with according to law: and whereas the said W. T. hath also delivered to [me] the said warrant, together with the information in that behalf, and also the deposition of C. D. in the said warrant mentioned, and hath proved to [me] upon oath the hand writing of the said J. S. subscribed to the same: and whereas [I] have ascertained that the sum which ought to be paid to the said W. T. for conveying the said A. B. from the said county of —, to the said county of —, and taking him before [me], is the sum of —, and that the reasonable expenses of the said W. T. in returning will amount to the further sum of —, making together the sum of —: these are therefore to order you as such treasurer of the said county of —, to pay unto the said W. T. the said sum of —, according to the form of the statute in such case made and provided, for which payment this order shall be your sufficient voucher and authority.

Given under my hand, this — day of —, 185—. S. P.

(d) *How, where the arrest is under a backed warrant.*

Where the accused is arrested upon a backed warrant, the constable, if he be not then prepared with any evidence against him, will take him before the justice who first issued the warrant, to be dealt with as above or herein-before is mentioned. But if at the time of the arrest, the prosecutor, or any of the witnesses upon the part of the prosecution, shall then be in the county or place, where such person shall have been apprehended, the \*constable or other person [\*55] who shall have so apprehended such person may, if so directed by the justice backing such warrant, take and convey him before the justice who shall have so backed the said warrant, or before some other justice or justices of the same county or place; and the said justice or justices may thereupon take the examinations of such prosecutor or witnesses, and proceed in every respect in manner above directed with respect to persons charged before a justice or justices of the peace with an offence alleged to have been committed in another county or place than that in which such persons have been apprehended.(a)

3. *Bail*. [1]

(a) *In treason.*

No justice or justices of the peace shall admit any person to bail for

(a) 11 & 12 Vict. c. 42, s. 11.

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[1] The magistrate having heard the examinations, and ascertained that the party accused is not entitled to be completely discharged, is next to determine whether he will bail or commit him.

treason, nor shall such person be admitted to bail, except by order of one of Her Majesty's secretaries of state, or by Her Majesty's court of Queen's Bench at Westminster, or a judge thereof in vacation.(a)[2]

(a) 11 & 12 Vict. c. 42, s. 28.

Bail is a delivery of a person to his sureties, upon their giving, together with himself, sufficient security for his appearance at court to answer the charge against him; he being supposed to continue in their friendly custody, instead of going to prison. In most of the inferior offences, bail will answer the same intention as commitment, and therefore it ought to be taken. But in offences of a capital nature, no bail can be security equivalent to the actual custody of the person. There is nothing that a man may not be induced to forfeit, to save his life; and it is no satisfaction or indemnity to the public, to seize the effects of those who have bailed a murderer, if the murderer himself be suffered to escape with impunity. 4 Black. Com. ch. 22.

[2] Authority is given by acts of congress, to take bail for any such crime or offence, except where the punishment is death, to any judge of the United States, and to any chancellor, judge of the supreme or superior court, or first judge of any court of common pleas, mayor of a city, in any state, and any justice of the peace or other magistrate of any state, where the offender may be found; the recognizance taken by any of the persons authorized to be returned to the courts of the United States having cognizance of the offence; and on refusal to enter into such recognizance, the magistrate may imprison the person so refusing. Act of Congress, of Sept. 24, 1789, s. 33, and Act of Congress, of March 2, 1793, s. 4.

When the punishment of an offence by the laws of the United States is death, bail can only be taken by the federal courts, or one of the judges thereof.

A person committed by a judge of a court of the United States, for an offence not punishable with death, may, if there be no judge of the United States in the district, be admitted to bail by a state judge.

In all cases of crimes and offences not capital, but subject to infamous punishment by the laws of the United States, a state magistrate, on the arrest of the offender, may take bail.

Where a judge of the United States has committed, no judge of a state has authority to interpose, in order to discharge on bail, except there is no judge of the United States in the district. 3 Binn. 515.

When the commitment is by a state judge, the law does not prohibit the bailing by a state judge; such power is included in the general authority to imprison or admit to bail; there is a reason for such authority, as commitments may sometimes be made either for want of bail, which is afterwards offered, or there may be a hasty commitment by an inferior magistrate requiring re-consideration. In such cases, it would be a grievance to have no relief but by a district judge of the United States. 5 Binn. 515. M'Kin. Am. Mag. 255—256.

In the state of New York, justices of the peace are authorized to let offenders to bail in all cases of felony, where the imprisonment in the state prison cannot exceed five years. 2 N. Y. Rev. Stat. 710, sec. 29. The court of oyer and terminer held in any county, also has power to let to bail any person committed, before indictment found, upon any criminal charge whatever. And the court of sessions has a similar power as to any offences triable in such court. Barb. Cr. L. p. 577.

In Pennsylvania, by act of assembly, "all prisoners shall be bailable, by one or more sufficient sureties, to be taken by one or more of the judges or justices that have cognizance of the fact, unless for such offences as are or shall be made felonies of death, by the laws of the province." Act of 1705; 1 Smith's Laws, p. 56; M'Kin. Dig. 713. Murder of the first degree is the only offence punishable with death.

Where a capital felony is charged, and the proof is evident, or the presumption great, no power exists any where to admit to bail. 2 Ashm. Rep. 233.

The practice has always been to take bail under the act of 1705, which has remained in force, as well in misdemeanors as in felonies, except in capital cases. 6 Watts & S. 314.

*(b) In felony and certain misdemeanors.*

Where any person shall appear or be brought before a justice of the peace, charged with a felony, or with an assault with intent to commit a felony, or with an attempt to commit a felony, or with obtaining or attempting to obtain property by false pretences, or with a misdemeanor in receiving property stolen or obtained by false pretences, or with perjury or subornation of perjury, or with concealing the birth of a child by secret burying or otherwise, or with wilful or indecent exposure of the person, or with riot, or with assault in pursuance of a conspiracy to raise wages, or assault upon a peace officer in the execution of his duty, or upon any person acting in his aid, or with neglect or

A safe rule, where a malicious homicide has been charged, is to refuse bail in all cases where a judge would sustain a capital conviction, if pronounced by a jury upon such evidence as has been exhibited to him on the hearing of the application to admit to bail; and in instances where the evidence for the commonwealth is of less efficacy, to admit to bail. Hence, where a judge is satisfied that the offence, at most, is only murder in the second degree, the prisoner is entitled to be liberated on bail. 2 Ashm. 227.

It is good cause for admitting to bail a prisoner confined to a close jail upon an indictment for murder, that he is laboring under a present, painful, severe and dangerous disease, caused by his imprisonment, and likely to be so aggravated by a continuance of it as probably to terminate fatally. 11 Leigh, 666.

In Pennsylvania, justices of the peace may take bail for the appearance of persons accused, generally, in cases of all crimes and misdemeanors, to answer at the proper court, except in cases of treason, homicide, robbery, burglary, buggery, horse-stealing, arson and rape; in which latter cases one of the judges of the supreme court, or the president of the court of common pleas, is alone authorized to take bail. 1 Smith's Laws of Penn. 137; 2 id. 531; 4 id. 334; 2 Penn. Black. 403; M'Kinney's Dig. 724. 445, 716.

NEW YORK.—A prisoner arrested, under a warrant issued pursuant to statute, (R. S. 707,) for an offence punishable by state prison, cannot be admitted to bail in the county where the arrest was made, but must be taken back to the county where the warrant was issued. 6 Hill, 340.

OHIO.—The magistrate, whether judge or justice of the peace, when he holds the examination, is authorized to take bail of the accused, and the recognizances of the witnesses. Walker's Introd. p. 624.

In general, in the several states, the magistrates before whom the examination is had, may take bail, in all cases, except those punishable capitally.

In Virginia, a justice may bail a prisoner charged with felony, if only a slight suspicion of guilt attaches to him. 5 Rand. 711.

In Connecticut, a sheriff may take bail of a prisoner, committed by a justice, for not finding sureties, and release him from confinement. 2 Day, 1.

A justice of the peace has no authority to take the recognizance of a prisoner, while in the custody of the officer under a *mittimus* issued by another justice for want of sureties for his appearance at court, and before his commitment to prison. 8 Greenl. Maine Rep. 390.

A justice cannot admit to bail a prisoner committed by another justice; and a recognizance in such case is void. 13 Pick. 86.

INDIANA.—If a person charged with a felony voluntarily appear before an associate judge, and enter into recognizance with sureties for his appearance, &c., the recognizance is valid, though the affidavit on which it was founded was taken before a justice of the peace. 1 Blackf. Rep. 200.

MISSISSIPPI.—A sheriff has no power to admit to bail in criminal cases. 1 Miss. 546. M'Kinney's Am. Mag. p. 255.

breach of duty as a peace officer, or with any misdemeanor for the prosecution of which the costs may be allowed out of the county rate, such justice of the peace may, in his discretion, admit such person to bail, upon his procuring and producing such surety or sureties as in the opinion of such justice will be sufficient to ensure the appearance of such accused person at the time and place when and where he is to be tried for such offence; and thereupon such justice shall take the recognizance of the said accused person and his surety or sureties, conditioned for the appearance of such accused person at the time and place of trial, and that he will then surrender and take his trial, and not depart the court without leave.(a)[3]

(a) 11 & 12 Vict. c. 42, s. 23.

[3] The duty of magistrates in relation to the taking of bail, is extremely important; requiring the exercise of great judgment and firmness. The two extremes of demanding excessive and of accepting insufficient bail, should be equally avoided; and in many cases the justice may be exposed to the censure of the public or of individuals, if he transcends or falls short of his duty in either of these respects. Davis' J. 83. But wherever he has authority under the statute, to take bail from the person accused, he is bound to do so, in case it is offered; and he has no discretion on the subject, except as to the *amount* of the bail and the responsibility of the sureties. It has been determined that a prisoner arrested in another county, upon an indorsed warrant, for an offence punishable by imprisonment in the state prison, cannot be let to bail in the county where the arrest is made, but must be taken back to the county in which the warrant was issued. 6 Hill, 344.

To refuse or delay to bail any person who is entitled to bail, is an offence at common law against the liberty of the subject, and for which the magistrate is also liable in damages to the party injured. It was also made punishable by ancient English statutes. 1 Nun & Walsh, 398; 2 Hawk. ch. 15, § 13; 3 Bos. & Pul. 551; Davis' J. 83; See 3 Edw. 1, St. 2, ch. 15, and 31 Car. II. And lest the intention of the law should be frustrated by magistrates, it is expressly declared by statute, 1 William and Mary, that excessive bail ought not to be required. And there is a similar provision in our statute, which declares that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted." 1 R. S. 94, § 17. What bail should be called excessive, must be left to the magistrate to determine, on considering the circumstances of the case. And on the other hand, if the magistrate takes insufficient bail, he is liable to be fined if the criminal does not appear; but if he does appear, according to the condition of the recognizance, those who admitted him to bail are safe; inasmuch as the end of the law is answered whenever the appearance of the prisoner is in fact procured. 2 Hawk. ch. 15, § 6; Davis' J. 83.

It is also an offence at common law, for a magistrate to grant bail where it ought to be denied; and it is punishable as a negligent escape. 2 Hawk. ch. 15, § 6; 1 Nun & Walsh, 399. It has been decided that it is no excuse for justices of the peace admitting a person to bail who was committed for an offence not bailable by law, that they did not know he was committed for such offence; for that they ought to inform themselves, at their peril, of the cause for which the party was committed, that they might thereby be satisfied that he was bailable by law. The magistrate is not bound to demand bail, or that the person to be bailed shall find sureties; nor is he bound to forbear committing the party, till he shall refuse to find sureties; but may justify a commitment, unless the party himself shall tender his sureties. 2 Strange, 1216; 2 Hawk. ch. 15, §§ 12, 14; 2 Hale, 123.

The recognizance should be for such an amount, as will be likely to secure a compliance with its conditions. The justice ought, therefore, in determining its amount, to take into consideration the nature of the offence, and the character and property of the defendant. A

The following is the form of the

*\*Recognizance of Bail.*

[\*56]

Be it remembered, that on the — day of —, in the year of our Lord —, A. B. of —, laborer, L. M., of —, grocer, and N. O. of —, butcher, personally came before [us] the undersigned, two of Her Majesty's justices of the peace for the said [county,] and severally acknowledged themselves to owe to our lady the Queen the several sums following; that is to say, the said A. B. the sum of —, and the said L. M. and N. O. the sum of — each, of good and

wealthy individual, charged with a penitentiary offence, would forfeit his recognizance, if the amount were not such as would be oppressively large, when required of a poor and obscure individual. If, by the commission of a crime, the accused has obtained property, and retains it, the justice should require a recognizance at least for a larger amount than the value of such property. The offender should not be permitted to make the crime itself an instrument for his escape. The amount should not be oppressive, but never so small as to hold out an inducement to the accused to forfeit his recognizances. Swan's Justice, p. 483.

In Pennsylvania, the amount of the bail is fixed by the magistrate, before whom it is taken, in his discretion. It is to be determined from a regard to the nature of the alleged offence, its punishment, the standing and property of the person charged, and the circumstance of the case. The usual custom in similar cases ought to be considered. The amount of the defendant's recognizance is, in general, not less than a hundred dollars, even in common assault and battery, or any misdemeanor.

In cases of aggravated assault and battery, or with intent to kill, or commit a crime or offence, the amount of bail should be larger.

In a case of a conspiracy to cheat, the defendants were required to enter into recognizances, with two sureties, each in the sum of \$10,000. So, also, in a case of a charge for a conspiracy to procure abortion. And so likewise, on a charge of a conspiracy to commit a rape.

In a case of forgery the defendant was held in recognizance with one surety, in the sum of \$1000.

For an alleged larceny of \$20 bail was required in \$500.

On a charge for uttering and passing a false writing, and obtaining thereby property of great value under false pretences, the accused was held to bail in \$2000.

Defendants charged with a conspiracy to cheat and defraud two persons out of \$500 each, were held each in \$600 to answer for the offence.

A person was required to find surety in \$300 to answer a charge for uttering and passing a false check for \$20 35, with intent to defraud.

To answer a complaint for obtaining \$50 by false pretences, a defendant was ordered to find bail in \$300.

In the case of a charge of publishing a libel on an individual, in a public newspaper, the two defendants were obliged to enter into recognizance in the sum of \$1000 to appear at court for trial.

One accused of obtaining \$218 by false pretences, was held to bail in \$700.

The sureties ought to be, at least, two men of ability, but whose sufficiency is left to the discretion of the magistrate, and, therefore, he may examine them, upon oath, as to the value of their property. And every one of the bail ought to be of ability to answer the sum in which, he is bound." 1 Chitty's Crim. Law, p. 99.

In criminal cases, no justification being requisite, bail is absolute in the first instance. The magistrate may, however, examine them on oath as to the sufficiency of their estate. And, it is said, that if he be deceived, he may require fresh sureties. McKinney's Am. Mag. 256, 257.



lawful money of Great Britain, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said lady the Queen, her heirs and successors, if he the said A. B. fail in the condition indorsed.

Taken and acknowledged, the day and year first above mentioned, at —, before us.

J. S.

J. N.

*Condition.*

The condition of the within-written recognizance is such, that whereas the said A. B. was this day charged before [us,] the justices within mentioned, for that [*&c., as in the warrant ;*] if therefore the said A. B. will appear at the next court of oyer and terminer and general jail delivery [*or court of general quarter sessions of the peace,*] to be holden in and for the county of —, and there surrender himself into the custody of the keeper of the [*common jail*] there, and plead to such indictment as may be found against him by the grand jury, for or in respect of the charge aforesaid, and take his trial upon the same, and not depart the said court without leave, then the said recognizance to be void, or else to stand in full force and virtue.

*Notice of the said Recognizance to be given to the Accused and his Bail.*

Take notice that you A. B. of —, are bound in the sum of —, and your [*sureties L. M. and N. O.*] in the sum of — each, that you A. B. appear, [*&c., as in the condition of the recognizance,*] and not depart the said court without leave; and unless you the said A. B. personally appear and plead and take your trial accordingly, the recognizance entered into by you and your sureties shall be forthwith levied on you and them.

Dated this — day of —, 185—.

J. S.[1]

[1] A recognizance is an *acknowledgment* of the party entering into it, and, of course, must be voluntary on his part. If he refuse, however, to enter into it, he, or those concerned, must abide the consequences that will ensue, in the course of the law, in the case.

Wheresoever any statute giveth justices of the peace power to take bonds of any man, or to bind over any man to appear at the assizes or sessions, or to take sureties for any matter or cause, they may take a recognizance. But they can take no recognizance, but only in such matters as concern their offices; but if they do, it seemeth to be void. Dalt. C. 168.

Every recognizance, taken by justices of the peace, must be made to the Commonwealth, or State. It ought to contain the name, place of abode, and profession, trade or calling, both of the principal and surety or sureties. It should be so descriptive, in these respects, that in case of its forfeiture, it may be sued with effect, and the parties made answerable in law. For an offence under the laws of Congress the recognizance should be to the United States.

## (c) \*How, after Commitment.

[\*57]

In all cases where a person charged with any indictable offence shall be committed to prison to take his trial for the same, it shall be lawful,

A justice of the peace can only require sureties to the next court. 1 Mass. Rep 488; 8 Mass. Rep. 78.

If the court in which the case is to be tried, is sitting at the time when the recognizance is taken, it ought to be for the appearance of the party at the present term or session of the court.

See *Commonwealth v. Canada*, 13 Pick. 89, 90; *Commonwealth v. Otis*, 16 Mass. 198; *State v. Berry*, 8 Greenl. 179; Rev. Stat. of Mass. ch. 135, § 22. It is held in *Commonwealth v. Canada*, *supra*, that a justice of the peace has no authority to admit to bail a prisoner, committed by another justice of the peace, for bailable offence, for not finding sufficient sureties to recognize for him; and a recognizance taken in such case is void. But see Rev. Stat. of Mass. ch. 35, § 22.

A justice of the peace is liable for knowingly taking insufficient bonds of prosecution. *Smith v. Trawl*, 1 Root, 165.

It is provided in the Constitution of the United States that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Constit. U. S. 8th art. of the amendments. See 3 Story on the Constit. 750, 751; Rawle on the Constit. ch. 10, pp. 130, 131.

It seems that an action does not lie in New Hampshire against a justice for demanding excessive bail on a criminal charge. *Evans v. Foster*, 1 N. Hamp. 374. See 2 Stark. Ev. (5th Am. ed.) 428, n. 1; *Hardison v. Jordan*, Cam. & Nor. 454; *Gregory v. Brown*, 4 Bibb, 28; *State v. Johnson*, 2 Bay, 385; *Lining v. Benthams*, 2 Bay, 1; *Boyer v. Potts*, 14 Serge. & Rawle, 158; *State v. Campbell*, 2 Tyler, 177.

See Petersdorff on Bail, 509, *et seq.* (Law Lib. No. 29, p. 509 *et seq.*) *State v. Corson*, 1 Fairfield, 473; *M'Carthy v. State*, 1 Blackf. 338; *State v. Wehman*, 3 Ohio, 14.

A recognizance taken by a justice of the peace and entered on his docket in these words; "*Jacob Kerns v. John Steward*. Recognizance—bail, 25. Simon Elliot appears and acknowledges himself bail in the above case;" is informal and void. *Kerns v. Schoonmaker*, 4 Ohio, 331. See *State Treasurer v. Woodward*, 7 Vermont, 528; *Same v. Rolfe*, 15 ib. 9. The justices of the Police Court for the city of Boston, after certifying and sending up to the municipal Court a record of a recognizance entered into before them, certified and returned, at the suggestion of the attorney for the Commonwealth, a mere extended record of the facts and circumstances as they appeared on their minutes, and upon *scire facias* on such extended recognizance, it was held that this proceeding of the police court was not irregular and the *scire facias* was sustained. *Commonwealth v. M'Neill*, 19 Pick. 127.

The date of the recognizance may be on the day on which the defendant is recognized to appear, as the court will presume it was executed in the morning, before the session commenced. *State v. Bradley*, 1 Blackford (Ind.) 84. But it was held in Massachusetts, under the Revised Stat. ch. 86, § 11 and ch. 138, § 113, these exceptions in a criminal case, filed in the municipal court or court of common pleas, must be entered in the supreme judicial court next to be held for the same county, and if the party, who filed such exceptions recognizes to enter and prosecute them in the supreme judicial court then in session, the recognizance is void. *Commonwealth v. Harley*, 7 Metcalf, 467.

A recognizance to answer a criminal charge need not show that the complaint had been made under oath. It stands on its own terms; independent of any previous proceedings. *M'Carthy v. State*, 1 Blackford (Ind.) 339.

But it should state in substance all the proceedings, which show the authority of the court or magistrate to take it. *State v. Smith*, 2 Greenl. 62; See *Commonwealth v. Daggett*, 16 Mass. 447; *Commonwealth v. Downing*, 9 Mass 520; *Ex parte Beaufort*, 3 Cranch, 448; *State v. Corson*, 1 Fairfield, 473; Rev. Stat. of Mass. ch. 135, § 30. It is essential to a re-

at any time afterwards, and before the first day of the sitting or session at which he is to be tried, or before the day to which such sitting or session may be adjourned, for the justice or justices of the peace

cognizance, that it recite the cause of its caption. *Commonwealth v. Downey*, 9 Mass. 320; *Same v. Daggett*, 16 Mass. 447; *Bridge v. Ford*, 4 Mass. 641; *Bridge v. Ford*, 7 Mass. 209. The recognizance should set out the kind of office for which the party is to answer. *Goodwin v. Governor*, 1 Stew. & Port. 465; *Simpson v. Commonwealth*, 1 Dana, 523; *Commonwealth v. West*, 1 Dana, 165. A recognizance not exactly according to statute may be good at common law. *Phelps v. Parks*, 4 Vermt. 488.

A recognizance to appear at a court of general sessions to answer to an indictment to be preferred, to do and receive, &c. and not depart &c. is valid, if the offence be substantially, although not technically, set forth. *People v. Blankeman*, 17 Wendell, 262. A recognizance must show on its face the court to which the defendant is bound to appear. *State v. Rye*, 9 Yerger, 386.

All recognizances in criminal case should be taken to and in the name of the Commonwealth. *Commonwealth v. Porter*, 1 Marsh. (Ken.) 44; *Commonwealth v. Canada*, 13 Pick. 87; *Kerns v. Schoonmaker*, 4 Ohio, 331. A recognizance to keep the peace taken in the name of the governor of Kentucky is void. *Adams v. Ashby*, 2 Bibb, 96.

Where a recognizance is entered into by the sureties alone, without the principal, conditioned for the defendant's appearance in court to answer a criminal charge, the recognizance is valid. *Minor v. State*, 1 Blackford, (Ind.) 236. See *People v. Slayton*, 1 Breese, 257.

*Chittenden v. Cutler*, 2 Chip. 25; *Young v. Shaw*, 1 ib. 224. But see *People v. Slayton*, 1 Breese, 257. A recognizance taken for a purpose not authorized by law is void. *Harrington v. Brown*, 7 Pick. 332. So where the court has no authority to act. *Commonwealth v. Loveridge*, 11 Mass. 337; *Vase v. Deane*, 7 Mass. 280; *Dow v. Prescott*, 12 Mass. 419; *Commonwealth v. Otis*, 16 Mass. 198.

It is not necessary, that a recognizance to answer a charge of felony, should be signed by the principal and bail. *Commonwealth v. Mason*, 3 Marsh. (Ken.) 456. See *Commonwealth v. Emery*, 3 Binn. 431; *Madison v. Commonwealth*, 2 A. K. Marsh, 131. A seal is not essential to the validity of a recognizance, *State v. Root*, 2 Rep. Const. Ct. 123. *Kearns v. State*, 3 Blackf. 336. It is provided by statute in New York, that all recognizances in order to be valid, must be signed by the party intended to be bound by them. See *People v. Huggins*, 10 Wendell, 471, 472.

Petersdorff on Bail, 514—516. (Law Lib. No. 29, pp. 514—516.)

Bail in criminal cases are invested with the same unrestricted authority, that is conferred upon them in criminal cases, id. See *Commonwealth v. Brickett*, 8 Pick. 138.

But in *South Carolina*, the surrender of a party under bail to the deputy sheriff, does not discharge the sureties from their liability on their recognizance. *State v. La Gerf*, 1 Bailey, 410. See *Stegars v. State*, 2 Blackf. 104.

Where a justice of the peace had neglected to return a recognizance, taken by him, until the second day of the term, at which it was returnable, the court ordered that he pay a fine for his neglect. *Ex parte Neal*, 14 Mass. 205. The recognizance must be filed and made a record of court to sustain a suit, and it must be so averred in the declaration. *People v. Van Epps*, 4 Wendell, 487. See *Palister v. Little*, 6 Greenl. 350. *Dodge v. Kellock*, 1 Fairfield, 266. The justice should also make the proper entry of the prisoner's failure, to appear, when called. *Potter v. Kingsbury*, 4 Day, 98. See Rev. Stat. of Mass. ch. 135, § 27, and it should be averred in the declaration that the default of appearance was entered of record. *People v. Van Epps*, *supra*. See *People v. Haddock*, 12 Wendell, 475.

See *Commonwealth v. M'Neill*, 19 Pick. 127. A justice taking a recognizance for appearance must return it to the court where the cosusor is to appear; and if the court has not jurisdiction to award execution on a *scire facias*, it ought to certify the recognizance to some court, where such execution can be awarded. *Johnson v. Randall*, 7 Mass. 340. A recognizance should be returned by the justice, who takes it, at the first day of the term of the

who shall have signed the warrant for his commitment, in his or their discretion, to admit such accused person to bail in manner aforesaid; or if such committing justice or justices shall be of opinion that for any of the offences hereinbefore mentioned the said accused person ought to be admitted to bail, he or they shall in such cases, and in all other cases of misdemeanors, certify on the back of the warrant of commitment his or their consent to such accused party being bailed, stating also the amount of bail which ought to be required, it shall be lawful for any justice of the peace, attending or being at the jail or prison where such accused party shall be in custody, on production of such certificate, to admit such accused person to bail in manner aforesaid;— or if it shall be inconvenient for the surety or sureties in such a case to attend at such jail or prison to join with such accused person in the

court to which it is returnable; and if without good cause he neglect to return it, he is liable to a fine. *Ex parte Neal*, 14 Mass. 205.

The neglect of one, who had been bound over to appear at the municipal court to appear personally at that court, was held to be a forfeiture of such recognizance. *Commonwealth v. McNeill*, 19 Pick. 127.

The person bound by a recognizance to appear and answer, is not at liberty to depart after once making his appearance in court, but he must remain until duly discharged, *People v. Stager*, 10 Wendell, 433. The condition that the party shall not depart until he is discharged by the court, is unnecessary as it respects the charge on which the recognizance is entered into, but it is intended to detain the party, should other charges be made against him. *Id.* 434. See *Keefhaven v. Commonwealth*, 2 Pennsylv. 240; *State v. Stout*, 6 Halst. 24; *People v. Clary*, 17 Wendell, 374; *Starr v. Commonwealth*, 7 Dana, 243.

Where the recognizance is for the principal's appearance on the first day of the term, his failure to attend on that day is a forfeiture: if, however, no indictment be found against him, and he appear during the term, the recognizers may be discharged by the favor of the court. *Aliter*, where the principal does not appear. *Adair v. State*, 1 Blackford (Ind.) 201. See *State v. Saunders*, 2 Halsted, 177; *State v. Cooper*, 2 Blackf. 227. A recognizance to appear at a term of the court, without designating a day, cannot be forfeited by a failure to appear on any particular day. *Griffin v. Commonwealth*, Litt. Sel. Ca. 31. A recognizance to appear at the first day of the next court, binds the party to appear at the first court actually held; a failure to hold the court at the regular time will not exonerate him. *Commonwealth v. Cayton*, 2 Dana, 135. A party was recognized in March, to appear "at the April Criminal term." There was no such term; the next criminal term was in May. In June, at the criminal law term, he was called, and failed to appear. There was no forfeiture of his recognizance. *Thurston v. Commonwealth*, 3 Dana, 224; see *State Treasurer v. Seaver*, 7 Vermont, 480; *Same v. Rolfe*, 15 ib. 9.

If the condition of a bond or recognizance become impossible by the act of God, or the obligee, or the conusee, the performance is excused. *People v. Manning*, 8 Cowen, 295; see *Commonwealth v. Craig*, 6 Randolph, 731.

Recognizances estreated into the Exchequer may be discharged or compounded, by the court according to the equity and circumstances of the case. *In re Pellard*; 13 Price, 299; S. C. nom.; *Ex parte Pellow*, M'Clel. 111. In Massachusetts the court has the same power by statute. Rev. Statute, Ch. 135, sec. 29.

A recognizance of bail in a criminal case is not designed as a satisfaction of the offence, when it is forfeited and paid, but as a means of compelling the party to submit to the trial and punishment, which the law ordains for his offence. *Ex parte Milburn*, 9 Peters, 710. A judgment rendered on a recognizance for failing to appear is no bar to another prosecution for the same offence. *Commonwealth v. Thompson*, 3 Litt. 284.

recognizance of bail, then such committing justice or justices may make a duplicate of such certificate as aforesaid, and upon the same being produced to any justice of the peace for the same county, riding, division, liberty, city, borough, or place, it shall be lawful for such last-mentioned justice to take the recognizance of the surety or sureties in conformity with such certificate, and upon such recognizance being transmitted to the keeper of such jail or prison, and produced, together with the certificate on the warrant of commitment as aforesaid to any justice of the peace attending or being at such jail or prison, it shall be lawful for such last-mentioned justice thereupon to take the recognizance of such accused party, and to order him to be discharged out of custody as to that commitment, as hereinafter mentioned.<sup>(a)</sup>[1]

And in all cases where such accused person in custody shall be admitted to bail by a justice of the peace other than the committing justice or justices as aforesaid, such justice of the peace so admitting him to bail shall forthwith transmit the recognizance or recognizances of bail to the committing justice or justices, or one of them, to be by him or them transmitted, with the examinations, to the proper officer.<sup>(b)</sup>

(a) 11 & 12 Vict. c. 42, s. 23.

(b) 11 & 12 Vict. c. 42, s. 23.

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[1] If the party is not ready with bail, at the time he is apprehended and examined, and the offence is bailable, he may at any time be released from imprisonment on finding sureties. 1 Burr. 460; 2 Hawk. ch. 16, § 1, n. 1; 1 Nun & Walsh, 383. And after the recognizance had been entered into, the justice before whom it is taken will send notice of the fact to the jailer and an order to liberate him. 1 Chit. Cr. L. 101; 1 Nun & Walsh, 383. And it is said that justices of the peace may send a prisoner, for a short time, to some private prison, to afford him an opportunity, when necessary, of procuring bail before he is committed for trial; but this practice has been disapproved of as inconvenient and not agreeable to law. For in strictness the magistrate has no authority thus to detain a party in custody out of the common jail; and in so doing he acts on his own responsibility, and should therefore be very cautious. 1 Burn, 321; 1 Chit. Cr. L. 345; Cro. Cir. Comp. 15. The practice, however, of permitting the prisoner to remain a short time before his final commitment, in the custody of an officer, to afford him this opportunity, is very reasonable and liable to no serious objection. A faithful officer will be careful, in such case, not to suffer an escape; and the party thereby may avoid the inconvenience of a commitment, in some cases, where his bail, when procured, would be ample security for his appearance to take his trial. Davis' J. 99.

Notice of bail is, in ordinary cases, not usually required by magistrates when the prosecutor is in attendance and has an opportunity of objecting; but it may be required if the magistrate thinks the case proper for it; and when the bail tendered has been rejected for insufficiency, and the party thereupon committed, the magistrate, in England, frequently does (and in strong cases it is very proper) order that a reasonable notice of bail, usually twenty-four or forty-eight hours according to circumstances, shall be given to the prosecutor or his attorney, in order that he may in the meantime inquire into the sufficiency of the bail tendered, and, if they are not satisfactory, have an opportunity of opposing them. 1 Nun & Walsh, 386; 1 Burn, 321. Notice should also be required when the securities have been previously rejected by another magistrate. Id. 381, 386.

The following is the form of the

*Certificate of Consent above mentioned.*

I hereby certify, that I consent to the within-named A. B.  
\*being bailed by recognizance, himself in —, and [two] [\*58]  
sureties in — each.

J. S.

*The like, on a separate Paper.*

Whereas A. B. was on the —, committed by me to the [house of  
correction] at —, charged with [ &c., naming the offence shortly: ]

I hereby certify, that I consent to the said A. B. being bailed by  
recognizance, himself in —, and [two] sureties in — each. Dated  
the — day of —, 185—.

J. S.

*(d) In other misdemeanors.*

Where any person shall be charged before any justice of the peace  
with any indictable misdemeanor other than those hereinbefore men-  
tioned, such justice, after taking the examinations in writing as afore-  
said, instead of committing him to prison for such offence, shall admit  
him to bail in manner aforesaid;—or if he have been committed to  
prison, and shall apply to any one of the visiting justices of such prison,  
or to any other justice of the peace for the same county, riding, divi-  
sion, liberty, city, borough, or place, before the first day of the sitting  
or session at which he is to be tried, or before the day to which such  
sitting or session may be adjourned, to be admitted to bail, such justice  
shall accordingly admit him to bail in manner aforesaid.(a)[1]

(a) 11 & 12 Vict. c. 42, s. 23.

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[1] A party who is thus bailed, is still, in supposition of law, in custody of his sureties, who are considered as his keepers, and may, therefore re-seize to bring him in if they fear his escape, and take him before the justice or court to be committed, and thus the bail may be discharged from their recognizance. But the defendant is at liberty to find new sureties. 1 Chit. Cr. L. 104; 2 Hale, 124; 2 Hawk, ch. 15, § 3; Com. Dig. "Bail" 2; 6 Mod. 231. Bail in criminal cases are invested with the same unrestricted authority over the person of the defendant that is conferred upon them in civil cases. Petersdorf on Bail, 514. Bail are said to have the principal always upon the string, and may pull it in when they please, to render him in their own discharge. 6 Mod. 231. They have the custody of the principal, and may take him at any time and in any place. 1 Highmore on Bail, 199. The taking is not considered as the service of process, but as a continuation of the custody which had been, at the request of the principal, committed to the bail. The principal may, therefore, be taken on Sunday. The dwelling house is no longer the castle of the principal, in which he may place himself to keep off the bail. If the door should not be opened on demand, at midnight, the bail may break it down, and take the principal from his bed, if that measure should be necessary to enable the bail to take him. 8 Pick. 140. And in surren-

(e) *Warrant of Deliverance.*

In all cases where a justice or justices of the peace shall admit to bail any person who shall then be in any prison charged with the offence for which he shall be so admitted to bail, such justice or justices shall send to or cause to be lodged with the keeper of such prison a warrant of deliverance under his or their hand and seal or hands and seals, requiring the said keeper to discharge the person so admitted to bail, if he be detained for no other offence; and upon such warrant of deliverance being delivered to or lodged with such keeper, he shall forthwith obey the same.(a)[2]

(a) 11 & 12 Vict. c. 42, s. 24.

dering the principal, they may command the co-operation of the sheriff and any of his officers. Petersdorf on Bail, 515. And besides this power of bail to take and render the party accused of a crime, bail in a civil action may have a *habeas corpus*. in some cases, to render the defendant in custody on a criminal charge, in order to be relieved from further liability on their recognizance. Id. ib.; 15 East, 78; 9 id. 154; 3 id. 232.

Bail may depute another person to take and surrender their principal; and the bail, or the person deputed by him for that purpose, may take the principal at any time and in any place, even in another state. 7 John. 145; 1 John. Cas. 413. So an executor or administrator may surrender the principal of his testator or intestate. 1 Bos. & Pul. 62; 7 Mass. R. 169.

The acquittal or condemnation of the principal does not affect the situation of the bail; for their responsibility in either case terminates, if the prisoner duly appears to answer the charge brought against him. 1 Wila. 315. And it appears that the right of the bail to be discharged, is not affected by the conduct of the principal on his trial. If he, therefore, stand *mute*, they are not liable on the recognizance, although a contrary inference might be drawn from the terms of that instrument. Petersdorf on Bail, 515. If the principal do not appear, and the recognizance be forfeited and the penalty paid by the bail, yet the principal continues amenable to the law, whenever he can be taken; for the penalty in the recognizance is only intended to compel a due observance of its condition, and has no connection with the liability of the principal. Id. 516.

It has been remarked, (Highmore on Bail, 204,) that if the bail have been compelled to pay the penalty, in consequence of the recognizance becoming forfeited, they cannot sustain an action against him for money paid to his use; but this opinion would appear to be unfounded, as it is now fully settled that where a person is bail for another, he is entitled to recover all the expenses he has incurred incidental to that situation. 5 Esp. 171; Petersdorf, 423. And if one of the bail is compelled to pay the whole of the debt created by the forfeiture of the recognizance, he may support an action for money paid, against his co-surety, and thereby compel him to contribute his proportion toward the liquidation of the demand. Petersdorf on Bail, 423, 424. In such action by one of the bail against his co-surety, to obtain contribution, he must prove the judgment as well as the execution. Id. 424; 1 C. Marsh. Rep. 6.

The recognizances for the appearance of the defendant, must be certified by the magistrate to the next court having cognizance of the offence charged against the prisoner, in the same manner as the examinations and the recognizances to prosecute and give evidence are to be certified and returned.

It appears to be a general rule that the defendant and his bail cannot be called upon their recognizance except on the day on which the former is bound to appear. If he is called on any other day, notice must be given of the intention. 1 Chit. Cr. L. 106.

[2] OHIO.—By special provision, when any person has been committed, for a bailable

The following is the form of the

*Warrant of Deliverance on Bail being given for a Prisoner already committed.*

To the keeper of the [*house of correction*] at —, in the said [*county*] of —.

Whereas A. B., late of —, [*laborer*] hath before [*us, two*] of Her Majesty's justices of the peace in and for the said county, entered into his own recognizance, and found sufficient sureties for his appearance at the next court of oyer and terminer and general jail delivery [*or court of general \*quarter sessions of the peace*] to be holden in [\*59] and for the county of —, to answer our sovereign lady the Queen, for that [*&c., as in the commitment,*] for which he was taken and committed to your said [*house of correction* : ] these are therefore to command you, in Her said Majesty's name, that if the said A. B. do remain in your custody in the said [*house of correction*] for the said cause, and for no other, you shall forthwith suffer him to go at large.

Given under our hands and seals, this — day of —, in the year of our Lord —, at —, in the [*county*] aforesaid.

J. S. [L. S.]

J. N. [L. S.]

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#### SECTION IV.

##### CONVICTION OF JUVENILE OFFENDERS FOR LARCENY.

###### (a) *In what cases.*

Every person who shall be charged with having committed, or having attempted to commit, or with having been an aider, abettor, counsellor, or procurer in the commission of any offence which now is or hereafter shall or may be by law deemed or declared to be simple larceny, or punishable as simple larceny,—and whose age at the period of the commission or attempted commission of such offence shall not in the opinion of the justices before whom he or she shall be brought

offence, either by a judge, sheriff, or justice, any single judge may admit such person to bail, and may direct the prisoner, by special warrant, to be brought before him for that purpose.

In that state, there is also an *examining court* specially provided for the relief of prisoners confined on criminal accusations. It consists of the three associate judges of the county, who, at the request of any such prisoner, may be convened at any time, on three days notice, and after examining into the facts of the case, may either discharge, re-commit, or hold the prisoner to bail, as they think proper. Walker's Intro. 624.



or appear, exceed the age of sixteen years,(a) shall, upon conviction thereof upon his own confession or upon proof, before any two or more justices of the peace for any county, riding, division, borough, liberty, or place, in petty sessions assembled, at the usual place and in open court, be committed to the common jail or house of correction within the jurisdiction of such justices, there to be imprisoned, with or without hard labor, for any term not exceeding three calendar months,—or, in the discretion of such justices, shall forfeit and pay such sum not exceeding three pounds, as the said justices shall adjudge, or if a male [not exceeding fourteen years of age,](b) shall be once privately whipped, either instead of or in addition to such imprisonment, or imprisonment and hard labor.(c)[1]

(b) *By whom.*

Any two or more justices of the peace for any county, riding, division, borough, or place, in petty sessions assembled, and in open court,—or any one magistrate of the police courts of the metropolis,—or any stipendiary magistrate sitting in open court, and having by law the

(a) 13 & 14 Vict. c. 36, s. 1.

(c) 10 & 11 Vict. c. 82, s. 1.

(b) 13 & 14 Vict. c. 37, s. 1.

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[1] The jurisdiction of a justice of the peace in criminal matters generally extends to three principal classes of cases: I. Those cases, in which the proceedings before them are merely primary and preliminary, that on the appearance or arrest of an accused person, he may, if due proof be made, be held to answer the charge before a proper court of justice. II. Cases of summary conviction, in which they have power to hear, try, and determine charges for particular statutory offences, and to punish by fine and imprisonment. III. Cases of surety of the peace, or for good behaviour, in which they may require a suspected party to enter into the proper recognizances.

There are some cases, in which proceedings are by statute authorized and directed to be had, for the punishment of offences by fine or imprisonment, and for the recovery of fines and forfeitures, before justices of the peace and similar magistrates, on their judgment and sentence; in which they have power to hear, try, and determine, and may acquit, or convict and punish. In some instances their judgments or sentences, under this jurisdiction, are final; in others, there may be an appeal on the facts to a proper court of justice.

Generally, the proceedings before justices of the peace, in criminal cases, are only *primary*, being merely *preliminary*, in order to the trial of the accused in a competent court; but in this class of cases they are final, for trial and judgment, acquittal or conviction and sentence; an appeal being allowed, in some instances from such a conviction, to a higher tribunal.

In this country proceedings of this kind have been provided for, by statute, in numerous cases, for offences against the public, and for violations of penal laws more immediately injurious to individuals, forming a *particular and very important class of jurisdiction delegated to justices of the peace, and similar magistrates.*

Of this description of cases are gambling, horse-racing, profane cursing and swearing, drunkenness, Sabbath-breaking by worldly employment on that day, obstructing public roads or canals, vagrancy, and the like; and in some states, common assault and battery, challenging to fight and affrays.

power to do acts usually required to be done by two or more justices of the peace,—have hereby authority to hear and determine the case \*according to the provisions of this act; (a) seemingly, [\*60] whether the offence be committed within their jurisdiction or not.[1]

(c) *Summons or warrant.*

Where any person, whose age is alleged not to exceed [sixteen] years shall be charged with any such offence on the oath of a credible witness, before *any* justice of the peace such justice may issue his summons or warrant to summon or apprehend him to appear before two justices, &c., at a time and place to be named therein.(b) The summons may readily be framed from the form;(c) and the warrant from

(a) 10 & 11 Vict. c. 82, s. 2.

(c) *Ante*, p. 32.

(b) *Id.* s. 4.

[1] A justice acts either singly, or in connection with other justices. Where an authority, of a *judicial* nature, is given by statute to two justices, it cannot be exercised by one; and in such cases the two justices must be together when the authority is exercised. 3 T. R. 38; 2 W. Bl. Rep. 1017; Bac. Abr. tit. Just. P. (E.) 5; 3 Burn. 561. But where the act to be done is merely *ministerial*, they may act separately. 1 Str. 393; 2 East. 244; 8 East. 327, note; 5 Bing. 319. Some statutes empower one justice alone to act; others require two, three, or four justices. Where an authority is conferred upon two it may be executed by a greater number. 2 Salk. 477; 5 Car. & Payne, 135; Dalt. ch. 6, § 8. But an authority given to two cannot be executed by one alone. Dalt. ch. 6, § 8; 4 Coke, 46; 3 Burn. 561. And where, by statute, a special authority is given to justices of the peace it must be pursued exactly, or their acts will be void. 2 Salk. 475; 5 Burr. 2686; Arch. Mag. Pocket Book, 147. But it is to be observed that the statutes which require their authority to be exercised by two or more justices relate generally to judicial acts. 1 Nun & Walsh, 62, note; 1 Black. Com. 354, note.

Most of the statutes give authority generally, without distinction, to all justices, which implies an equal power in all, within the limits of their respective jurisdictions. But some statutes point out those of a particular description; and the powers given by such statutes are, of course, confined to justices possessing the necessary qualification. *Id.* 64.

It has been laid down that where, by statute, a thing is appointed to be done by or before one person certain, by such express designation of one, all others are excluded. Dalt. ch. 6; 3 Burn. 562. Thus it was held under a statute giving authority to a justice *residing* in a county, that none but a justice resident there had jurisdiction. *Sharp v. Aspinall*, 1 Barn. & Cr. 47. So where a statute requires the act to be done by the *next* justice, it has been holden that it must be the next, and that the authority of all others is thereby excluded; but where the statute says justices *in* or *near* the place, any justice of the county may take cognizance of the matter, notwithstanding such description, these latter words being held to be merely directory. 3 Bac. Abr. 798; 1 Saund. 263, a. note; *Rex v. Jennings*, 3 Keb. 383. And it has been held that in constructing the acts which mention justices *in* or *near* the place where the offence was committed, any justice of the county may take cognizance of the matter. 1 Saund. 263; 3 Keb. 283; Bac. Abr. tit. Just. of Peace, E. 5; 2 Str. 1154; 14 East's Rep. 267, 274.

Where a statute directed any two justices of the county to make an inquiry, and if certain evidence was obtained, empowered "such justices" to make an order, it was held that both acts must be done by the same two magistrates. 12 Ad. & Ellis, 78.

the form.(a) Of course this is not necessary, where the party has already been apprehended without warrant, and is in custody; but in that case he must be brought before two or more justices in petty sessions, or before a police or stipendiary magistrate, as above mentioned.[2]

(d) *Hearing.*

Any justice may issue a summons requiring the attendance of any

(a) *Ante*, p. 31.

[2] The power of a justice of the peace to convict an offender in a summary way, without a trial by jury, is in restraint of the common law, and nothing will be *presumed* in favor of this branch of his office; but the intendment will be against it. Where, therefore, this especial power is given to him by statute, it must appear that he has strictly pursued it; otherwise his proceedings will be void.

There must, in the first place, be an information or charge against a person; then he must be summoned, or have notice of such charge, and have an opportunity to make his defence; and the evidence against him must be such as the common law approves, unless the statute specially directs otherwise; then, if the person be found guilty, there must be a conviction, judgment, and execution, according to the course of the common law, directed and influenced by the special authority given by statute; and finally, there must be a record of the whole proceedings, wherein the justice must set forth the particular manner and circumstances, so that if an appeal should be taken, it may appear that he has conformed to the law, and not exceeded the bounds prescribed to his jurisdiction.

When the offence is between party and party, and not of an aggravated nature, and the supposed offender is not likely to abscond, a summons is recommended, as the preferable process to procure his attendance; and this seems necessary where there is no oath of the offence having been committed. But where there is an accusation on oath of an offence of a higher nature, as treason or felony, it is proper to issue a warrant, in the first instance, if there appear any reasonable ground for the charge. But although there be a positive charge on oath, yet if the justice see that no credit is to be given to it, he may decline issuing a warrant. For petty assaults, though a justice is authorized to issue a warrant, on complaint on oath of the accuser, yet a summons is more advisable, as in many cases it is found that the accusation is frivolous or without any foundation. A summons should be signed by the magistrate who issues it, and may be directed to the party himself, or to a constable requiring him to summon or give notice to the party, where attendance is required. And it is usual not only in the summons to fix a day, but a particular hour, for the appearance of the suspected individual; but the accused is bound to wait until the magistrate can attend to the complaint. In general a summons may be granted without the oath of the complaining party; but in some cases, by particular enactment, an oath is absolutely requisite. If the complaint is on oath, it should be so stated, and a copy of the summons should be served upon, or left at the residence of the accused. In a criminal prosecution against the wife there is no occasion to summon the husband. 1 Chitty on Crim. Law. p. 32.

When a magistrate takes jurisdiction of an offence committed in his view, he may issue a summons or warrant, according to the nature of the case, without any complaint or information.

The summons is for the purpose of requiring the accused to appear before the magistrate in order to answer the charge, and that he and his witnesses may be examined, and, if necessary, the witnesses on the part of the prosecution, in his presence. The magistrate is to be regulated, in fixing the precise time of the return of the summons, and the examination, by the distance, and by the particular circumstances of each case. If the accused do not appear on the summons, and it was duly served, and where the information was on oath, the magistrate may issue a warrant.

person as a witness upon the hearing, and it may be served either by delivery of a copy to the witness, or by leaving it with some person for him at his usual place of abode;(a) or if he refuse or neglect to attend, the justice may issue his warrant. This summons and warrant may readily be framed from the forms.(b)

As soon as the party and witnesses are before the justices, and before the party is asked whether he or she has any cause to show why he or she should not be convicted, one of the justices shall say to him—: “ *We shall have to hear what you have to say in answer to the charge against you; but if you wish the charge to be tried by a jury, you must object now to our deciding upon it at once,*”—or words to the like effect.(c) If he object, the summary proceeding ceases, and the prosecutor must proceed in the ordinary way, by indictment; but if he say he has no objection then the justices take his plea, proceed to hear the witnesses, and convict him, or dismiss the charge.

The justices may remand the party for further examination; or they may allow him to go at large, upon his procuring a surety or sureties to be bound by recognizance for his appearance at his further examination.(d)

(e) *Conviction and commitment.*

The conviction may be drawn in the following form, or in any other form to the same effect; and which conviction shall be good and effectual to all intents and purposes.(a)[1]

(a) 10 & 11 Vict. c. 82, ss. 7, 8.

(b) *Act*, pp. 40, 41.

(c) 13 & 14 Vict. c. 37, s. 2.

(d) 10 & 11 Vict. c. 82, s. 5.

(e) *Id.* s. 9.

[3] A conviction (in the sense in which it is here used,) is a record of the summary proceedings upon any penal statute, before one or more justices of the peace, or other persons duly authorized, in a case where the offender has been convicted and sentenced.

The following observations on the form of a record of conviction, are principally intended for those cases in which no directions are given by the statute authorizing this mode of proceeding in the particular instance.

When the conviction proceeds on the information of some person, and not on the justice's own knowledge, that information should be set forth, stating the day when it was taken, that it may appear to have been given within the time limited by law; the place where it was taken, that it may appear that the justice was acting within the limits of his jurisdiction; the name of the justice or justices to whom it was given; and if directed to be taken on oath, it should be stated to be so taken.

The facts by which the information is supported, must have arisen before the information was given; for if they appear to be subsequent to the information, the conviction will be quashed. The time of committing the offence must likewise be stated, for the same reason as the time of giving the information, that from the day of the offence, and the day of commencing the prosecution, it may appear that it was commenced in due time, and also that the party may be enabled to defend himself against a second charge. But the offence need

The following is the form given in the schedule to the statute :

[\*61]

*\* Conviction.*

— } Be it remembered, that on the — day of —, in the year  
to wit: } of our Lord one thousand eight hundred and —, at —

not be proved to have been committed precisely on the day alleged; it has been held, that it was sufficient to state that it was between such and such a time.

The information must state the place where the offence was committed, that it may appear to have arisen within the jurisdiction of the justice; and it must be proved to have been committed in the place laid in the information; for where the jurisdiction of the magistrates who try the offence is local, the offence must be proved to have been committed within their jurisdiction.

The particular manner in which the offence was committed, must be set forth and described in the manner directed by the act creating it an offence, that it may appear to come within its provisions.

Whenever the statute inflicts a penalty for an offence created by it, upon conviction before one or more justices of the peace, but there is an exception in the enacting clause, of persons under particular circumstances, it is necessary to state in the information, that the defendant is not within any of the exceptions. And it seems immaterial whether the exception be in the same section, or a preceding section, or in a preceding act, referred to by the enacting clause.

But where the exemption is contained under a proviso, it is matter of defence, and therefore it is not necessary to state in the conviction that the defendant is not within such proviso.

It is a fundamental rule, that the party should be summoned, before he is convicted. But the defendant's appearance will, in this case, as in other cases of process, cure not only all defects and informalities in the summons, but also the want of a summons.

If the party, on being summoned, do not appear, proof having been made on oath of the service of the summons, the justice may proceed to convict him, for he will not be allowed, by his own default, to escape the penalty of the law.

The information should be read to the defendant, and he should be put to plead thereto: that is, either to confess or deny it, before the justice proceeds to hear evidence in its support.

The defendant's confession of the charge before the justice, is the strongest evidence of the offence. For though a statute should direct a conviction to be "Upon the oath of one or two credible witnesses," without adding, "Or, by confession of the offender," yet conviction upon his confession before the justice, has been held sufficient; and what is still stronger, it has been held, that a confession made to others, and not to the justice, if proved by such persons to his satisfaction, in the presence of the defendant, will be sufficient evidence to convict. Where the defendant confesses the charge, it seems to be sufficient only to state in the conviction, the information, the defendant's appearance, the confession, and adjudication.

But a confession will extend no further than to the facts charged in the information; therefore, if the offender be not brought by the information within the act upon which the conviction is founded, the defendant's confession will not make the conviction good.

The informer, where he receives part of the penalty, cannot be a witness. For which reason, it is requisite to name the witness in the conviction, that it may appear that it is not the same person with the informer.

It is essential that the evidence be given in the presence of the defendant, that he may have an opportunity of cross-examining the witness; and it must appear on the face of the conviction, that the evidence was so given. But if it appear on the conviction, that the evidence was given on the same day that the defendant appeared and pleaded, the court will presume that it was given in his presence.

in the county of —, [*or riding, division, liberty, city, &c., as the case may be,*] A. O. is convicted before us J. P. and Q. R., two of Her Majesty's justices of the peace for the said county, [*&c.,*] for that he the said A. O., did [*specify the offence, and the time and place when and where the same was committed, as the case may be, but without setting forth the evidence.*] and we the said J. P. and Q. R., adjudge the said A. O. for his said offence to be imprisoned in the —, [*and there kept to hard labor*] for the space of —, [*or we adjudge the said A. O., for his said offence, to forfeit and pay — [here state the penalty actually imposed,]* and in default of immediate payment of the said sum, to be imprisoned in the — [*and there kept to hard labor*] for the space of —, unless the said sum shall be sooner paid.]

Given under our hands and seals, the day and year first above mentioned.

The justices may order restitution of the property stolen; or if the property be not forthcoming, they may order the offender to pay the value of it to the prosecutor, at once or by instalments.<sup>(a)</sup>

(a) 10 & 11 Vict. c. 82, s. 12.

The evidence should be set forth particularly in the conviction, that the court may judge whether the justice has convicted on proper evidence.

The conviction should state not merely the result of the evidence, but the whole evidence itself. It is not sufficient that the witness swear generally that the defendant was guilty of the premises; particular facts must be proved and stated.

The magistrate is the sole judge of the weight of the evidence; and it is entirely and conclusively for his consideration, and he is placed in the situation of a jury, and the court before whom the conviction is brought on appeal, will not substitute themselves in the place of the justices acting as jurymen; they cannot judge of the credit due to witnesses whom they did not hear examined, and can only look to the form of the conviction, and see that the party, if convicted, has been convicted by legal evidence.

There must be a judgment in the conviction, stating not only that the defendant was guilty, but likewise adjudging the fine or forfeiture to which the party is subjected.

The justice ought to give the defendant a copy of the conviction, if he demand it.

The form of conviction given by statute, must be strictly adhered to. Where a conviction was drawn up in another form, and a warrant granted on it, it was held illegal, and that an action of trespass lay against the justice, and those acting under it.

The judgment should be stated in the present tense, but the previous parts of the record of conviction may be in the past time, although it has been held that the whole of the record should be in the present tense, which is, perhaps, the safest rule to pursue.

If the convicting magistrate give a proper date to the time of conviction upon the face of it, and afterwards add an impossible date when he sets his hand to the conviction, (being before the offence committed,) the latter may be rejected as surplusage. It is enough that the conviction sets forth that the witness was examined on oath, without stating that the magistrate had authority to administer the oath. Where a penalty is to be sued for, before justices of the peace, within a certain time after the offence committed, upon conviction for such offence, it ought to appear on the face of the evidence stated in such conviction, that the prosecution was in time; and if the witness be only stated to have mentioned the month in which the offence was committed, omitting the year, and there be no word of reference to connect it with the true date, the omission cannot be supplied, either by reference to the offence charged in the information, or by presumption arising from the justice having convicted the defendant. *Waterman's Treatise*, p. 301-304.

61—1 CONVICTION OF JUVENILE OFFENDERS FOR LARCENY.

Also, the justices are empowered to order that the prosecutor be allowed his expenses.(a)

The following forms of warrants of commitment, are not given by the schedule to the act :—

*Warrant of Commitment on a Conviction where the punishment is by Imprisonment, &c.*

To the constable of —, and to the keeper of the [house of correction] at —, in the said [county] of —.

Whereas A. O. was this day duly convicted before the undersigned, [two] of Her Majesty's justices of the peace in and for the said [county] of —, for that [stating the offence as in the conviction,] and it was thereby adjudged that the said A. O. for his said offence should be imprisoned in the [house of correction] at —, in the said county [and there kept to hard labor] for the space of —: these are therefore to command you, the said constable of —, to take the said A. O., and him safely convey to the [house of correction] at — aforesaid, and there to deliver him to the keeper thereof, together with this precept; and I do hereby command you the said keeper of the said [house of correction] to receive the said A. O. into your custody in the said [house  
[\*62] \*of correction,] there to imprison him [and keep him to hard labor] for the space of —; and for your so doing this shall be your sufficient warrant.

Given under my hand and seal, this — day of —, in the year of our Lord—, at —, in the [county] aforesaid.

J. S. [L. s.]

*Warrant of Commitment upon a Conviction for a Penalty.*

To the constable of —, and to the keeper of the [house of correction] at —, in the said [county] of —.

Whereas A. O. was on this day duly convicted before the undersigned [two] of Her Majesty's justices of the peace in and for the said [county,] for that [stating the offence as in the conviction ;] and it was thereby adjudged that the said A. O. for his said offence should forfeit and pay the sum of —, [&c., as in the conviction,] and in default of immediate payment of the said sum, to be imprisoned in the [house of correction] at — in the said [county] [and there kept to hard labor] for the space of —, unless the said sum should be sooner paid: and whereas the said A. O. hath not paid the said sum or any part thereof, but therein hath made default: these are therefore to command you the said

(a) 10 & 11 Vict. c. 82, ss. 15, 16, 17.

constable of —, to take the said A. O., and him safely to convey to the [house of correction] at — aforesaid, and there to deliver him to the keeper thereof, together with this precept; and I do hereby command you the said keeper of the said [house of correction] to receive the said A. O., into your custody in the said [house of correction,] there to imprison him [and keep him to hard labor] for the space of —, unless the said sum shall be sooner paid: and for your so doing this shall be your sufficient warrant.

Given under our hands and seals, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.

J. P. [L. s.]

Q. R. [L. s.]

This fine, if paid, is to be paid to the clerk of the convicting justices, and by him to the county rate, or rate in the nature of a county rate for the county, city, &c. in which the offence was committed.(a)

(c) *Dismissal of the charge.*

If the justices, upon the hearing of any such case, shall deem the offence not to be proved, or that it is not expedient to inflict any punishment, they shall dismiss the party charged, on finding surety or sureties for his future good behavior, or without such sureties, and there make out and deliver to the party a certificate of his dismissal;(b) which certificate shall release the party from all further or other proceedings for the same cause.(c)

(a) 10 & 11 Vict. c. 82, s. 6.

(b) Id. s. 1.

(c) Id. s. 3.



## INDICTMENT AND PLEADINGS.

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1. *Venue*, p. 63.

- (a) *What*, p. 63.
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## SECTION I.

## INDICTMENT.

AN indictment is an accusation at the suit of the crown, found to be true by the oaths of a grand jury.<sup>(a)</sup>[1] It consists of the venue, the commencement, the statement of the offence, and the conclusion; and in this order I shall treat of it.

(a) 2 Hawk. c. 25, s. 1.

[1] An indictment may be defined to be a written accusation of one or more persons of a crime presented upon oath by a jury of twelve or more men, termed a grand jury. In the language of Lord Hale, it is a plain, brief, and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature. 2 Hale, 169. In general, the rules and principles of pleading, with respect to the structure of a declaration, are applicable to an indictment, (2 Stra. 904,) and therefore, where the criminal law, as to the form of an indictment in a particular case, is silent, resort may be had to decisions on the requisites of pleading in civil actions. Strictly speaking, an indictment is not so called until it has been found "a true bill" of the grand jury. Before that it is termed a bill only.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Const. U. S. Art. 5. See Waterman's Criminal Law, tit. Indictment.

A *presentment*, properly speaking, is an accusation made by a grand jury of an offence upon their own observation and knowledge, or upon evidence before them, and without any bill of indictment laid before them at the suit of the government. After the presentment has been delivered into court by the grand inquest, an indictment is framed upon it by the officer of the court; for it is regarded merely as instructions for an indictment, to which the party accused must answer. 4 Blk. Com. 301.

"There is another mode of prosecution, which exists by the common law in regard to misdemeanors; though these are ordinarily presented upon indictments found by a grand jury. This mode is by information, usually at the suit of the government or its officers. An information generally differs in nothing from an indictment, in its form and substance, except that it is filed at the mere discretion of the proper law officer of the government, *ex officio*, without the intervention of a grand jury. This process is rarely resorted to in America; and it has never yet been formally put in operation by any positive authority of congress, under the national government, in mere cases of misdemeanor, though common enough in civil prosecutions for penalties and forfeitures. 3 Story on the Const. 659. In Pennsylvania there is a constitutional provision against proceeding by information in any case where an indictment lies; (Const. art. 9, § 10;) and the same restriction exists in several of the other states. *State v. Mitchell*, 1 Bay, 267; *Clearly v. Desselin*, 1 McCord, 35. In New York, (Const. art. 7, § 7,) and in Virginia, (Davis's C. Law, 422,) the limitation is confined to cases of infamous crime. In New Hampshire, it obtains in all cases, where the punishment is death or confinement at hard labor. Rev. Stat. N. Hamp. 457. In Vermont, a distinction of the same character is made. Rev. Stat. Ver. chap. cii. In the latter state,

1. *Venue*. [2](a) *What*.

The venue is the county, &c., stated in the margin of the indictment, and is descriptive of the extent of the jurisdiction of the court before which the offender is to be tried:—in indictments to be tried at the assizes, the venue is the county or county of a city, &c., to which the judges' commission relates; in indictments to be tried at the sessions, the county, riding, division, city, or borough to which the commission of the peace extends. In indictments for offences triable at the central criminal court, the venue is merely "Central Criminal Court, to wit," being descriptive of a certain district, namely, the county of Middlesex, the city of London, and parts of the counties of Essex, Kent, and Surrey, within which the court has jurisdiction.

(b) *General rule*.

The general rule as to venue, is that a person who has committed an indictable offence, if tried at the assizes, must be indicted and tried in the county in which the offence was committed; if tried at the sessions, in the county, riding, division, city, or borough within which the \*offence was committed, and for which a court of quarter sessions is holden. [1] But to this there are many exceptions, mostly created by statute, which I shall now proceed to notice. [\*64]

in fact, it has been decided by the Supreme Court, that the provision in the federal constitution, (Constitution U. S., art. 5,) applies only to cases in the United States courts. *State v. Keyes*, 8 Vermont, 57. In Massachusetts, it has been laid down as a general rule, that all public misdemeanors which may be prosecuted by indictment, may be prosecuted by information on behalf of the commonwealth, unless the prosecution be restrained by the statute to indictment." *Com. v. Waterborough*, 5 Mass. 257, 259. Wharton's Cr. Law, pp. 60, 61.

[2] Venue is derived from the Latin *vicinitas*, neighborhood. The original and proper form of the word seems to have been *visne*, being that in which it occurs in the oldest reports. *Venus* seems properly to denote a *coming*, (from *vener*, to come,) and is so used in the Statute of Westminster. 1 Burrill's Law Dict. tit. Venue.

[1] At common law, the venue should always be laid in the county where the offence is committed, although the charge is in its nature transitory, as seditious words or battery, (Hawk. b. 2, c. 25, s. 35;) and it does not lie on the prisoner to disprove the commission of the offence in the county in which it is laid, but it is an essential ingredient in the evidence on the part of the prosecutor, to prove that it was committed within it. 2 New Rep. 92; 2 Leach, 634; 2 East P. C. 605. And in the earlier periods of our history, it was even necessary that the offence should be tried by a jury of the visne or neighborhood who were then regarded as more likely to be qualified to investigate and discover the truth, than persons living at a distance from the scene of the transaction; it being a maxim of the common law, *quod ibi semper debet fieri triatio ubi juratores meliorem possunt habere notitiam*. Co. Lit. 125, a & b. n. 1; 6 Co. 14 b.; 2 T. R. 240; 2 Hale, 163. It seems, that until very recently, the right to challenge for want of hundredors, existed, (id. ibid. ;) and although the practice had fallen into disuse, the right was not actually abrogated until the act of 6 Geo.

*(c) Offences in a county of a city or town corporate.*

By stat. 38 G. 3, c. 52, s. 2, the indictment for an offence committed or charged to be committed within the county of any city or town corporate, may be referred to the jury of the county next adjoining to the county of such city or town corporate, sworn and charged to enquire for the King, for the body of such adjoining county, at any sessions of oyer and terminer or general jail delivery. The statute<sup>(a)</sup> however, requires the prosecutor in such a case to enter into recognizance in 40*l.*, before the court where such bill shall be preferred, conditioned to pay the extra costs of the prosecution, if the court at the trial shall be of opinion that he ought to pay the same. The words "town corporate," in the above act, mean a town corporate which is a county of itself, such as Kingston-upon-Hull, &c.<sup>(b)</sup> But the statute<sup>(c)</sup>

(a) Sec. 12.

(c) Sec. 11.

(b) *R. v. Milner*, 2 Car. & K. 310.

4, c. 50, by which it was taken away. The venue was always regarded as a matter of substance, and therefore, at common law, when the offence was commenced in one county and consummated in another, the venue could be laid in neither, and the offender went altogether unpunished. 1 Hale, 651, 652; Hawk. b. 2, c. 25, § 36; Bac. Ab. indictment, F.; and see the preamble of the 2d & 3d Edw. 3, c. 24. Thus, under the statute of 8 Hen. 6, c. 12, against stealing records, it was holden, that if the offence were committed partly in one county, and partly in another, the offender could be punished in neither, except for the misprision of felony. 1 Hale, 652, 653; Hawk. b. 2, c. 25, § 36, 40. Thus also under the 3 Hen. 7, c. 2, against the forcible abduction and marriage of an heiress, it appears to have been considered, that if the forcible abduction were confined to one county, and the marriage took place in another, no trial could be had in either; though if the forcible abduction had been continued into the county where the marriage took place, the offence would be there completed, and there the offender might be tried. Cro. Car. 488; Hob. 183; Hawk. b. 2, c. 25, § 40. And thus also, if a mortal blow was given in one county, and the party died in consequence of the blow in another, it was doubted whether the murder could be punished in either, for it was supposed that a jury of the first could not take notice of the death in the second, and a jury of the second could not enquire of the wounding in the first. 1 East, P. C. 361; Bac. Abr. Indictment, F.; Hawk. b. 2, c. 25, § 36. See recital in 2d & 3d Edw. 6, c. 24, s. 2. So also before the stat. 28 Hen. 8, c. 15, the offences therein mentioned, if committed on the high seas, could not be tried on shore, (2 New Rep. 91; Dougl. 791; 1 Taunt. 26;) and a felonious taking in Scotland or Ireland could not be tried here, though the party brought the goods with him into this part of the United Kingdom. 2 East, P. C. 772; 13 Geo. 3, c. 31, § 4, 5; 44 Geo. 3, c. 92, § 7, 8. And the same objection arose in case of accessories in one county, to a felony committed in another. 1 Hale, 62, 63; Staundf. b. 1, c. 46; and see preamble 2 & 3 Edw. 6, c. 24.

At common law, however, if a party steal goods in the county of A. and carry them into the county of B. he may be indicted or appealed of larceny in the latter county. But this does not contradict the general rule, but is founded upon another principle, viz. that the possession of goods stolen by the thief is a larceny in every county into which he carries the goods, because the legal possession still remaining in the true owner, every moment's continuance of the trespass and felony amounts, in legal consideration, to a new caption and asportation. 2 East, 771-2. So although matter of inducement constituting no part of the offence happen abroad, but the crime itself be committed in any county in England, the offender may be indicted here; as where a man marries one wife in France, and afterwards another in England, during the life-time of the former. Kel. 15.

specially excepts London, Westminster, and the borough of Southwark: and the cities of Bristol, Chester, and Exeter are excepted from it by stat. 5 & 6 W. 4, c. 76, s. 109. But now by stat. 14 & 15 Vict. c. 55, s. 19, all offences committed in any "county of a city or county of a town corporate, within which Her Majesty has not been pleased for five years next before the passing of this act, to direct a commission of oyer and terminer and general jail delivery to be executed," and which are not triable at the quarter sessions, may be tried in the next adjoining county. And by sect. 24, the next adjoining county shall be the same as is named in sched. C. to stat. 5 & 6 W. 4, c. 76; by which the county of Northumberland is the next adjoining county to Berwick-upon-Tweed, and to Newcastle-upon-Tyne, and Yorkshire the next adjoining county to Kingston-upon-Hull. By the same schedule, Gloucestershire is declared to be the next adjoining county to Bristol, Cheshire to Chester, and Devonshire to Exeter; but at those cities the assizes are holden.[2]

[2] Receivers of stolen property may be indicted in any county where they received, or had such property, notwithstanding the theft was committed in another county.

Where an offence is committed on the boundary of two counties, or within five hundred yards of the boundary, an indictment may be found in either of such counties.

NEW YORK.—A. stole a gun in New Jersey, and was apprehended with it in New York, held that he should be delivered up to the government of New Jersey as a fugitive from justice, and could not be tried in New York. 2 Johns. 479; same point, *The People v. Gardner*, 2 Johns. 477.

PENNSYLVANIA.—A person who steals goods in another state, and brings them into this state cannot be indicted here for felony. He is to be treated as a *fugitive from justice*. *Simmons v. The Commonwealth*, 5 Binney, 617. So in North Carolina, *State v. Brown*, 1 Hayw. 100; see also *McCullough's case*, 2 Rogers' Rec. 45.

MASSACHUSETTS.—One was indicted for larceny in one county, and the evidence at the trial was, that the goods were stolen in another county, and brought into the county where the indictment was found, by two persons other than the prisoner, who came afterwards, and joined them in the possession and disposal of them. His conviction upon this evidence was held good. 10 Mass. 154; *Commonwealth v. Cousins*, 2 Leigh, 708.

It has been decided, that if a person steal goods in one of the United States, and convey them into another, where they are received by another person, such receiver is liable to an indictment in the latter state. *Commonwealth v. Andrews*, 2 Mass. 14. And in Connecticut, it has been the uniform practice to sustain criminal prosecutions against persons stealing in other states, and fleeing into that state with the property stolen. *Rea v. Peas*, 1 Root, 69. See also, *State v. Ellis*, 3 Conn. 185; *People v. Burke*, 11 Wendell, 129; *United States v. Davis*, 5 Mason, 356; *Commonwealth v. Cullen*, 1 Mass. 115; see, respecting the form of the indictment in cases of receiving stolen goods, *Potts v. State*, 3 Blackf. 28; *Holford v. State*, 2 Blackf. 103; *Redman v. State*, 1 Blackf. 429.

PENNSYLVANIA.—An indictment against accessories in felony, may be in the county where the offence of accessory was committed, though the principal felony was committed in another county. 1 Smith Laws Penn. 119.

But if the nature of the property be changed, an indictment for stealing the article in its original state cannot be preferred in the county into which, when so changed, the property is carried. *R. v. Edwards*, R. & R. 497; *R. v. Halloway*, 1 C. & P. 127. Nor where several commit a joint felony in the county of A., and there divide the goods, and afterwards separately carry each his respective share into the county of B., can they be indicted for a

By stat. 14 & 15 Vict. c. 100, s. 23, in such a case the county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of [special] venue. The usual form of the marginal venue is thus:—"County of York (being the next adjoining county to the county of the town of Kingston-upon-Hull,) to wit:." or as the case may be.[3]

(d) *Offences on a journey or voyage, &c.*

Where any felony or misdemeanor shall be committed on any person,—or in respect of any property,—in or upon any coach, [\*65] wagon, cart, \*or other carriage whatsoever, employed in any journey,—or shall be committed on any person, or on or in respect of any property, on board any vessel whatever employed on any voyage or journey upon any navigable river, canal, or inland navigation:—such felony or misdemeanor may be dealt with, enquired of, tried, determined, and punished in any county, through any part whereof such coach, wagon, cart, carriage, or vessel shall have passed, in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed, in such county.(a)[1]

(a) 7 G. 4, c. 64, s. 13.

joint felony in the latter county. *R. v. Barnes*, 2 Russ. 174. But if two persons steal a thing in one county, though one of them alone carry the property into another county, yet, if both afterwards co-operate to secure the thing in the latter county, both may be indicted in the latter county; for the subsequent concurrence may be connected with the previous taking. *R. v. County*, 2 Russ. 175; *R. v. McDonagh*, Car. Supp. 23. The taking into the second county, however, must be *animo furandi*; the mere possession there is not sufficient. A constable took the defendant with two stolen horses in Surrey, and afterwards, at his request, rode with him on the horses into Kent, where he escaped; the defendant was afterwards indicted in Kent, and the judges were unanimously of opinion that there was no evidence of stealing in Kent. *R. v. Simmonds*, 1 Mood. C. C. 408.

[3] The venue is stated in the margin next after the caption, thus:—"Saratoga County, ss."—"City and County of New York, ss." See *The United States v. Grush*, 5 Mason, 290, 302. Where an indictment commences, "State of Tennessee, Hardin County, and the offence is laid to have been committed "in the county aforesaid," the venue is well laid. *Barnes v. State*, 5 Yerger, 186. In North Carolina, it is held, that an indictment is sufficient without a venue, if it lays the commission of the offence within the jurisdiction of the court. *State v. Glasgow*, Cam. & Nor. 38, and an indictment ought to show expressly, that the county in which the offence was committed was within the jurisdiction of the Court. *State v. Adams*, Martin (N. Car.) 33. The place where the offence was committed, must be charged on the body of the commitment; it is not sufficient to charge it in the margin only. *Missouri v. Cook*, 1 Miss. 547. See *Stephens's case*, 2 Leigh, 759; *State v. Godfrey*, 3 Fairf. 361.

[1] When an offence shall have been committed within this state, on board of any vessel, an indictment may be found in any county through which or any part of which such vessel

And in all cases where the side, centre, or other part of any highway, or the side, bank, centre, or other part of any such canal, river, or navigation, shall constitute the boundary of any two counties, such felony or misdemeanor may be dealt with, enquired of, tried, determined and punished in either of the said counties, through, adjoining to, or by the boundary of any part whereof such coach, wagon, cart, carriage or vessel shall have passed, in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county.(a)

(e) *Offences on the boundaries of counties.*

Where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties,—or within the distance of 500 yards of any such boundary or boundaries,—every such felony or misdemeanor may be dealt with, enquired of, tried, determined, and punished, in any of the said counties, in the same manner as if it had been actually committed therein.(b)[2]

This has been holden not to extend to trials in limited jurisdictions, but to be confined to trials in counties only; and where a man was tried for larceny at the sessions of the borough of Southwark, it appearing that the offence was in fact committed in the city of London, about twenty yards within the boundary between it and the borough; and being afterwards indicted for the same larceny in London, he pleaded *auterfois acquit*: the judges held the plea to be bad, as the sessions had no jurisdiction to try the offence, this section of the statute extending only to trials in counties, and not to trials in limited jurisdiction.(c)

(f) *Offences begun in one county and completed in another.*

Where any felony or misdemeanor shall be begun in one county and completed in another, it may be dealt with, enquired of, heard, determined, and punished in either county, as if it were wholly committed therein.(d)[3]

(a) 7 G. 4, c. 64, s. 13.

(b) 7 G. 4, c. 64, s. 12.

(c) *R. v. Welsh*, Ry. & M. 175.

(d) 7 G. 4, c. 4, s. 12; see *R. v. Welsh*,

*supra*.

shall be navigated in the course of the same voyage or trip, or in the county where such voyage or trip shall terminate. Where the mortal wound, &c. is given in one county, and death takes place in another, the indictment may be found in the county where the death happened.

[2] There is a similar statute in New York. 2 R. S. 4th ed. p. 910, sec. 45. In Massachusetts and Maine, any offence committed on the boundary of two counties, or within one hundred rods of the dividing-line, may be alleged in the indictment to have been committed, and may be prosecuted and punished in either county. R. S. of Mass. ch. 133, sec. 7; R. S. of Maine, ch. 166, sec. 4. Also, in Wisconsin. R. S. of Wis. ch. 141, sec. 7.

[3] See 2 R. S. 4th ed. p. 911, secs. 47 and 50; R. S. of Wis. ch. 141, secs. 8, 9; R. S. of Mass. ch. 133, sec. 8; R. S. of Maine, ch. 166, secs. 5 and 6.



*(g) Offences partly in England, partly out.*

Where any person, previously stricken, poisoned, or otherwise hurt \*upon the sea, or at any place out of England, shall die of such stroke, poisoning, or hurt in England,—or being feloniously stricken, poisoned, or otherwise hurt at any place in England, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of England,—every offence committed in respect of any such case, whether the same amount to the offence of murder or manslaughter, or of being accessory before the fact to murder, or after the fact to murder or manslaughter,—may be dealt with, enquired of, tried, determined, and punished, in the county or place in England in which such death, stroke, poisoning, or hurt shall happen, in the same manner as if the offence had been wholly committed in that county or place.(a)[1]

*(h) Offences abroad.*

By stat. 9 G. 4, c. 31, s. 7, if any of His Majesty's subjects shall be charged in England with any murder or manslaughter, or with being accessory before the fact to any murder, or after the fact to any murder or manslaughter, the same being respectively committed on land out of the United Kingdom, whether within the King's dominions or without,—a commission of oyer and terminer under the great seal shall be directed to such persons, and into such county or place, as shall be appointed by the Lord Chancellor, for the speedy trial of such offender; peers however are in such cases to be tried by their peers. The venue in the margin of the indictment, in such a case, should be the county in which the special commissioners are directed by their commission to sit. Where the indictment stated the offence to have been committed at Boulogne, in the kingdom of France, to wit, at London, &c., and the grand jury objected to it, as stating the death to have happened at two places,—Bayley, J. ordered the words "at London," &c., to be struck out.(b) The admission of the prisoner that he is a British subject, is good evidence that he is so.(c)

(a) 9 G. 4, c. 31, s. 8.

*R. v. Depardo*, R. & Ry. 134; *R. v. Sawyer*,

(b) *R. v. Helsham*, 4 Car. & P. 394.

2 Car. & K. 101; and see stat. 11 & 12 Vict.

(c) *Id.*; see *R. v. Matto*, 7 Car. & P. 458; c. 42, s. 2; and *ante*, p. 35.

[1] In Massachusetts, by Statute 1795, ch. 45, (R. S. ch. 123, secs. 8, 9,) when any person is feloniously struck, poisoned, or injured in one county, and dies of the same stroke, &c. in another county—and when any person is struck, &c. on the high seas, without the limits of the state, and dies of the same stroke in the state, the offender may be indicted and tried in the county where the death happened. This statute is not repugnant to the declaration in the constitution of the state, that in criminal prosecutions, the verification of the facts in the vicinity where they happen, is one of the greatest securities of the life, &c. of the citizen. *Commonwealth v. Parker*, 2 Pick. 550.

Also, for misdemeanors committed abroad, by persons holding public offices or employments under the British government, the offenders may in like manner be tried, &c., in this country.(a)

(b) *Offences at sea.*

The venue in indictments for offences committed at sea, within the jurisdiction of the Admiralty, varies according to the court in which the offender is prosecuted:—if proceeded against before a special commission, which was the only mode of prosecution formerly, the venue in the margin is merely “Admiralty of England;” if at the central criminal court, “Central Criminal Court, to wit;” if at the assizes, the county in which the assizes are holden. Besides [\*67] thus noticing the venue, it may be convenient in this place to make a short statement as to the extent of the Admiralty jurisdiction, and the offences of which the admiral is said to have cognizance.[1]

(a) 42 G. 3, c. 85; see *R. v. Shawe*, 5 M. & S. 403.

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[1] The United States have no unwritten criminal code to which resort can be had as a source of jurisdiction. *U. S. v. Hudson & Goodwin*, 7 Cranch, 32; *U. S. v. Coolidge*, 1 Wheat. Rep. 415; *U. S. v. Beavans*, 3 Wheat. 336; *U. S. v. Willberger*, 5 Wheat. 76.

The act of Congress gives to the district courts, exclusive of the state courts, and concurrently with the circuit courts, cognizance of all crimes and offences cognizable under the authority of the United States, and committed within their districts, or upon the high seas, where only a moderate corporal punishment, or fine or imprisonment, is to be inflicted. This is the ground of the criminal jurisdiction of the district courts; and it is given to them as district courts; and as it includes the minor crimes and offences committed on the high seas, and cognizable in the courts of admiralty under the English law, the district courts may be considered as exercising the criminal jurisdiction of a court of admiralty in those cases. The Constitution of the United States declares, that the judicial power of the Union shall extend to all cases of admiralty and maritime jurisdiction; and it has been supposed that the federal courts might, without any statute, and under this general delegation of admiralty powers, have exercised criminal jurisdiction over maritime crimes and offences. But the courts of the United States have been reluctant to assume the exercise of any criminal jurisdiction in admiralty cases, which was not specially conferred by an act of congress. 1 Kent's Com. 7th ed. p. 390-391.

The grant in the Constitution, of judicial power, to the government of the United States, in all cases of admiralty and maritime jurisdiction, is without limitation, and, of course, embraces criminal as well as civil cases. It is under this grant alone, that the federal government have the right to punish a large class of offences whose punishment is provided for, in the acts of Congress in relation to crimes and offences on the high seas. In these acts, the various offences are not classed or described as admiralty cases, but they are indiscriminately arranged with other descriptions of crimes subject to the federal jurisdiction. They will be found in the crimes acts of 1790, of 1804, of 1820, of 1825, and of 1835, in various sections, providing for the punishment of crimes and offences committed “on the high seas, or in any arm of the sea, or in any river, harbor, creek, basin or bay, or in any other waters within the admiralty and maritime jurisdiction of the United States.” The power of the federal government to punish these offences, is derived from the admiralty and maritime grant in the Constitution; and of all of them which are not capital, the district court has jurisdiction. If committed within any district, the trial must be in that district; and if upon

The admiral has exclusive jurisdiction of all offences committed on the high seas, and within the harbours, creeks, and havens of foreign countries. But within the harbours, creeks, and havens of this country, the courts of common law, and not the admiral, have jurisdiction: as for instance, if an imaginary line were drawn across the mouth of such creek, &c., from one point of land to the other,—of all offences committed within the line, the common law would have jurisdiction; but all offences committed without the line, would be within the jurisdiction of the admiral. As to the sea shore:—below low water mark, the admiral has exclusive jurisdiction; above high water mark, the courts of common law have exclusive jurisdiction; and between high and low water mark, the courts of common law and the admiral have alternate jurisdiction,—the courts of common law have jurisdiction of all offences committed on the strand when the tide is out,—the admiral jurisdiction of all offences committed on the water, when the tide is in. Formerly, if a man on land fired a pistol or gun at a man who was upon the sea, and killed him, the offence was deemed to be within the

the high seas, out of the district, then in the district where the offender is apprehended, or into which he may be first brought. Those who contend for the narrow jurisdiction of the admiralty, have not always considered what would be its effect upon the criminal jurisdiction of the general government.

Under the general provisions that, in admiralty and maritime cases, the mode of proceeding should be according to the usages of courts of admiralty, the trial of maritime offences must have been according to the usage of admiralty courts, had not the Constitution and amendments otherwise provided:

“The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed, but when not committed within any state, the trial shall be at such place or places as the congress may, by law, have directed.”

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger.”

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.”

The practical operation of these provisions, has been to make the practice of the admiralty, in criminal cases, the same as the practice of the courts of common law, in like cases. The cases are none the less cases of admiralty and maritime jurisdiction, although, like criminal cases in the English admiralty, they are tried before a jury, and, from the beginning, conducted after the manner of trials at common law, in criminal cases. The proper effect of those provisions is not, however, to adopt, in such cases, the practice of the state courts, but the practice must be according to the usage of admiralty courts, subject to the limitations of the Constitution, the amendments, and the acts of congress.

The powers usually exercised by justices of the peace, and other magistrates in the states, of issuing warrants for crimes, making preliminary examinations, and committing, are usually exercised by the United States commissioners, by virtue of the act of August 23, 1842. *Benedict's Am. Admiralty*, p. 314–316.

Admiralty jurisdiction; for the offence was holden to be committed where the death happened, and not at the place from whence the cause of death proceeded.(a) But now, in such a case we have seen,(b) he may be tried in the same manner as if the whole of the offence was committed on land.(c) Also, all offences committed on the high seas against any Act relating to the customs, shall, for the purposes of prosecution, be deemed to have been committed on the place on land in the United Kingdom into which the offender shall be taken, brought, or carried, or in which he shall be found.(d)[2]

Besides the offence of piracy, and some other offences which can only be committed at sea, the admiral has jurisdiction of all treasons, felonies, conspiracies;(e) murder;(g) attempts to murder or maim or do

(a) *R. v. Combes*, 1 East, P. C. 367.

c. 87, s. 95.

(b) *Ante*, p. 65, 66.

(e) 28 H. 8, c. 15.

(c) 9 G. 4, c. 31, s. 8.

(g) *Id.*; 1 East, P. C. 367; see *R. v. Scrva*

(d) 3 & 4 W. 4, c. 53, s. 77; 8 & 9 Vict. *et al.*, 2 Car. & K. 53.

[2] "There has existed," says Kent, "a very contested question, and of ancient standing, touching the proper division or boundary line between the jurisdiction of the courts of common law and the courts of admiralty. The admiralty jurisdiction in England originally extended to all crimes and offences committed upon the sea, and in all ports, rivers and arms of the sea, as far as the tide ebbed and flowed. Lord Coke's doctrine was, that the sea did not include any navigable waters within the body of a county; and Sir Matthew Hale supposed, that prior to the statute of 35th Edw. III., the common law and the admiralty exercised jurisdiction concurrently in the narrow seas, and in ports and havens within the ebb and flow of the tide. Under the statutes of 13 R. II. c. 5, and 15 R. II. c. 3, excluding the admiralty jurisdiction in cases arising upon land or water within the body of a county, except in cases of murder and mayhem, there have been long and vexatious contentions between the admiralty and the common law courts. On the sea shore the common law jurisdiction is bounded by low water mark where the main sea begins; and between high and low water mark, where the sea ebbs and flows, the common law and the admiralty have a divided or alternate jurisdiction.

"With respect to the admiralty jurisdiction over arms of the sea, and bays and navigable rivers, where the tide ebbs and flows, there has been great difference of opinion, and great litigation in the progress of the English jurisprudence. On the part of the admiralty it has been insisted, that the admiralty continued to possess jurisdiction in all ports, havens and navigable rivers, where the sea ebbs and flows below the first bridges. This seemed also to be the opinion of ten of the judges of Westminster, on a reference to them in 1713. On the part of the common law courts it has been contended, that the bodies of counties comprehend all navigable rivers, creeks, ports, harbors and arms of the sea, which are so narrow as to permit a person to discern and attest upon oath, anything done on the other shore, and as to enable an inquisition of the facts to be taken. In the case of *Bruce*, in 1812, all the judges agreed, that the common law and the admiralty had a concurrent jurisdiction in bays, havens, creeks, &c., where ships of war floated. The high seas mean the waters of the ocean without the boundary of any county, and they are within the exclusive jurisdiction of the admiralty up to high water mark when the tide is full. The open ocean which washes the sea-coast is used in contradistinction to arms of the sea enclosed within the *fauces terræ*, or narrow headlands and promontories; and under this head is included rivers, harbors, creeks, basins, bays, &c., where the tide ebbs and flows. They are within the admiralty and maritime jurisdiction of the United States; but if they are within the body of a county of any particular state, the state jurisdiction attaches." Com. pp. 365, 366.

grievous bodily harm, within stat. 1 Vict. c. 85, by sect. 10; all other offences against the person, within stat. 9 G. 4, c. 81, by sect. 32; doing injury by explosive substances, within stat. 8 & 9 Vict. c. 25, by sect. 17: offences punishable by the statute against forgery, (a) all offences relating to the coin within stat. 2 W. 4, c. 34, by sect. 20; and generally, all other offences committed on the high seas, out of the body of any county. (b) And all offences committed at sea [\*68] \*are now punishable in the same manner as if committed on land. (c) [1]

By stat. 28 H. 8, c. 15, all treasons, felonies, robberies, murders, and conspiracies committed on the seas, or in any haven where the admiral has jurisdiction, were triable, according to the course of the common law, in such places as were appointed by commission. But that mode of proceeding being found productive of delay, jurisdiction was given to the central criminal court of all offences "committed or alleged to have been committed on the high seas, and other places within the jurisdiction of the Admiralty of England." (d) And now, by stat. 7 & 8 Vict. c. 2, s. 1, authority is given to Her Majesty's judges of assize and commissioners of oyer and terminer, to inquire of, hear, and determine all offences alleged to have been committed on the high seas and other places within the jurisdiction of the Admiralty of England; and, by sect. 2, in all indictments preferred before them, the venue laid in the margin shall be the same as if the offence were committed in the county where the trial is to be had, but the material facts shall be averred to have taken place "on the high seas." It is not necessary to allege that it was committed within the jurisdiction of the Admiralty. (e) And the accessory before or after the fact, may be tried by the same court which has jurisdiction to try the principal felon. (g) [2]

(a) 1 W. 4, c. 66, by s. 27.

Wallace, 1 Car. & M. 200.

(b) 39 G. 3, c. 37.

(e) *R. v. Jones et al.*, 2 Car. & K. 165; 1

(c) 7 & 8 G. 4, c. 28, s. 12.

Den. C. C. 101.

(d) 4 & 5 W. 4, c. 36, s. 22; and see *R. v.*

(g) *Ante*, pp. 15, 18.

[1] See Rev. Stat. of Mass. ch. 133, § 9; Rev. Stat. of Maine, ch. 166, § 6.

[2] The Constitution of the United States, Art. III. Sec. 2, provides, that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. The Judiciary Act of Sept. 24, 1789, provides:

Sec. 9. The District Courts shall have, exclusively of the courts of the several states, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.

Sec. 11. The Circuit Courts shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct; and concurrent jurisdiction with the District Courts of the crimes and offences cognizable therein.

(j) *Murder and manslaughter.*

Where the death and cause of death both happen in the same county, &c., the venue of course must be laid there. Where the cause of death happens in one county and the death in another, the venue may be laid in either.(a) And where the cause of death happens in England, and the death on the high seas or at any place out of England,—or if the cause of death happen on the high seas or at any place out of England, and the death in England,—the party, whether charged with murder or manslaughter, or as accessory before the fact to murder, or after the fact to murder or manslaughter, may be tried in the county or place in England where the cause of death or death happened, in the same manner as if the offence had been wholly committed in that county or place.(b)[3]

(k) *Libel.*

In an indictment for publishing a libel, the venue must be laid in the county, &c., where it was published. But if the publication were by sending it from the defendant to the prosecutor, unsealed, &c., the venue may be laid either in the county from which it was sent, or in that in which it \*was received. And the same, if it were [\*69] sent sealed, and the indictment was for writing or printing and publishing it.(c)[1]

(a) See stat. 7 G. 4, c. 64, s. 12; *ante*, p. 65.

(b) 9 G. 4, c. 31, s. 8; *ante*, pp. 65, 66.

(c) See *R. v. Burdett*, 4 B. & Ald. 95.

[3] In the state of New York, where the mortal wound is given in one county, and the death happens in another, the indictment may be found in the latter county; and the same proceedings are to be had therein, in all respects, as if the wound was given in the county where the death took place. 2 N. Y. Rev. Stat. 727, sec. 47; see Rev. Stat. of Ohio, ch. 35, sec. 37; Rev. Stat. of Wis. ch. 141, secs. 8 and 9; Rev. Stat. of Mass. ch. 133, sec. 8; Rev. Stat. of Maine, ch. 166, secs. 7 and 8.

If a person be stabbed in Virginia, and die of his wounds in another state, he cannot be tried for the murder in any county in Virginia; but he may be tried for the stabbing in the county where the blow was inflicted. *Com. v. Linton*, 2 Va. Cas. 205.

[1] In an indictment for a libel, if the defendant has once authorized the publication, he is guilty of a publication in whatever county the libel is afterwards in consequence published, and he may be indicted accordingly. Bull. N. P. 6; 7 East, 65. And if a party writes and composes a libel in one county, with an intent to publish, and afterwards publishes it in another, he may be indicted in either. 4 B. & A. 95; and see 3 B. & A. 717. A mere acknowledgment by the defendant in the county in which the venue is laid, of the fact of publication, which, in truth, was in another county, is not sufficient to warrant the trial in the first county. 7 East, 68. Nor is the post mark on a libellous letter, of a particular place within the county where the venue is laid, sufficient evidence of the publication there by the defendant; but if it be sent to the prosecutor at a place without the county and yet actually received by him within it, that will be sufficient to support the indictment. 1 Campb. 215, 216.

(1) *Larceny.*

The venue in larceny, as in other cases, may be laid in the county in which the goods were stolen.[2] But at common law, if a man steal goods in one county, and carry them into another, he may be indicted and tried in either;(a) for he is deemed guilty, as well of a taking as of a carrying away, in both. The larceny, however, must be one at common law, and not a larceny created by statute.(b)

And now, by stat. 7 & 8 G. 4, c. 29, s. 76, if any person, having stolen or otherwise feloniously taken any chattel, money, or valuable security, or other property whatsoever, in any one part of the United Kingdom, shall afterwards have the same property in his possession in any other part of the United Kingdom, he may be dealt with, tried, and punished for larceny or theft in that part of the United Kingdom where he shall have such property, in the same manner as if he had actually stolen or taken it in that part.

Jersey, however, is not a part of the United Kingdom, for this purpose; and therefore where it appeared that the prisoner stole the goods in Jersey, and they were found in his possession at Weymouth in Dorsetshire, the judges held that he could not be indicted for it in Dorsetshire, within the meaning of this act.(c) So, where a man stole a brass furnace in Radnorshire, broke it to pieces there, and then brought the pieces of brass into the county of Hereford: Hullock, B., held that he

(a) 2 Hawk. c. 25, s. 38.

(b) *R. v. Millar*, 7 Car. & P. 665.

(c) *R. v. Prowes*, Ry. & M. 349; and see *R.*

*v. Madge*, 9 Car. & P. 29.

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[2] It is a general rule that larceny must be tried in the same county or jurisdiction in which it was committed. 2 Russ. on Cr. 173. Where an indictment for larceny alleged the offence to have been committed in a vessel in the first ward of the city of New York, and it appeared on the trial that it was lying in the river, at a wharf of the third ward, it was held this was not a material variance *The People v. Honeyman*, 3 Denio, 121. As the property in the goods stolen always remains in the true owner, unaltered by the wrongful taking, every carrying away is a new trespass. Hence, it follows that the venue may be laid in any county into which they are conveyed, (3 Chit. Cr. L. 943, note (a); 2 Russ. on Cr. 173, 175; Roscoe's Cr. Ev. 521, 523;) as the offence of taking and converting is there in itself complete, (1 Hale, 547; 1 Hawk. ch. 33, sec. 52;) and this, though the goods were not carried into the county in which the venue is laid, until long after the original taking. Ry. & Moo. C. C. 45. But this, it is said, will not be the case when it is such a taking of which the common law will not take cognizance; as if goods are taken on the high seas, until the offence is made indictable here by some particular statute. 1 Hawk. ch. 33; but see 2 Rogers' Rec. 45, contra. A foreigner committing larceny abroad, coming into this state and bringing the stolen property with him, may be indicted and punished in the same manner as if such larceny had been committed in this state. And the indictment may charge such larceny to have been committed in any town or city into or through which the stolen property was brought. 2 R. S. 698, sec. 4; 11 Wend. 129; 3 Chit. Cr. L. 944, note (c.)

could not be indicted in Hereford for stealing the furnace there, it never having in fact been in Hereford.(a)

But no distance of time, between the stealing in one county and having the property in another, will prevent the party from being indicted in the latter county; and therefore where the property was stolen by the prisoner in Yorkshire in November, 1823, and brought by him into Durham in March, 1824, the judges held that he might be indicted for the larceny in Durham.(b) But where the prisoners stole two horses at different times and at different places in Somersetshire, and brought both at the same time into Wilts, and had them there in their possession: Littledale, J., held that this did not warrant the including both larcenies in one indictment; and he therefore put the prosecutor to his election as to which offence he would prosecute.(c)

(m) *Embezzlement.*

The venue must be laid in the county, &c., in which the embezzlement took place, if that be known.

\*But in the absence of express evidence upon that subject, [\*70] the venue may be laid, either in the county where the defendant received the money, &c., or and perhaps more properly in the county in which he ought to have accounted for it to his master, and did not.

Where the master resided in Staffordshire, and the prisoner by his orders received money for him in the county of Salop, and being afterwards asked by his master in Staffordshire whether he had received it said he had not; and there was no evidence in which of the two counties the embezzlement actually took place: being indicted for this offence in the county of Salop, ten of the judges held it to be correct.(d)

On the other hand, where a master, residing in Middlesex, sent his servant to a customer in Surrey with goods, for which he was to be paid, and he received payment from the customer accordingly; and being asked by his master, on his return, if he had received payment, answered that he had not: being indicted for the offence in Middlesex and it being objected that he should have been indicted in Surrey where he received the money, the judges held that he was properly indicted in Middlesex; that the denial of the receipt of the money, when the prisoner was called upon by his master to account for it, was the first act from which the jury could with certainty say that the prisoner intended to embezzle it; and that even if it were proved that he had

(a) *R. v. Holloway*, 1 Car. & P. 127.

P. C. 295.

(b) *R. v. Parkin*, Ry. & M. 45.

(d) *R. v. Hobson*, 1 East, P. C. xxiv., R. &

(c) *R. v. Smith and Jefferies*, Ry. & Mo. N. Ry. 56.



spent the money in Surrey, that would not necessarily have confined the trial of the offence to that county.(a)[1]

(a) *R. v. Taylor*, R. & Ry. 63.

[1] Two cases occurred upon the repealed statute, 39 Geo. 3, in which questions were raised as to the *county* in which the offence within that statute might be considered as having been so completed as to authorize a trial in such county.

In the first of these cases, the prisoner was indicted in the county of Salop. The residence of the master was at Litchfield, in Staffordshire, where the prisoner served him in his trade. On a Saturday morning, both of them were at Shrewsbury; and the master having authorized a person named Beaumont, to collect some debts for him at that place, returned home the same morning, leaving the prisoner at Shrewsbury to receive the money from Beaumont, and bring it to him at Litchfield the same night. The prisoner received the money from Beaumont about noon, and also a letter for his master, which had been left at Beaumont's, but which did not relate to the money transaction. He left Shrewsbury soon after, but did not go to his master at Litchfield till the following evening. He then delivered the letter; and being asked about the money, he said he had not received any. A few days after, the master, in consequence of information he had received by letter, charged the prisoner with having received the money, and another servant who had been at Shrewsbury on Saturday, being present, told the prisoner that he had seen him receive money, but the prisoner persisted in denying that he had received any. Some time afterwards, the master, having received further intelligence, bid the prisoner go to Shrewsbury to clear himself. On the Saturday following, the prisoner went to Beaumont, at his house in Shrewsbury, and desired him to make a search on the left hand side of the room in which they had been; but no search was made, Beaumont telling him it was of no use to search, as he had received the money from him. The jury having found the prisoner guilty, the case was submitted to the consideration of the twelve judges, upon two questions; first, whether, under this statute, an indictment might not be found and tried in the county where the money or goods were received, although there were no evidence of any other fact locally arising within the same county? and, secondly, whether, if further local proof were necessary, the subsequent conduct of the prisoner at Shrewsbury were not sufficient to obviate the objection, as being an act in furtherance of the purpose of secreting or embezzling? A majority of the judges were of opinion, that the conviction was right. Lawrence, J., thought that embezzling being the offence, there was no evidence of any offence in Shropshire, and that the prisoner was improperly indicted in that county. But the other judges were of opinion that the indictment might be in Shropshire where the prisoner received the money, as well as in Staffordshire where he embezzled it by not accounting for it to his master; that the statute having made the receiving property and embezzling it amount to a larceny, made the offence a felony where the property was first taken, and that the offender might therefore be indicted in that or in any other county into which he carried the property.

In the other case, which occurred shortly afterwards, the indictment charged the prisoner with embezzling the sum of ten shillings, the property of his master, James Barker. The evidence was, that the prosecutor, Barker, who was a fish-monger in Drury-lane, in the county of Middlesex, sent his servant, the prisoner, with some herrings to a street in Blackfriars-road, in the county of Surrey, to a Mrs. Stevens; telling him that he was to receive the sum of ten shillings for them. He went with the herrings about six o'clock in the evening, and delivered them to Mrs. Stevens, who paid him the ten shillings; after which he returned to his master, who asked him if he had brought the money, to which he replied that he had not, for that Mrs. Stevens had not paid him. His master then paid him his weekly wages (it being on a Saturday,) and he went away, being to return on Monday morning, as usual: but did not return, nor did he ever account for the money. Upon this evidence, it was contended, on the part of the prisoner, that he was only liable to be indicted in the county of Sur-

*(n) False pretences.*

The obtaining of the money by the false pretence, is in this case the offence, and the venue must therefore be laid in the county, &c. where the money was obtained. A difficulty sometimes arises in this respect, where the false pretence is made by letter. Where the prisoner gave the letter containing the false pretence, to an accomplice in Middlesex, desiring him to put it into the post-office at Gravesend; it was dated as from Gravesend, and directed to the prosecutor at Bath, requesting him to send him a post-office order by post, directed to James Power, Gravesend; the letter arrived at Bath, but the prosecutor being then in Middlesex, it was forwarded to him there, and he accordingly sent the post-office order from Middlesex to Gravesend: the prisoner being indicted in Middlesex, for obtaining this post-office order by false pretences, it was objected that the offence ought to be tried in Kent, where the order and the money for it was received; but the judges held that by desiring the order to be sent by post, the prisoner constituted the postmaster his agent for receiving it, and the postmaster having received it in Middlesex, the prisoner was properly indicted there.<sup>(a)</sup>[2]

*(b) R. v. Jones, 19 Law J. 162 m.*

rey, where the money was received: and the jury have found him guilty, this point was reserved for the consideration of the judges. The opinion of the judges was afterwards delivered by Lord Alvanley, C. J., who first referred to the foregoing case of *Hobson*, and then proceeded: "In the present case, no doubt can be entertained. The prisoner, being sent over Blackfriars-bridge into the county of Surrey, there received ten shillings for his master. The receipt of that money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money to his own use until after he had returned into the county of Middlesex. It was not proved that the money ever was embezzled until the prisoner was in the county of Middlesex. In cases of this sort, the nature of the thing embezzled ought not to be laid out of the question. The receipt of money is not like the receipt of an individual thing, where the receipt may be attended with circumstances which plainly indicate an intention to steal, by showing an intention in the receiver, to appropriate the thing to his own use. Thus, if a servant receive a horse for his master, and sell it before he gets out of the county where he first received it, it might be said that he is guilty of the whole offence in that county. But with respect to money, it is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pay them away. In such a case as this, therefore, even if there had been evidence of the prisoner having spent the money on the other side of Blackfriars-bridge, it would not necessarily confine the trial of the offence to the county of Surrey. But here there is no evidence of any act to bring the prisoner within the statute until he is called upon by his master to account. When called upon by his master, to account for the money, the prisoner denied that he had ever received it. This was the first act from which the jury could with certainty say that the prisoner intended to embezzle the money. In this case, there was no evidence of the prisoner having done any act to embezzle in the county of Surrey, nor could the offence be complete, nor the prisoner be guilty within the statute until he refused to account to his master. We are, therefore, of opinion that the prisoner was properly indicted in the county of Middlesex."

[2] Where a party residing in Ohio, and who had never been in the state of New York, fraudulently made receipts acknowledging the delivery to him, as a forwarder, of a quantity

[\*71]

\*(o) *Stealing from wreck, &c.*

For stealing from a ship in distress, wrecked, stranded, or cast on shore, the offender may be indicted and tried, either in the county, &c., in which the offence was committed, or in any county next adjoining.(a)

So, any person committing an offence against stat. 9 & 10 Vict. c. 99, intituled "An Act for consolidating and amending the laws relating to wreck and salvage," by which persons cutting away or defacing buoys or buoy ropes—or purchasing anchors, cables, or goods weighed up, swept for, &c.,—are punishable,—may be laid to be committed and may be tried in any city, county, or place where any such article, matter, or thing in relation to which such offence shall be committed, shall have been found in the possession of the person committing the offence or where the offender may at any time happen to be.(b)

(p) *Receivers.*

A person charged with receiving goods feloniously stolen, or obtained by false pretences, knowing the same to have been so stolen or obtained, may be indicted and tried, either in any county or place where he shall have or shall have had the property in his possession, or in any county or place where the principal offender may be tried, in the same manner as he may be indicted and tried in the county or place where he received the property.(c)

(q) *Forgery.*

By stat. 11 G. 4 & 1 W. 4, c. 66 (the Forgery Act,) s. 24, if any person shall commit any offence against that Act, or shall commit any offence of forging or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, whether the same shall be indictable at common law or by virtue of any statute made or to be made: the offence of every such offender may be dealt with, tried, and punished, and laid and charged to have been committed, in any county or place in which he shall be apprehended or be in custody, as if his offence had been actually committed in that county or place; and every

(a) 7 &amp; 8 G. 4, c. 29, s. 18.

(c) 7 &amp; 8 Vict. c. 29, s. 56.

(b) 9 &amp; 10 Vict. c. 99, s. 38.

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of produce, for the use of a firm in New York, and subject to their order, when, in fact, he had not received such produce, and he employed innocent agents to present such receipts to the firm in New York, and obtain money thereon, which they did; it was held that the offence must be considered as committed in New York, where the money was obtained; that the employer was guilty as a principal, and that he was liable to be indicted and tried in New York, for the offence. *People v. Adams*, 3 Denio, 190.

accessory before or after the fact, if the same be a felony, and every person aiding, abetting, or counselling the commission of such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished, and his offence laid and charged to have been committed in any county or place in which the principal may be tried.

Where the jury found that the prisoner was guilty of the forgery with which he was charged, but that there was no evidence of his having committed it within the jurisdiction of the court: the judge held that the defendant being before the court at his trial, was there "in custody" within the meaning of the above section, and that it was therefore unnecessary to allege or \*prove when or where he [\*72] was taken into custody.(c)[1]

(r) *Treason or conspiracy.*

The venue in treason committed in England, may be laid in any county in which a good overt act can be proved. Treason out of the realm, may be tried either before the court of Queen's Bench, by a jury of the county where the court sits,—or by commission, in any county therein named, by a jury of such county.(b)[2]

So the venue in conspiracy may be laid in any county where a good overt act can be proved.(c)[3]

(a) *R. v. Smythies*, 19 Law J. 31, m.; and 53.

see *R. v. Whiley*, 1 Car. & K. 150.

(c) *R. v. Brisac and Scott*, 4 East, 171.

(b) 35 H. 8, c. 2; see 2 Hawk. c. 25, ss. 48,

[1] The venue in indictments for forgery, must be laid in in the county where the offence is committed; as the indictment can only be preferred and trial had in that county. Thus, where a note with forged indorsements is sent by the defendant per mail, from one county to an individual in another county, for the purpose of obtaining credit upon it, the proper place of trial is the county to which the note was sent; the offence not being consummated until the note is received by the person to whom the note was transmitted. 21 Wend. 509. The fact of forging a note within a particular county, cannot be inferred from its having been uttered there. 5 Pick. 279.

[2] A distinction has been taken, that where a levying war is laid as an overt act of compassing the king's death, though laid within the county, it may be proved elsewhere; but that where the levying war is laid as the substantive treason, it is local and must be laid in the proper county:—for a levying war in Surrey may be good evidence of a compassing the king's death in Middlesex, and so tend to establish the treason there; but a levying war in Surrey does not prove a levying war in Middlesex, though it may be adduced to show the nature of the act laid as treason in the proper county. Kel. 14, 15. And after the proof of one overt act of treason, by levying war in the proper county, proof of levying war in another county is admissible. Kel. 14, 15; Fost. 9; 8 St. Tr. 218; See the observations in 1 East, P. C. 126; Stark. 20, note p; Kelynge, 15. So in the case of conspiracies, the venue may be laid in the county where any overt act by any one of the conspirators can be proved, and evidence may be there given of transactions in other counties. 4 East, 171; 6 East, 590. acc.; 1 Salk. 174, cont.

[3] In conspiracy the venue should be laid in the county where the conspiracy took place; or in the county where any one of the conspirators did an act to further their common object;

*(s) Unlawful oaths.*

In an indictment for administering an oath to commit treason or murder, the venue may be laid, and the offender tried before a court of oyer and terminer, in any county in England, as if the offence were committed there.<sup>(a)</sup>

*(t) Foreign service.*

The offence of engaging in foreign military or naval service, without licence from the crown, or going abroad for that purpose, or engaging others in such service,—if committed in England, may be tried before the court of Queen's Bench, and the venue laid at Westminster; or at the assizes or sessions for the county where the offence was committed and the venue laid there;<sup>(b)</sup> or if committed out of the United Kingdom, the offender may be prosecuted in the court of Queen's Bench, Westminster, and the venue laid at Westminster, in the county of Middlesex.<sup>(c)</sup>[4]

(a) 52 G. 3, c. 104, s. 8.

(c) 59 G. 3, c. 69, s. 9.

(b) 59 G. 3, c. 69, s. 4.

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and the trial must be in such county. *People v. Mather*, 4 Wend. Rep. 229; 6 Salk. 174. The want of venue in an indictment for a conspiracy to the averment of the false pretences is fatal. *People v. Ward*, 1 Johns. 66. If it does not appear from the records that the venue was proved, the judgment must be reversed. *Yates v. Steele*, 10 Yerger, 549.

[4] "It is the doctrine of the English law," says Mr. Kent, (2 Com. p. 42, *et seq.*) "that natural born subjects owe an allegiance, which is intrinsic and perpetual, and which cannot be divested by any act of their own. In the case of *Macdonald*, who was tried for high treason, in 1746, before Lord Ch. J. Lee, and who, though born in England, had been educated in France, and spent his riper years there; his counsel spoke against the doctrine of natural allegiance as slavish and repugnant to the principles of their revolution. The court, however said, that it had never been doubted, that a subject born, taking a commission from a foreign prince, and committing high treason, was liable to be punished as a subject for that treason. They held, that it was not in the power of any private subject to shake off his allegiance and transfer it to a foreign prince; nor was it in the power of any foreign prince, by naturalizing or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the crown. Entering into foreign service, without the consent of the sovereign, or refusing to leave such service, when required by proclamation, is held to be a misdemeanor at common law.

"It has been a question, frequently and gravely argued, both by theoretical writers, and in forensic discussions, whether the English doctrine of perpetual allegiance applies in its full extent to this country. The writers on public law have spoken rather loosely, but generally in favor of the right of a subject to emigrate and abandon his native country, unless there be some positive restraint by law, or he is at the time in possession of a public trust, or unless his country be in distress, or in war, and stands in need of his assistance. Cicero regarded it as one of the firmest foundations of Roman liberty, that the Roman citizen had the privilege to stay or renounce his residence in the state at pleasure. The principle which has been declared in some of our state constitutions, that the citizens have a natural and inherent right to emigrate, goes far towards a renunciation of the doctrine of the English common law, as being repugnant to the natural liberty of mankind, provided we are to consider emigration

(u) *Inciting to mutiny.*

The offence of endeavoring to seduce any person serving in Her Majesty's forces by sea or land, from their duty and allegiance, or inciting them to mutiny, which is made felony by stat. 37 G. 3, c. 70, s. 1, may, whether committed on the high seas or in England, be prosecuted and tried before any court of oyer and terminer or jail delivery for any county in England, as if the offence had been committed there.(a)

(v) *Smuggling.*

In an indictment for smuggling, or for any offence against stat. 8 & 9 Vict. c. 87, or any other Act relating to the customs, if the offence have been committed in England, the venue may be laid and the offender tried in any county, in such manner and form as if the offence was committed in that county.(b) And where any offence shall be committed on the high seas against that Act or any other Act \*relating to the customs, such offence shall, for the purpose of [\*73] prosecution, be deemed and taken to have been committed at the place on land in the United Kingdom, into which the offender shall be taken, brought or carried, or in which such person shall be found.(c)

(w) *Post office.*

The offence of every offender against the post-office Acts, may be dealt with, indicted, tried, and punished, and laid and charged to have been committed, either in the county or place where the offence shall be committed, or in any county or place in which the offender shall be apprehended or be in custody; and where an offence shall be com-

(a) 37 G. 3, c. 70, s. 2.

(c) 8 & 9 Vict. c. 87, s. 95.

(b) 8 & 9 Vict. c. 87, s. 136.

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and expatriation, as words, intended in those cases, to be of synonymous import. But the allegiance of our citizens is due, not only to the local government under which they reside, but primarily to the government of the United States; and the doctrine of final and absolute expatriation requires to be defined with precision, and to be subjected to certain established limitations, before it can be admitted into our jurisprudence, as a safe and practicable principle, or laid down broadly as a wise and salutary rule of national policy. The question has been frequently discussed in the courts of the United States, but it remains to be definitely settled by judicial decisions."

Mr. Kent, after a historical review of the principal discussions in the United States courts on this subject, concludes that a citizen cannot renounce his allegiance to the United States without the permission of government, to be declared by law; and that as there is no existing legislative regulation on the case, the rule of the English common law remains unaltered. See 2 Kent. Com. page 49.

mitted in or upon or in respect of a mail, or upon a person engaged in the conveyance or delivery of a post letter bag, or post letter, or in respect of a post letter bag or post letter, or a chattel or money or valuable security sent by the post, such offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed as well in any county or place in which the offender shall be apprehended or be in custody, as also in any county or place through any part whereof the mail or the person, or the post letter bag or post letter, or the chattel, money or valuable security sent by post, in respect of which the offence shall be committed, shall have been passed in due course of conveyance or delivery by the post, in the same manner as if it had been actually committed in such county or place.(a)[1]

(x) *Counterfeit coin.*

In all offences against stat. 2 W. 4, c. 34, relating to the coin, the venue in ordinary cases is laid in the county, &c., in which the offence was committed. But where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against that Act, all or any of the said offenders may be dealt with, indicted, tried and punished, and their offence laid and charged to have been committed, in any one of the said counties or jurisdictions, as if the offence had been actually and wholly committed within such one county or jurisdiction: provided that crimes and offences against that Act, committed in Scotland, shall be tried in Scotland as hitherto.(c)[2]

(y) *Escape and rescue from prison.*

Any person escaping from a jail or house of correction, or breaking prison or being rescued therefrom, may be tried either in the jurisdiction where the offence was committed, or in that where he shall be apprehended and retaken.(c)

(a) 1 Vict. c. 36, s. 37.  
(b) 2 W. 4, c. 34, s. 15.

(c) 9 G. 4, c. 64, s. 44.

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[1] By act of congress, establishing the post-office department, authority is given to the federal officers to prosecute in the state courts for offences against the department. Acts have also been passed by congress giving jurisdiction to the courts of certain states over offences against the revenue, and vesting authority in the collectors to sue for certain offences in the state courts generally.

[2] Forging or altering the coin of the United States is punished by acts of congress, and properly subject to the jurisdiction of the federal courts. The legislatures of the several states, in some instances, have passed laws punishing the offence, and the state courts, as authorized by act of congress, have jurisdiction thereof under the laws of the particular state.

*(z) Returning from transportation.*

In prosecutions for returning from transportation before the expiration of the sentence, the offender may be tried either in the county or place \*where he shall be apprehended, or in that [\*74] from whence he was ordered to be transported.(a)

*(aa) Sending a challenge to fight.*

Where a challenge to fight is sent by letter in one county, and received in another, even if sent by post, the venue in an indictment for the offence, may be laid in the county from which the letter was sent,(b) or in the county in which it was received.

*(bb) Threatening letter.*

In an indictment for sending a threatening letter, the venue may be laid in the county where the letter was received,(c) or in the county from which it was sent.

*(cc) Bigamy.*

In prosecutions for bigamy, the venue may be laid, and the offence may be dealt with, inquired of, tried, determined and punished, in the county where the offender shall be apprehended or be in custody, as if the offence had been actually committed in that county;(d) or it may be laid in the county where the second marriage took place.(e)[1]

*(dd) For an offence of omission.*

Where the offence consists of omitting to do an act which the law enjoins or commands to be done, the venue should be laid in that county in which the act ought to have been done. And therefore in an indictment against a bankrupt for not surrendering, the venue must be laid in the county in which the Bankruptcy Court is situate, at which he ought to have surrendered.(g)

In an indictment for not repairing a highway or bridge, the venue

(a) 5 G. 4, c. 84, s. 22.

(b) *R. v. Williams*, 2 Camp. 506.

(c) *Girdwood's case*, 1 Leach, 142, 2 East, P. C. 1120; *Essex's case*, 2 East, P. C. 1125; 2 Russ. 723.

(d) 9 G. 4, c. 31, s. 22; see *R. v. Whiley*, 1 Car. & K. 150; and see *R. v. Smythies*, 19

Law J. 31 m.; ante, pp. 71, 72.

(e) 2 Hawk. c. 25, s. 39.

(g) *R. v. Milner*, 2 Car. & K. 310.

[1] In New York and Virginia, the venue in bigamy may be laid either in the county where the offence was committed or in the county where the defendant is apprehended. 2 N. Y. Rev. Stat. 687, sec. 8; Rev. Code of Virginia, ch. 106, sec. 19.



must be laid in the county, &c., in which the part of the highway or bridge which is out of repair is situate.

*(ee) Accessories before the fact.*

By stat. 7 G. 4, c. 64, s. 9, the offence of accessory before the fact howsoever indicted may be inquired of, tried, determined, and punished, by any court which shall have jurisdiction to try the principal felon in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed on the high seas or at any place on land, whether within His Majesty's dominions, or without; and in case the principal felony shall have been committed within the body of any county, and the offence of accessory within the body of any other county, the accessory may be tried and punished in either county.(a)[2]

[\*75]

*\*(ff) Accessories after the fact.*

By stat. 11 & 12 Vict. c. 46, s. 2, the offence of accessory after the fact, howsoever indicted, may be inquired of, tried, determined, and punished, by any court which shall have jurisdiction to try the principal felon, in the same manner as if the act by reason of which such person shall have become an accessory, had been committed at the same place as the principal felony.(b)

*(gg) Central criminal court.*

The central criminal court has jurisdiction of all indictable offences committed within the city of London, the county of Middlesex, and within certain limits in the counties of Essex, Kent, and Surrey.(c)

(a) See *ante*, p. 15.

(b) See *ante*, p. 18.

(c) 4 & 5 W. 4. c. 36, s. 2. These limits are thus described by sec. 2:

City of London.

County of Middlesex.

In the county of Essex:—the parishes of Barking, East Ham, West Ham, Little Ilford, Low Layton, Walthamstow, Wanstead, St. Mary, Woodford, and Chingford.

In the county of Kent:—Charlton, Lee, Lewisham, Greenwich, Woolwich, Eltham, Plumstead, St. Nicholas Deptford, that part

of St. Paul Deptford which is in the county of Kent, the liberty of Kidbrook, and the hamlet of Mottingham.

In the county of Surrey:—the borough of Southwark, the parishes of Battersea, Bermondsey, Chamberwell, Christchurch, Chap-ham, Lambeth, St. Mary Newington, Rotherhithe, Streatham, Barnes, Putney, that part of St. Paul Deptford which is within the county of Surrey, Tooting, Graveney, Wandsworth, Merton, Mortlake, Kew, Richmond, Wimbledon, the Clink liberty, and the district of Lambeth Palace.

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[2] The New York revised statutes provide that an indictment against an accessory to any felony, may be found in the county where the offence of such accessory shall have been committed, notwithstanding the principal offence was committed in another county; and that the like proceedings shall be had thereon, in all respects, as if the principal offence had been committed in the same county. 2 N. Y. Rev. Stat. 727, sec. 48.

The court has jurisdiction to try all offences committed or alleged to be committed on the high seas, and other places within the jurisdiction of the Admiralty of England.<sup>(a)</sup>

The venue in the margin of the indictments in this court, is in all cases "Central Criminal Court, to wit;" and the facts in the body of the indictment are stated to have taken place "within the jurisdiction of the said court."<sup>(b)</sup>

(hh) *Defective venue cured.*

By stat. 7 G. 4, c. 64, s. 20, it was enacted that judgment, whether after verdict, outlawry, confession, default, or otherwise, should not be stayed or reversed, for want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence. But now, by stat. 14 & 15 Vict. c. 100, s. 24, no indictment for any offence shall be holden insufficient, "for want of a proper or perfect venue." Still, however, if it appear in evidence that the prisoner is on his trial in a wrong jurisdiction, and that the court has not cognizance of the offence, he must be acquitted.<sup>(c)</sup>[1]

(a) 4 & 5 W. 4, c. 36, s. 22.

c. 24.

(b) *Id.* s. 3; see also, stat. 9 & 10 Vict.

(c) See 2 Hawk. c. 25, s. 35.

[1] It seems proper here to remark, that the venue may be changed, on motion of the public prosecutor, if it appears that a fair and impartial trial cannot be had in the county where the indictment was found. And this, although there has been no actual experiment made, by way of trying the cause, or even empannelling a jury in the county where the venue is laid. *The People v. Webb*, 1 Hill, 179. There is no fixed rule defining what shall not be received as proof of the fact that a fair and impartial trial cannot be had. *Ib.*; see *The People v. Bodine*, 1 Hill, 147.

In Illinois, a prisoner is entitled to a change of venue whenever, by petition verified by affidavit, he brings himself within the requisitions of the statute; and it is not within the discretion of the court to allow it or not. *Clark v. The People*, 1 Scam. Rep. 117; see also, *McGoon v. Little*, 2 Gilman, 42. A change of venue may be awarded, in a criminal case, by consent, without requiring a petition or affidavit to be filed for that purpose. *People v. Scates*, 3 Scam. 351; see *Davidson v. Wheeler*, 1 Morris, 238. Where an indictment was found in one county of Illinois, against several jointly, and the venue was changed to another county, on motion of one of the accused, without consent of the others, when he was tried, and afterwards the indictment was returned to the county where it was found, and the others held to answer, it was held that the proceedings were regular. *Hunter v. The People*, 1 Scam. 453.

In Indiana, a refusal to change the venue in a criminal case, cannot be assigned for error. *Findley v. The State*, 5 Blackf. 576; *S. P. Spence v. The State*, 8 Blackf. 201. An order of court changing the venue of an indictment, is conclusive of its own regularity, unless the contrary appear of record. *McCawley v. United States*, 1 Morris, 486.

The necessity of changing the venue, in any case, in order to secure an impartial trial, is not to depend upon the suggestion, or even the belief, of the defendant, but upon facts shown to the court, or admitted, sufficient to satisfy the court that the change is necessary to procure an impartial trial. *The State v. Burris*, 4 Harring. 582.

The place of trial cannot be changed in a criminal case, for the convenience of witnesses or parties, though it may be where a fair and impartial trial cannot be had in the proper county. *People v. Harris*, 4 Denio, 150. (See Waterman's Cr. Law. tit. Venue.)

[\*76]

*\*2. Commencement of the Indictment.*

The following is the form of the

*Commencement of an Indictment.*

Yorkshire, } The jurors for our Lady the Queen upon their oath  
to wit. } present, that [*&c.*, *stating the matter of the indictment.*]  
A second or subsequent count begins thus: "And the jurors aforesaid upon their oath aforesaid do further present, that" &c.

Where the indictment commenced "The jurors of our Lady the Queen," it was holden that it was not bad on that account, as the caption would cure it.(a)

At the assizes, the venue in the margin is the county, or the county of the city or the county of the town corporate, in and for which the assizes are holden. At the quarter sessions, the venue is regulated by the commission of the peace under which the court derive their jurisdiction: for instance, at the sessions for the East Riding of the county of York, the venue is "East Riding of the county of York," and so of the other ridings, and of the divisions of Lincolnshire, each having a separate commission of the peace; and at the sessions for Hull, the venue is "Borough of Kingston-upon-Hull," and so of other boroughs, having separate commissions of the peace, and separate courts of quarter sessions.

The caption of an indictment is the heading of the record, when the record is made up, and is the same to every indictment found at the same assizes or sessions. It shows, and it must show correctly and with certainty, the court before which the indictment was found, the grand jurors by whom it was found, and the time and place when and where found.(b) It must appear from it that the indictment was found before a court that had jurisdiction of the offence;(c) it must appear from it, that the jurors who found it were of the county, &c., for which the court was holden, that they were at least twelve in number, and that they found the indictment upon their oaths;(d) it must show the day and year on which the court was holden, and must state the indictment to be then found, in the present tense;(e) and it must state the place where the indictment is found, and show that it is within the county, &c., in which the court has jurisdiction.(g)[1]

(a) *Broom v. Regina*, 12 Shaw's J. P. 628.

(d) 2 Hawk. c. 25, s. 126.

(b) 2 Hawk. c. 25, s. 118.

(e) Id. s. 127.

(c) Id. s. 119-123.

(g) Id. s. 128.

[1] The caption is no part of the indictment; its office is to state the style of the court, the time and place of its meeting, the time and place where the indictment was found, and the jurors by whom it was found; and these particulars it must set forth with reasonable certainty. It is said, also, that it must show that the *venire facias* was returned, and from

The following is the form of a

*Caption of an Indictment at the Assizes.*

Warwickshire, } Be it remembered that at the general sessions of  
to wit: } the Lady the Queen of oyer and terminer, holden

whence the jury came, or it will be fatal on demurrer. *McClure v. State*, 1 Yerger's Tenn. Rep. 260, per White, J.; *State v. Hunter*, Peck's Tenn. Rep. 166; *State v. Fields*, ib. 140; *State v. Williams*, 2 McCord, 301.

A caption to an indictment is necessary only where the court acts under a special commission. *State v. Wasden*, 2 Taylor, 163. It is no part of the indictment. *People v. Jewett*, 3 Wend. 319; *State v. Brickell*, 1 N. Car. 354. See *McClure v. State*, 1 Yerger, 260; *State v. Hunter*, Peck, 116; *State v. Smith*, 2 Harr. 533; *State v. Jones*, 4 Halst. 457; *State v. Williams*, 2 McCord, 301; *Vandyke v. Drew*, 1 Bailey, 65.

The preface to a bill of indictment is no part of the presentment of the grand jury, and may be amended at any time so as to conform to the other records of the term. If wholly omitted, the presentment may nevertheless be sufficient. The minute made by the clerk upon the bill at the time of the presentment, and the general records of the term, will supply any defect in such preface. *State v. Gilbert*, 13 Verm. 647.

Where an indictment commenced "the grand jurors within and the body of the county," &c., it was held, on motion in arrest, that the omission of the word "for" after the word "and" did not violate the indictment. *State v. Brady*, 14 Verm. 353.

A formal statement and the indictment that it was found by the authority of the State, is not necessary, if it appear from the record that the prosecution was in the name of the State. *Greeson v. State*, 5 How. (Miss.) 33.

The name of the county in which the indictment was presented, must either be stated in the margin or appear in the body of the caption. 2 Hale, 165, 166. It is usual to state it not only in the margin, but in the body of the caption, and therefore it is safer to adhere to this form, although the better opinion is, that if it be referred to, as *the county aforesaid*, no objection on that account can be supported. 1 Saund. 308; 3 P. Wms. 439. The caption must also set forth the court where the indictment was found, so that it may appear to have jurisdiction. 2 Hale, 166.

But though the name of the county be left blank in the margin of an indictment for misdemeanor, it is enough if the county be stated in the body of the indictment. *Seft v. Commonwealth*, 8 Leigh, 721. See *State v. Lane*, 4 Ired. 113.

*State v. Sutton*, 1 Murphey, 281. The caption of an indictment must set forth, that it was found as a special court, if the fact were so; but where a caption was defective in this respect, the court gave leave to amend after conviction. *State v. Williams*, 2 McCord, 301. See *Dean v. State*, Martin & Yerg. 127; *Burgess v. Commonwealth*, 2 Virg. Ca. 483; *Taylor v. Commonwealth*, 2 ib. 94; *Commonwealth v. James*, 1 Pick. 375.

The caption of an indictment must set forth with sufficient certainty, the court in which, the jurors by whom, and the time and place at which, the indictment was found. *State v. Williams*, 2 McCord, 301, and cases cited above.

Next to the statement of the court, follows the name of the *place* and *county* where it was holden, and which must always be inserted, (Dyer, 69, A.; Cro. Jac. 276; 2 Hale, 166; Hawk. b. 2, c. 25, s. 128; Bac. Ab. Indictment, I;) and, though it may be enough, after naming a place, to refer to "the county aforesaid," yet, unless there be such express reference to the county in the margin, or it be repeated in the body of the caption, it will be insufficient. 2 Hale P. C., 180; 3 P. Williams, 439; 1 Saund. 308, note; 1 Cro. Eliz. 137, 606, 738. This is necessary, in order to show that the place is within the limits of the jurisdiction; and, therefore, whether the caption wholly omit the place, or do not state it with sufficient certainty, the proceedings will be alike invalid, though amendable, (Cro. Jac. 276; 2 Hale, 166; Hawk. b. 2, c. 25, s. 128; Bac. Ab. Indictment, I;) as if it state it to be taken only at the town, without adding "*the county aforesaid*," the omission will vitiate. Cro.

at Warwick in and for the said county of Warwick, on Friday  
 [\*77] the — day of —, in the — year \*of the reign of the  
 Lady Victoria now Queen of the United Kingdom of Great

Eliz. 137, 606, 738, 751; 2 Hale, 166; Hawk. b. 2, c. 25, s. 128; Bac. Ab. Indictment, I, Williams, J., Indictment, IV. But, though the name of the county be left blank in the margin of an indictment for misdemeanor, it is enough if the county be stated in the body of the indictment. *Seft v. Com.*, 8 Leigh, 721. The omission of North Carolina, in an indictment found in a court of that state, where the name of the county is inserted in the margin or body of the indictment, is not a cause for arresting the judgment. *State v. Lane*, 4 Iredell, 113. An indictment in the same state containing, in its caption, a statement of the term in these words: "Fall Term, 1822," and, in the body of the indictment, charging the time of the offence in these words: "on the first day of August, in the present year," was held good; and it was said that there was no necessity for stating any time in the caption of an indictment found in the County or Supreme Courts. *State v. Haddock*, 2 Hawk. 461. Wharton's Cr. Law, p. 65.

The caption, by implication, at least, must show that the grand jury were of the county where the indictment was taken. *Tipton v. State*, Peck's Tenn. Rep. 38; *per Haywood & Beck*, J. J.; *contra*, *White*, J. In *Woodsides v. State*, 2 How. Miss. Rep. 655, where the caption of the indictment was: "*The state of Mississippi, Wilkinson County, ss. The circuit court of Wilkinson County, October term, 1835, thereof, in the year of our Lord, 1835. The grand jurors of the state of Mississippi empaneled and sworn in and for the county of Wilkinson, and state of Mississippi, upon, &c.*," it was held that the record presented a sufficient allegation that the grand jurors were of the state of Mississippi and of the county of Wilkinson.

The indictment must be shown to have been taken on oath. 2 Hale, 167. See *Jerry v. State*, 1 Blackford, 396; *Curtis v. People*, 1 Breese, 198; *Hoffman v. Commonwealth*, 6 Rand. 685; *People v. Guernsey*, 3 John. C. 265; *Woodsides v. State*, 2 How. (Miss.) 655; *State v. Fields*, Peck, 140; *State v. Hunter*, Peck, 166. The names of the grand jury ought to appear somewhere in the record. *Mahan v. State*, 10 Ohio, 232.

Where an indictment purports to be on the affirmation of some of the grand jury, it must appear that they alleged themselves conscientiously scrupulous of taking an oath. *State v. Fox*, 4 Halst. 244; *State v. Harris*, 2 Halst. 361. If one of the grand jurors be a Quaker, the indictment should conclude, "The jurors for our lady the Queen, upon their oath and affirmation, present," &c. 9 Car. & Payne, 78.

The words "good and lawful men" include every qualification in this behalf required by law in Indiana. *Jerry v. State*, 1 Blackford, 396. These words in the caption will be understood to mean freeholders. *State v. Glasgow*, Cam. & Nor. 38; see *State v. Price*, 6 Halst. 203; *Collier v. State*, 2 Stewart, 288; *Bonds v. State*, Martin & Yerger, 143; *Cornwell v. State*, ib. 147. It is unnecessary to set out the words "good and lawful men" in an indictment for murder, in South Carolina. *State v. Yancy*, Const. Rep. 237.

In New York, it has been held that an indictment taken at the sessions must, in the caption, state that the grand jury were, then and there, sworn and charged; the omission of the words "then and there" will be fatal on motion in arrest of judgment, (*People v. Guernsey*, 3 John. Rep. 265;) but the contrary was held in Mississippi, where it was said that if it appear from the record that the grand jurors were sworn, it will be presumed that they were then and there sworn. *Woodsides v. The State*, 2 How. Miss. Rep. 655.

When an indictment purports to be on the affirmation of some of the grand jurors, it is said, in New Jersey, that it must appear that they were persons entitled by law to take affirmations in lieu of oaths, or it will be fatally defective; (*State v. Harris*, 2 Halstead, 361,) but such is not the usual practice, the indictment going no further, in most states, than to aver the fact of its being made on the oaths and affirmations of the grand jurors. If the caption omit to state the grand jury were sworn, it will be presumed they were sworn; at least the recital in the indictment that "the grand jury were elected, empaneled, sworn, and charged," will be sufficient. *McClure v. State*, 1 Yerger, 260, *per* Catron, J.

Britain and Ireland, before Sir —, knight, one of the justices of our said Lady the Queen assigned to hold pleas before the Queen herself, Sir —, knight, one of the justices of our said Lady the Queen of her court of Common Bench, and others their fellows, justices of the said Lady the Queen, assigned by letters patent of our said Lady the Queen under her great seal of the United Kingdom, made to them the aforesaid justices and others, and any two or more of them (whereof one of them the said Sir —, and Sir —, the said Lady the Queen would have to be one,) to enquire (by the oath of good and lawful men of the county aforesaid, by whom the truth of the matter might be better known, and by other ways, methods, and means whereby they could or might the better know, as well within liberties as without) more fully the truth of all treasons, misprisons of treasons, insurrections, rebellions, counterfeittings, clippings, washings, false coinings, and other falsities of the monies of the United Kingdom, and of other kingdoms and dominions whatsoever; and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, unlawful assemblies, misprisons, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintainancies, oppressions, champerties, deceits, and all other misdeeds, offences, and injuries whatsoever, and also the accessories of the same, within the county aforesaid, as well within the liberties as without, by whomsoever or howsoever done, had, perpetrated and committed and by whom, to whom, when, how, and in what manner; and of all other articles and circumstances in the said letters patent of the said Lady the Queen specified, the premises and every or any of them howsoever concerning; and for this time to hear and determine the said treasons and other the premises according to the law and custom of the realm of England; and also keepers of the peace, and justices of the said Lady the Queen assigned to hear and determine divers felonies, trespasses, and other misdemeanors committed within the county aforesaid, —by the oath of A. B. [*&c., naming the grand jurors*] esquires, good and lawful men of the county aforesaid, then and there empaneled, sworn, and charged to inquire, for the said Lady the Queen, and for the body of the said county, it is presented that [*&c., setting out the indictment to the end.*](a)

*Caption of Indictment at the Sessions.*

*East Riding of the* } At the general quarter sessions of the  
*county of York, to wit:* } peace, holden at the town of \*Beverly, [\*78]  
 in and for the said riding, on Tuesday the — day of —, in  
 the — year of the reign of our sovereign Lady Victoria, by the grace

of God of the United Kingdom of Great Britian and Ireland, Queen, defender of the faith, before A. B. and C. D., esquires, and others their associates, justices of our said Lady the Queen, assigned to keep the peace in the said riding, and also to hear and determine divers felonies trespasses, and other misdemeanors in the said riding committed,—by the oath of twelve good and lawful men of the riding aforesaid, sworn and charged to inquire for our said Lady the Queen, and for the body of the riding aforesaid, it is presented that [*&c.*, *setting out the indictment to the end.*]

Although in the first of the above forms the names of the grand jurors are set out, according to the precedent from which it is taken, yet it has been holden, on error to the House of Lords, that this is not necessary.<sup>(a)</sup> I have accordingly omitted the names in the second of the above forms.[1]

(a) *Aylett v. Rex, in error*, 3 Bro. Parl. Ca. 529.

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[1] When there is any material defect in the caption, the court may in their discretion either quash it, or leave the defendant to demur, as in case of the indictment itself. *Hawk. b. 2, c. 25, s. 146*; *Bac. Ab. Indictment, K.* To induce the court to quash an indictment for a defect in the caption the defect must be of a clear and decisive character. *State v. Hickman*, 3 Halsted, 299. So that the observations we have already made on that subject, will also be applicable here, and therefore it would be useless to repeat them. Any objection to the jurisdiction of the inferior court, apparent from the caption as well as to the subject matter of the indictment itself, may be taken advantage of upon demurrer. 1 T. R. 316; 2 Leach, 425.

But though the caption, like the indictment itself, may, if defective, be either quashed by the court or demurred to on the part of the defendant, it differs materially from it in its capacity of amendments, for the return to the court is merely a ministerial act, and ministerial acts may be amended at any time according to the common law. 1 Saund. 249, 250 a.; 3 Mod. 167; Comb. 70, 73. It has, indeed, been frequently holden, that a mistake of the clerk in making up the record can be amended only in the term in which the return is made, and not at any subsequent period; (*Sir W. Jones*, 420; 1 Roll. Ab. 196; *Style*, 85; 8 Co. 156, 157; *Bro. Ab. Amendment*, 32; 2 Sess. Cas. 9; 1 Sid. 155, 175; 2 Hale, 168; 2 Ld. Raym. 968, 1039; 6 Mod. 273, 278; 1 Vent. 344; *Hawk. b. 2, c. 25, s. 97*; *Bac. Abr. Indictment, G. 11*;) but the contrary has also been often determined, (3 Mod. 167; Comb. 73, Cro. Jac. 592, 276, 7; 1 Stra. 138; 2 Ld. Raym. 1518; 4 Burr. 2527; 1 Sid. 244; 2 Bulstr. 35; 2 Stra. 843; 4 Bla. Com. 407; 2 Roll. Rep. 59,) and is so settled after considerable investigation, upon the ground that ministerial acts are at any time amendable, and that the alteration in the caption is not to alter the return, but to make the copy correspond with the original. 1 Saund. 249, n. 1; 4 East. 175; 3 Mod. 167. And agreeably to this resolution, the return to the writ of certiorari has been amended by rule of court, by inserting the time when the quarter sessions were holden, and the names of the justices who were present, and the names of the jurors by whom the indictment was presented, though the latter is now unnecessary; and the entry-roll and record of *Nisi Prius* have been altered to make them agree with the amended caption after the term in which the certiorari was returned, and even after a general verdict of guilty. 4 East, 175, 6; 3 Mod. 167. But it has been said, that the caption of an inquisition cannot be amended at any time after it is filed, any more than the body, because it is drawn at the time with the indictment itself, and forms a part

3. *Body of the Indictment.*

(a) *Defendant how named.*

The person charged by the indictment must be described by his christian or first name, and his surname.[2]

of the accusation, while in other cases it is merely made up from the schedule by the clerk of the court, as its ministerial officer. Hawk. b. 2, c. 25, s. 97; but see Stark. 261.

PENNSYLVANIA.—Defects in the caption of an indictment, as not naming the judges, the jurors, the place, &c. which might be fatal if the indictment were so removed into a superior court, may be supplied in the court where it was taken, by reference to other records there. Addison's Rep. 174—80. See *State v. Williams*, 3 McCord, 301.

It has been held in Pennsylvania that defects in the caption of the indictment, as not naming the judges, the jurors, and the county, which would be fatal if the indictment were removed into a superior court, may be supplied in the court in which it is taken by reference to other records there. *Pennsylvania v. Bell*, Add. 173. And in New Jersey, it is said that it may be amended in the Supreme Court, on proper evidence of the facts; or the *certiorari* may be returned to the court below and the amendment made there. *State v. Jones*, 4 Halstead, 457. And such is the practice in South Carolina. *State v. Williams*, 2 McCord 341; *Vandyke v. Darr*, 1 Bailey 16.

[2] A name which he has usually gone by and acknowledged, is sufficient; and if there be a doubt which of two names is the real one, the second may be added after an *alias dictus*, thus: "Richard Wilson, otherwise called Richard Sayer." If his name be unknown, and he refuse to disclose it, he may be indicted as "a person whose name is to the jurors unknown, but who was personally brought before them by the keeper of the prison." Mat. Dig. 270. But an indictment against him as a person to the jurors unknown, is insufficient, without something to ascertain whom the grand jury meant. Russ & Ry. C. C. 489. If, however, it appears in evidence that he is known, it seems he must be acquitted. 1 Holt, 595; 3 Campb. 264. And where, in an indictment for receiving stolen goods, the principal was so described, and it appeared that he was known, the receiver was acquitted for the variance. Id. ib. But if the principal be really unknown, he may be so described in an indictment against the receiver. 2 East's P. C. 781.

Where T. H. P. was indicted by the name of T. P., junior, it was held a misnomer. 1 Pick. 388; 3 id. 2d ed. 262, 263, n. 1. But in another case, (3 Peter's 7.) Thompson, J. said: "It may well be questioned whether the middle letter of a name forms any part of the christian name of a party." And in a case in the supreme court of this state, it was expressly decided that the law recognizes but one christian name. 5 John. 84; See also Co. Litt. 3 (a) 1 Ld. Raym. 562. Junior, or younger, also forms no part of the name. 1 Pick. 388; 10 Mass. Rep. 205; 7 John. 549. A defendant cannot be described with an *alias dictus* of the christian name. 1 Chit. Cr. L. 203, and note (m.)

It seems, that if the *sound* of the name is not affected by the mis-spelling, the error will not be material. Id. ib.; 10 East, 84; 16 id. 110; Russ. & Ry. C. C. 412. And if two names are in original derivation the same, and taken promiscuously in common use, though they differ in sound, yet there is no variance. 2 Roll. Abr. 135; Bac. Abr. Misnomer.

If the defendant plead misnomer of his surname, the prosecutor may reply, that the defendant is known as well by one name as the other. 2 Hale, 238. Where a man is in the habit of using initials for his christian name, and is so indicted, and the fact whether he was so known is put in issue, and he is convicted, the court will not interfere on that ground; for if a man by his own conduct renders it doubtful what his real name is, he is answerable for the consequences. 4 McCord, 487; see also 2 Crompt. & Jer. 215.

Whatever mistakes may be made in the name of the defendant, however, he cannot afterwards take advantage of the error, if he appears and pleads not guilty. 1 Chit. Cr. L. 202; 1 Bay, 377. Misnomer, is only matter of abatement, and is not a good cause for arresting the judgment. 16 Mass. Rep. 146, 147.



Formerly also, his addition of place or late residence, and his addition of degree or mystery, must have been given; as—"late of the parish of —, in the county of —, laborer," or the like; and if it were omitted, or a wrong addition given to him, he might plead the matter in abatement. But now by stat. 14 & 15 Vict. c. 100, s. 24, no indictment for any offence shall be holden insufficient "for want of, or imperfection in, the addition of any defendant;" and such addition may therefore be safely omitted altogether.[3]

The name of the defendant committing the offence must be repeated to every distinct allegation; but it will suffice to mention it once as the nominative case in one continuing sentence. 4 Harg. St. Tr. 747.

Where a name appears to be a foreign one, a variance of a letter which according to the pronunciation of the language, does not vary the sound, is not a misnomer, as *Petrie* for *Petrie*. *Petrie v. Woodward*, 3 Caine's Rep. 219, *State v. Upton*, 1 Devereux, 513. Where surnames with a prefix to them, are ordinarily written with an abbreviation, the names thus written in an indictment are sufficient. *State v. Keene*, 10 N. Hamp. Rep. 347.

Where a father and son have the same name, and are both indicted the English rule is to distinguish them by naming one as the elder, the other as the younger. In Massachusetts and Maine, however, it has been said that *junior* is no part of the name. *Com. v. Perkins*, 1 Pick. 388; *State v. Grant*, 22 Maine, 171; See *Cort v. Stackweather*, 8 Connecticut, 280. But in New Hampshire, it was held that when L. W. and L. W., Junior, being father and son, live in the same town, and the indictment averred certain acts to be done by L. W., evidence was not admissible to show they were done by L. W., *junior*, it being presumed that L. W. in the indictment, meant L. W., *senior*. *State v. Vitum*, 9 New Hamp. Rep. 519. In New York, in a similar case, it was said that if a man be known by the addition of "*junior*" to his name, an indictment against him, without that addition, is not conclusive that he was the person indicted. 2 Caine's Rep. 165.

[3] In England, at common law, as well as by statute 1 Henry, 5, ch. 5, it was formerly necessary to state in indictments, not only the name of the defendant, but his addition of estate, degree, or mystery. The statute of 1 Henry, 5, ch. 5, is said to be in force in most of the United States. In New York, it is customary to state the defendant's addition, although there is no statute making it necessary.

The addition required is of his degree, as yeoman, gentleman, esquire; of his mystery, as husbandman, sailor, spinster, &c. And it should be the addition to which the party was entitled at the time of the indictment. "Late Esq." &c. would be bad. Leach, 420. Therefore, if the addition be only general, as a servant, farmer, citizen, &c., these are no good additions. Crown Cir. Comp. 42.

The additions commonly in use are, for a man, laborer; for a woman, if single, spinster; if married, A. B., the wife of C. D., laborer; if a widow, widow. Ibid.

The addition ought to be to the substantive name, and not to the *alias dictus*. Ibid.; 1 Chit. Cr. L. 209.

Laborer and yeoman, though both good additions for a man, are bad when applied to a female; but she may be described as the wife of A. B., yeoman, because that term applies with certainty to the husband; but not as the wife of A. B., *spinster*, because they may refer either to the wife or the husband. 1 Chit. Cr. L. 206.

With respect to the addition of *mystery*, the following are sufficient: husbandman, merchant, tailor, broker, hostler, smith, miller, manufacturer, carpenter, cook, brewer, baker, butcher, parish clerk, schoolmaster, scrivener, mercer, fishmonger, dyer, and all other lawful trades and professions. Ibid. But all epithets which charge the defendant with improper or unlawful practices are insufficient; as maintainer, extortioner, abettor, vagabond, common informer, thief, and all terms of a similar description. So also the addition of an office is bad, unless the defendant is prosecuted for something done in his official capacity. Ibid.

And whether the names, or the addition (if any) given to the defendant in the indictment, be a correct description of him or not, is now immaterial; for by stat. 7 G. 4, c. 64, s. 19, no indictment or information shall be abated by any dilatory plea of misnomer or of want of addition or of wrong addition of the party offering such plea; but the court, if satisfied of the truth of the plea by affidavit or otherwise, shall forthwith cause the indictment or information to be amended, and shall call upon the party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded. It may be necessary here to observe, that a name of dignity, as Baron, Baronet, Garter King at Arms,<sup>(a)</sup> or the like, is not an addition, but as much a part of the name of the defendant as his christian or surname. But if it be omitted, or erroneously stated, this is the subject of amendment, within the meaning of the section last mentioned.[4]

(b) 2 Hawk. c. 25, s. 69.

It is said that where the defendant is engaged in several occupations, he may be described by either of them. But if a gentleman by birth engage in trade, he should be described as a gentleman, and not by his art or mystery. *Ib.* 208; 2 Inst. 688.

The additions in common use in the United States, are yeoman, laborer, and gentleman; and there are few cases in which the defendant, on being indicted as such, has pleaded in abatement. In Virginia, however, where the common law distinctions have been carried out with a nicety which approaches to the English practice, it has been held that the difference between the addition of laborer and yeoman is sufficient to abate the indictment. *Com. v. Sims*, 2 Virg. Cas. 374.

Any addition calculated to cast contempt or ridicule on the defendant is bad, and it has been held, in Maine, that the addition, "lottery vendor," when the defendant was, in fact, a lottery broker, is bad on abatement. *State v. Bishop*, 15 Maine Rep. 122. Where, in an indictment against a woman, she is described as A. B., "wife of C. D.," these latter words are mere addition, or *descriptio personæ*, and need not be proved on trial.

As to the addition of the *residence* of the defendant, it seems that a county as well as a place must, in general, be laid in the indictment. If the defendant occasionally live in two places, the addition of either will suffice. If there are two places in the same county, the names of which are partly similar, as Great Dale and Little Dale, the defendant cannot be indicted as of Dale only. So, if the same place be sometimes called North Dale and sometimes East Dale, but never Dale simply, he may plead that there is no such town, because a part of the name is not equal to the whole. 1 Chit. Cr. L. 209. But it seems that if there are two places of precisely the same name, in the same county, and never otherwise denominated, it will suffice to allege the defendant to be of the town generally, without adding any distinction. *Ibid.* 209, 210.

The defendant must be described as of the town, or hamlet, or place, and county, of which he was, or is, or in which he is or was conversant. In Massachusetts, Rhode Island, Pennsylvania, Louisiana, and, in fact, in most of the states, the forms in common use give the addition of place, as "late of the said county," or "of the county of ———." In the city New York, the practice is to charge "late of the ——— ward, in the city of New York." Wharton's Cr. Law, p. 69, 70.

[4] The Revised Statutes of Massachusetts provide that no indictment shall be quashed or deemed invalid, nor shall the judgment or proceedings thereon be arrested or affected by reason of the omission, or mis-statement of the title, occupation, estate or degree of the defendant, or of the name of the city, town, county, or place of his residence. Rev. Stat. of Mass. ch. 137, sec. 14. And there is a similar statute in New York. 2 N. Y. Rev. Stat. 728, sec. 52.

[\*79] \*When however it is necessary to discribe the defendant in any particular way to bring him within the purview of any statute on which the indictment is framed, such statute extending only to such persons as are named in it,—the indictment must so describe the party, as to bring him within the words and meaning of the statute, and the evidence must support the description.(a)

In indictments against a parish or township for the non-repair of a highway,(b) or the inhabitants of a county for not repairing a bridge, the indictment may be against the inhabitants of the parish, township, or county generally, without naming any individual.

An indictment against a corporation, must charge them by their corporate names;(c) and if there be any mistake in doing so, it may be remedied by amendment as above-mentioned.[1]

(b) *Prosecutor or party injured, how named.*

The prosecutor or party injured, or any other person named in the indictment, if known, must be described with certainty;(d) if an individual, he must be described by his christian and surname; if a corporation, by their name of incorporation. But it is not necessary to give any addition of degree or mystery;(e) nor is it safe to do so; for where in bigmay, the second wife was described as Elizabeth Chant, widow, and it appeared in evidence that she was at the time, in fact and by reputation, a single woman, the judges held the misdescription to be fatal, although it was not necessary to have stated more than the name of the party.(g) But if the party be described by the name by which he is usually known, it will be sufficient; and therefore where the prosecutor is named in the indictment "John Hancox," his real name being John Walter Hancox, but he was usually called and known by the name of John Hancox, Parke, J. held it to be sufficient.(h) So, where the real name was Richard Jeremiah Pratt, but

(a) 2 Hawk. c. 25, s. 112.

& Ald. 579.

(b) Id. s. 68.

(g) *R. v. Deeley*, R. & Ry. 303; 4 Car. & P.

(c) See *ante*, pp. 8, 9.

579.

(d) 2 Hawk. c. 25, s. 71.

(h) *R. v. Berriman*, 5 Car. & P. 601.

(e) 2 Hale, 182; and see *R. v. Peace*, 3 B.

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[1] In Pennsylvania, it was determined, that where an act of assembly directed "the president, managers, and company" or a certain turnpike-road to remove a gate on the road, that an indictment would not lie against the president and managers, *individually*, for not removing the gate. *Com. v. Demuth*, 12 Serg. & Rawle, 389. In Maine, however, it is said, that where an offence is committed by virtue of corporate authority, the individuals concerned in its commission, in their personal capacity, and not as a corporation, must be indicted, (*State v. Great Works*, 20 Maine Rep. 41;) and, in Virginia, it has been determined still more broadly, that a corporation cannot be impleaded *criminaliter* by its artificial name at common law. *Com. v. Swift Run Gap Turnpike Co.* 2 Virg. Ca. 362. Whart. Cr. Law.

he was named in the indictment Richard Pratt, the name by which he was generally known, it was holden sufficient.(a) So, where the prosecutrix was named in the indictment by a name which she had assumed, but by which alone she was known in the neighborhood, the judges held it sufficient.(b) So, where the prosecutor was named Charles Frederick Augustus William, duke of Brunswick, that being the name by which he was generally known, though his proper family name was D'Este: the court held that as the law in this case only required certainty to a common intent, the description was sufficient.(c) So, if a bastard acquire a name by reputation, he may be described by it in the indictment. And \*when a child was baptized by the [\*80] name of Louis, and his mother's maiden name was Drake, the only name by which she was known, and the nurse to whom he was sent spoke of him to several persons as Louis Drake,—this was holden to be evidence to go to the jury, to say whether he was not a bastard, and whether he had not acquired this name of Drake by reputation.(d) So, if the name in the indictment be spelt differently from the real and usual mode of spelling it, but be *idem sonans* with it, (and whether it be *idem sonans* seems to be a question to be left to the jury,) it will be sufficient; otherwise not.(e) But the indictment shall not be holden insufficient, because any person therein mentioned is designated by a name of office, or other descriptive appellation, instead of his proper name.(g)[1]

(a) *Anon.* 6 Car. & P. 408.

(b) *R. v. Norton*, R. & Ry. 510.

(c) *R. v. Gregory*, 10 Shaw's J. P. 262.

(d) *R. v. Drake*, 14 Shaw's J. P. 483.

(e) *R. v. Davis*, 20 Law J. 207, m.

(g) 14 & 15 Vict. c. 100, s. 24.

[1] The statute of additions extends to the defendant alone, and does not at all affect the description either of the prosecutor, or any other individuals whom it may be necessary to name, (2 Leach, 861; 2 Hale, 182; Burn, J. Indictment; Bac. Abr. Indictment, G. 2. *Ogilvie's case*, 2 Carr. & Payne, 230; Roscoe's Dig. Cr. Ev. 81; 2 Russell, 707, 708, n. (o).) and, therefore, no addition is in any case necessary, unless more than two persons are referred to, whose names are similar, (ibid.;) and even this does not seem absolutely necessary, for where, upon an indictment for assaulting Elizabeth Edwards, it appeared that there were mother and daughter of that name, and that the assault was upon the daughter, it was held sufficient. 3 B. & A. 579. *Jackson v. Prevost*, 2 Caines, 165. Indeed, with respect to this matter, certainty to a common intent is all that the law requires, and if the description be sufficiently explicit to inform the prisoner who are his accusers, the indictment may be supported. 1 Leach, 248; 2 Leach, 861; Hawk. b. 2, c. 25, s. 72. But it is, in general, necessary to set forth the names of third persons with sufficient certainty; and, therefore, it seems to be generally agreed at this day, that an indictment for suffering divers bakers to bake, &c. against the assize, when that offence was indictable, or for distraining divers persons without just cause, or for taking divers sums of money of divers persons without just cause, or for taking divers sums of money of divers persons for toll, cannot be supported. Hawk. b. 2, c. 25, s. 71; Bac. Abr. Indictment, G. 2; Bro. Indictment, 21; 2 Rol. Abr. 80; but in an indictment for lodging poor persons in an unhealthy place, it was held not necessary to state the names of such persons. Cald. 432. See *Commonwealth v. Maxwell*, 2 Pick, 139. An indictment for retailing spirituous liquors to *divers persons*, without license, is bad. *State v. Stockey*, 2 Blackf. 289.

If, however, the name of the party be unknown, he should be described as "a person to the jurors aforesaid unknown;"(a) but if afterwards at the trial it appear that the party is known, the defendant must be acquitted. Where the prisoner was indicted for plundering a vessel which had been wrecked, and the property was laid, in the first count, to belong to persons therein-named, and in the second count to belong to persons unknown; at the trial, the witnesses did not know the christian names of the owners, so that the first count could not be proved; and the counsel for the prosecution then proposed to rely upon the second count: but Richards, C. B., held that the defendant must be acquitted; his lordship said, "The owners it appears are known, but the evidence is defective on this point; how can I say that the owners are unknown? I remember a case at Chester, where the property was laid as belonging to a person unknown, but upon the trial it was clear that the owner was known, and might easily have been ascertained by the prosecutor; and Lord Kenyon accordingly directed an acquittal."(b) So, where an indictment against an accessory before the fact to a larceny, stated the larceny to have been committed by a person unknown, and the grand jury found the bill on the evidence of a person who acknowledged that he had committed the larceny: Le Blanc, J. ordered the defendant to be acquitted.(c) Where a man named Daniel Campbell was indicted for the manslaughter of a woman, who, in the first count was called Catherine Macgennis, in the second, Catherine Campbell, and in the third, a person to the jurors unknown; and it appeared in evidence that her christian name was not known, that there was no proof of her surname being Macgennis, and the only proof of her name being Campbell, was, that the prisoner at one time stated her to be his wife, though he afterwards denied it: [\*81] Erskine, J. left it to the \*jury to say whether she was the wife of the prisoner, for if so, she was entitled to the name of Campbell, though not to that of Catherine, but if she was not his wife, and the jury believed that her name could not with due diligence have been ascertained, then she was a person unknown within the meaning of the third count: the jury acquitted the prisoner.(d) In another case, where a woman named Stroud was indicted for the murder of her illegitimate child, which in the first count was called "Harriet Stroud," and in the second as "a female of tender age, whose name is to the jurors aforesaid unknown;" the evidence was, that the child was baptized by the name of Harriet, and not Harriet Stroud; the prisoner was found guilty; but the case being reserved for the opinion of the judges, they held that she ought not to have been convicted on either

(a) 2 Hawk. c. 25, s. 71; and see *R. v. Mary Smith*, 6 Car. & P. 151.

(b) *R. v. Robinson*, Holt, 595.

(c) *R. v. Walker*, 3 Camp. 264.

(d) *R. v. Campbell*, 1 Car. & K. 82.

count: not on the first count, because the child's name was not proved to be Harriet Stroud; and not on the second, because the child had a name, "Harriet," by which it might have been described in the indictment.(a) But where a woman was indicted for murdering her illegitimate child immediately after its birth, and it was neither described by any name, nor as a child whose name to the jurors was unknown: the woman being acquitted of the murder, but convicted of concealing the birth, this seeming defect in the indictment was made the subject of a motion in arrest of judgment; but Coleridge, J., held the indictment to be correct; the child being illegitimate, could have no name but by reputation, and it could not have acquired that at the time of its death; and to state in the indictment that its name was to the jurors unknown, was assuming that it had a name.(b) And this decision was afterwards confirmed by the judges.(c)[1]

(a) *R. v. Sarah Stroud*, 1 Car. & K. 187.

(c) *R. v. Willis*, 1 Car. & K. 782.

(b) *R. v. Willis*, 1 Car. & K. 722.

[1] There are, indeed, some cases in which the names of third persons cannot be ascertained, in which it is sufficient to state "a certain person or persons to the jurors aforesaid unknown." Hawk. b. 2, c. 25, s. 71; 2 East P. C. 651, 781; Cro. C. C. 36; Plowd. 85, b.; Dyer, 97, 286; 2 Hale, 181. Roscoe's Dig. Cr. Ev. 81; *Rex v. Smith*, 6 Carr. & Payne, 161. Thus, an indictment for harboring thieves unknown, is sufficient, from the necessity of the case, and the fair presumption which exists that their names cannot be ascertained. Ibid.; Sta. 497, 186. So, upon the same ground, if the dead body of a person murdered be found, and is impossible to discover who he was, an indictment for having killed some one unknown would be valid. 2 Hale, 181; Dyer, 99, a. 285; Plowd. 85, 129; Hawk. b. 2, c. 23, s. 78; Hawk. b. 2, c. 25, s. 71; Bac. Abr. Indictment, G. 2; Burn, J. Indictment; Cro. C. C. 36. And if stolen goods be found upon a highwayman, and it is not known to whom they belong, he may be indicted for stealing the goods and chattels of some one or certain persons unknown. Ibid.; Keilw. 25; 2 East P. C. 651, 781. And in treason or in trespass, it is enough to say, that he hath procured some one unknown, because all are principals. Com. Dig. Indictment, G. 1. And the receiver of stolen goods may be indicted, without naming the principal felon. 2 East P. C. 781; Campb. 264, 265. See *Holford v. State*, 2 Blackf. 103; *Com. v. Andrews*, 3 Mass. 126. Thus, also, in the indictment of the regicides for having procured the death of Charles the First, the fact was agreed to be well laid as done by some one unknown, whose face was concealed by a vizor. Kel. 10; Hawk. b. 2, c. 25, s. 71; Com. Dig. Indictment, G. 1. And thus, if a man steal the goods of an abbey during a vacancy, he may be prosecuted for stealing the goods of the church, though the church can have no property. Hawk. b. 2, c. 25, s. 71.

But these cases are exceptions to the general rule, and are supported by the particular circumstances which render a strict observance of the common maxim incompatible with the purposes of justice. For wherever the name of the party injured is known, it is absolutely necessary to insert it. 3 Campb. 264, 265; 2 Russ. 1313; Hawk. b. 2, c. 25, s. 71; Burn. J. Indictment; Cro. C. C. 36; Sum. 95; Plowd. 85; Keil. 25; Dyer, 99; Dalt. J. c. 131; 9 H. 6, 46. Thus, in an indictment for larceny, though the goods may be laid to be the property of persons unknown, if that is actually the case (*State v. Haddock*, 2 Hayw. 162,) yet if the owner be really known, the allegation will be improper, and the prisoner must be discharged from that indictment, and tried upon a new one rectifying the mistake. 2 East P. C. 651, 781; 3 Campb. 265, note; 1 Hale, 512; Hawk. b. 2, c. 25, s. 71; 2 Leach, 578; Kenyon, 598. Where an indictment laid a watch stolen to be the property of A., and the proof

By stat. 7 G. 4, c. 64, s. 14, in any indictment or information where-in it shall be requisite to state the ownership of any property whatso-

was that B. was the general owner, but that he had exchanged watches with A. for a few weeks, and the watch was stolen while in the possession of A., it was held that A. had a special property in the watch sufficient to sustain the indictment. *Yates v. State*, 10 Yerger, 549. And an indictment will be bad against an accessory, stating the principal to be unknown contrary to truth, and the judge will direct an acquittal. 3 Campb. 264, 265; 2 East P. C. 781; 2 Russ. 1313. And where the parties' names may be ascertained on inquiry, it seems they must be named; and where property was stated in one count to belong to certain persons, naming them specifically, but in another count to belong to *persons unknown*, and the prosecutor by defect of evidence could not prove the Christian names of the persons as described in the first count, it was considered he could not recur to the other count, (Holt, C. N. P. 595;) but the finding of a grand jury of a bill for receiving goods, imputing the same to have been stolen by J. S., does not of itself negative, in another indictment for the same offence, an averment that the goods were stolen by persons unknown. *Russ. & Ry. C. C.* 372. In an indictment for larceny, the owner of the property stolen must, if known, be accurately stated, and a variance would be fatal. 1 Mass. Rep. 476. *Com. v. Morse*, 14 Mass. 217, 218; *Com. v. Manley*, 12 Pick. 173, 174. And it was anciently decided, that where a man is indicted for murdering another, the name of the party killed ought to be disclosed by the inquest; but this could only mean where the name was capable of discovery. *Hawk. b. 2, c. 25, s. 71*; *Staundf.* 181, b. 2, c. 18. And, upon the same principle, in indictments for burglary, and stealing in a dwelling-house to the value of forty shillings, stealing from the lodgings, and for arson, the name of the owner of the house must be truly inserted, (*Leach*, 89, 21, 78, 9, 237, 252, 336, 338, 545, 774; 2 East P. C. 531, 780; 2 Hale, 244, 245. And an indictment for pulling down a dwelling-house as well as for burglary, must set forth correctly, whose house it is; and, therefore, where the indictment charged that it was the dwelling-house of A., and it appeared that A. was a *feme covert*, a new trial was granted. *State v. Martin*, 2 Murphey, 533;) but if he be known by one name as well as by another, the indictment may describe him of either. 2 Hale, 244, 245; *Hawk. b. 2, c. 35, s. 3*. So, in an indictment on the black act, for maliciously shooting at the prosecutor, if the offence be laid in the house of a third person, an error in his name will be a fatal variance. 1 *Leach*, 351; 1 East P. C. 415; 2 Hale, 244, 245; but see *Stark*, 178, notes (f) and (g).

It has also been laid down, that an indictment against a thief, that he found a dead body and stole from it certain property, is good, without calling them the goods and chattels of any one. 2 Hale, 181; *Bac. Abr. Indictment, G. 2*. See *Wonson v. Sayward*, 13 Pick. 402. And if a grave be opened in the night, and the shroud be stolen, the indictment cannot lay the goods as the property of the deceased, but must state them to belong to his executors, or those who buried the deceased. 12 Co. 113; 3 Inst. 110; 2 Hale, 181; *Cro. C. C.* 36; *Bac. Abr. Indictment, G. 2*; 2 East P. C. 652. Judgment will be arrested, where the property stolen is laid as belonging to a person who is deceased. *State v. Davis*, 2 Car. Law Repos. 291. And if goods be stolen from the custody of one who has them as executor, the offender may either be indicted for stealing the goods of the testator in the custody of the executor, or the goods of the executor without naming him in that capacity. 2 Hale, 181; *Bac. Abr. Indictment, G. 2*. A corporation must prosecute in their corporate name, and the names of the individuals composing it will not suffice. 1 *Leach*, 253; 2 East P. C. 1059; and see 1 *Ry. & Moo. C. C.* 15. But, on the other hand, where property is vested in trustees under an act of parliament, if they are not incorporated, they must be described by their proper names as individuals, and their character as trustees subjoined as a description of the capacity in which the legislature authorized them to act. 1 *Leach*, 514. *Roscoe's Dig. Cr. Ev.* 519.

As to the mode in which the parties injured, or any third persons should be mentioned, we have already seen, that if a person is described with such certainty, that it is impossible to mistake him for any other, such a description will in general suffice; and a person may

ever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be; and whenever, in any indictment or information for any felony or misdemeanor, it shall be necessary to mention, for any purpose whatsoever, any partners, joint tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision shall be construed to extend to all joint stock companies and trustees.(a)

(a) See *R. v. Boulton*, 5 Car. & P. 537; *R. v. Steel*, Car. & M. 337.

be described by the name by which he is usually known. Hawk. b. 2, c. 25, s. 72; 2 Leach, 248; Russ. & Ry. C. C. 510. Thus it has been adjudged, that an indictment for an assault on John, parish priest of D. is sufficiently certain, and if the defendant after verdict if not guilty, be indicted again, with the addition of the prosecutor's surname, he may plead his former acquittal; (Dyer, 285 a; Keilw. 25; Hawk. b. 2, c. 25, s. 72; Bac. Abr. Indictment, G. 2.) and an indictment for larceny, laying the goods stolen to be the property of Victory Baroness Tuckheim, by which appellation she had always acted and was known, was held good, though her real name was Selima Victorie. 2 Leach, 861. So an indictment for forgery of a draft addressed to Messrs. Drummond and Company, Charing Cross, by the name of Mr. Drummond, Charing Cross, without stating the names of Mr. Drummond's partners, was held sufficient. 1 Leach, 248; 2 East, P. C. 990. But a mere statement of the Christian name, without any addition to ascertain the precise individual is bad, because uncertain. Hawk. b. 2, c. 25, s. 71; Bac. Abr. Indictment, G. 2; but see Starkie, 184; 6 St. Tr. 805; Moor, 466. The son of a duke or earl, who during the life of his father is called marquis or lord, must not be described as really possessing those titles, but must be called by the family name; and the words "commonly called Marquis, &c." may be added by way of addition. 2 Salk. 451; 2 Leach, 547. So it was holden before the Union, that a peer of Ireland should be thus described: "James Hamilton, Esquire, Earl of Clanbrassil, in the Kingdom of Ireland," because no dignity in another country can give a higher title here than that of esquire; (2 Leach, 547,) and that in such an indictment the words "commonly called," &c. were untechnical, but may be rejected as surplusage. Id. *ibid.* An indictment stating goods to be the property of the overseers of the poor *for the time being*, is a sufficient description that the property was in the overseers at the time of the offence. Russ. & Ry. C. C. 359; 3 J. B. Moore, 22; 3 Burn. J. 24th ed. 254. An indictment for robbery committed on a woman in her maiden name is good, though she marry before the finding of the indictment by the grand jury. 1 Leach, 536. A bastard should be described of the name he has gained by reputation, describing him of his mother's name, he not having gained that name by reputation, would be bad. Russ. & Ry. C. C. 358. If a party be known by one name as well as another, he may be described of either. 2 Hale, 244, 5; Hawk. b. 2 c. 35, s. 3; Russ. & Ry. C. C. 510. And it seems if the sound of the name is not affected by the mis-spelling, such mis-spelling will be immaterial; and where a party was indicted for an offence upon one *Whyneard*, whose real name was *Winyard*, but pronounced *Winnyard*, the indictment was held good; (Russ. & Ry. C. C. 412;) so, "*Benedetto*" for "*Beneditto*" is no variance; (2 Taunt. 401,) nor is "*Segrave*" for "*Seagrave*" 2 Stra. 889. But an indictment charging the prisoner with having personated "*M' Cann*" instead of "*M' Carn*" is bad, (3 Stark. Evid. 1578,) and "*Tarbart*" for "*Tabart*," (5 Taunt. 541,) "*Shakpear*" for "*Shakespeare*," (10 East, 83,) and "*Shulliff*" for "*Shirliff*," (4 T. R. 611; for other instances, see 3 Stark. Evid. 1678,) are variances.



And with respect to the property of counties, ridings, and  
 [\*82] divisions, it is enacted, that in any indictment or information \*for  
 any felony or misdemeanor committed in, upon, or with respect  
 to any bridge, court, jail, house of correction, infirmary, asylum, or  
 other building, erected or maintained in whole or in part at the expense  
 of any county, riding, or division,—or on or with respect to any goods  
 or chattels whatsoever, provided for at the expense of any county,  
 riding, or division, to be used for making, altering, or repairing any  
 bridge, or any highway at the ends thereof, or any court or other such  
 building as aforesaid, or to be used in or with any such court or other  
 building,—it shall be sufficient to state any such property, real or per-  
 sonal, to belong to the inhabitants of such county, riding, or division,  
 and it shall not be necessary to specify the names of any such inhabi-  
 tants.(a)

And with respect to the property of parishes, townships, and hamlets,  
 it is enacted, that in any indictment or information for any felony or  
 misdemeanor committed in, upon, or with respect to any workhouse or  
 poor house, or on or with respect to any goods or chattels whatsoever,  
 provided for the use of the poor of any parish or parishes, township or  
 townships, hamlet or hamlets, place or places,—or to be used in any  
 workhouse or poor house, in or belonging to the same,—or by the mas-  
 ter or mistress of such workhouse or poor house,—or by any workmen  
 or servants employed therein,—it shall be sufficient to state any such  
 property to belong to the overseers of the poor for the time being of  
 such parish or parishes, township or townships, hamlet or hamlets, place  
 or places, and it shall not be necessary to specify the names of all or  
 any of such overseers.(b) And where goods were laid to be the prop-  
 erty of “the overseers of the poor for the time being” of the parish  
 of K., the judges held it to be sufficient, the words “for the time being  
 sufficiently importing that the goods were the property of those who  
 were overseers at the time of the theft.”(c)

The guardians of the poor of a union or parish, are by stat. 5 & 6  
 W. 4, c. 69, made a corporation, and are called “*the guardians of the  
 poor of the — union, (or of the parish of —,)* in the county of —;”  
 and as such they may accept, take, and hold, for the benefit of such  
 union or parish, any buildings, lands, or hereditaments, goods, effects,  
 or other property, and by that name may prefer indictments; and in  
 every such indictment relating to any such property, it shall be suffi-  
 cient to lay or state the property to be that of the guardians of the  
 — union, or of the parish of —.”(d)

And in any indictment or information for any felony or misde-

(a) 7 G. 4, c. 64, s. 15.

(b) 7 G. 4, c. 64, s. 16.

(c) *R. v. Went, R. & Ry.* 359.

(d) 5 & 6 W. 4, c. 69, s. 7; 5 & 6 Vict. c. 57,  
 s. 16.

meanor committed on or with respect to any materials, tools or implements for making, altering or repairing any highway within any parish, township, hamlet, or place, otherwise than \*by trustees [\*83] or commissioners of any turnpike road, it shall be sufficient to aver that any such things are the property of the surveyor or surveyors of the highways for the time being of such parish, township, hamlet, or place, and it shall not be necessary to specify the name or names of any such surveyor or surveyors.(a)

And with respect to property under turnpike trusts, it is enacted, that in any indictment or information for any felony or misdemeanor committed on or with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or other thing, erected or provided in pursuance of any Act of parliament for making any turnpike road, or any of the conveniences or appurtenances thereunto respectively belonging,—or any materials, tools, or instruments provided for making, altering, or repairing any such road,—it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, and it shall not be necessary to specify the names of any such trustees or commissioners.(b)

And lastly, with respect to property under the commissioners of sewers, it is enacted that in indictment or information for any felony or misdemeanor committed on or with respect to any sewer or other matter within or under the view, cognizance or management of any commissioners of sewers, it shall be sufficient to state any such property to belong to the commissioners of sewers within or under whose view, cognizance, or management any such things shall be, and it shall not be necessary to specify the names of any such commissioners.(c)

If in any of these cases, there should appear upon the trial to be a variance between the indictment and evidence, in the name or description of any person or body politic or corporate therein alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein,—or in the name or description of any person, or body politic or corporate, therein alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence,—or in the christian name or surname, or both christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described,—the court may order the indictment to be amended, if it consider the variance not material to the merits of the case, and that the defendant cannot be thereby prejudiced in his defence on the merits.(d)[1]

(a) 7 G. 4, c. 64, s. 16.

(b) *Id.* s. 17

(c) 7 G. 4, c. 64, s. 18.

(d) 14 & 15 Vict. c. 100, s. 1.

[1] A variance in the name will not be fatal, if the name be immaterial to constituting the offence, and may be rejected as surplusage. 1 Ry. & Moo. C. C. 1; 2 East P. C. 593.

*Time.*

Formerly, the indictment must have stated, either expressly or by way of reference, the day, month, and year on which each material fact stated in it, took place; otherwise the indictment would be [\*84] bad.(a) In felonies, \*this was universally required;(b) as for instance, in an indictment for murder, time must have been stated, not only to the assault, but also to the stroke, and to the death.(c) But in misdemeanor, it was said not to be necessary to lay a time to every fact, as the time first laid was deemed to be connected with all the facts subsequently stated.(d)

And if the time so stated were repugnant, uncertain, or impossible, as if the indictment stated a fact to have occurred on a day subsequent to the filing of the bill, or an impossible day, or a day that never happened, it was bad.(e) So, if it laid the offence to be committed in divers days between such a day and such a day, it would be bad.(g) Where however the offence consisted of an omission, it was not necessary to allege any time to it.(h)[1]

(a) 2 Hawk. c. 25, s. 77.

(b) Id.; 2 Hale, 177, 178.

(c) Id.

(d) 2 Hale, 178.

(e) 2 Hawk. c. 25, s. 77.

(g) Id. s. 82.

(h) 2 Hawk. c. 25, s. 79.

Roscoe's Dig. Cr. Ev. 82. If the name of a person be mistaken in an indictment, and the allegation, in which the misnomer occurs be immaterial, so that it may be rejected as surplusage, it will not vitiate the indictment. *Com. v. Hunt*, 4 Pick. 262; *U. S. v. Howard*, 3 Sumner, 12. But where there is a repugnancy or absurdity in the description of the party injured, the error will be fatal, as where one is indicted for stealing the goods and chattels of the said I. S., where I. S. had not been previously mention, (Hawk. b. 2, c. 25, s. 72,) although those words have in some cases been rejected as surplusage. 1 Leach, 109. And it should be observed, that a material error in the names of the persons aggrieved, or in whom property stolen ought to be laid, is much more important than a mistake in the name or addition of the defendant; for the latter can only be objected to by a plea in abatement, which can only delay the trial, while the former will be sufficient ground for arresting the judgment, when the objection appears on the face of the indictment; or, if it be an error in fact, will be a ground of acquittal on the trial at last, as far as respects that part of the charge, (1 East P. C. 514; 2 Leach, 774; 1 Leach, 252, 286, 351, 370; 1 East P. C. 415,) though the mistake only affects the higher offence, the indictment may still be valid as to the inferior crime, as if a party be indicted for burglariously breaking and entering the dwelling-house of Jno. Snoxalt, and stealing therein goods, the property of Ann Lock; if the name of the owner of the house be mistaken, the defendant cannot be found guilty of the capital part of the indictment, viz. the burglary, yet he may be convicted of the simple larceny, (Leach, 252, 333, n. (a). See 1 Blackf. Rep. 37;) so in an indictment for stealing to the amount of forty shillings, in the dwelling-house of A. B., under the 12 Ann. c. 7, the defendant may be acquitted of the capital part of the charge, when not strictly proved, and found guilty of the simple larceny. Leach, 339, n. (a).

[1] VERMONT.—Every sufficient indictment, must set forth the day, month, and year, and in cases of burglary, the hour, when the offence was committed; and though another day may be shown in evidence on trial, yet it must be a day within the term prescribed by the statute of limitations, and the day set forth in the indictment, must also be some day within

But now by stat. 14 & 15 Vict. c. 100, s. 24, no indictment for any offence shall be holden insufficient, "for omitting to state the time at

the statute time, or the indictment will be sufficient. *State v. 9 S.*, 1 Tyler, 295. See *State v. Roach*, 2 Hayw. 552; *Shelton v. State*, 1 Stew. & Port. 208. Every material fact to constitute the crime, must be laid in the indictment, with time and place. *State v. Bacon*, 7 Vermont, 219; *State v. Beckwith*, 1 Stewart, 318.

ILLINOIS.—Where an indictment does not aver the year to be "the year of our Lord," and contain the words "in the name and by the authority of the People of Illinois," it is bad. The form required by the statute must be used. *Whitesides v. People*, 1 Breese, 4. See *State v. Anthony*, 1 M'Cord, 235; *Allen v. Com.*, 2 Bibb, 210.

An indictment is not vitiated by stating an offence to have been committed on the first March instead of the first day of March. *Simmons v. Com.*, 1 Rawle, 142. An indictment for theft, alleged to have been committed "on the second day of March, Anno Domini one thousand eight," was held insufficient, and judgment was arrested on motion. *State v. 9 S.*, 1 Tyler, 295.

An indictment charging that the defendant was a common Sabbath-breaker and profaner of the Lord's day, commonly called Sunday, and that he, on divers days, being Lord's days, did keep a certain open shop, and then and there exposed to sale divers goods, &c. to negroes and others, to the great damage of the good citizens, &c. was held insufficient, and judgment was arrested. *State v. Brown*, 2 Murphey, 224. See *State v. Walker*, 2 Murphey, 229.

But an indictment founded on the slave trade act of 20th April, 1818, ch. 86, secs. 2 and 3, for causing a vessel to sail from a port of the United States to be employed in the slave trade, it is sufficient if the indictment allege that the offence was committed after the passing of the act, at some time between certain specified days, though no day in certain on which it was committed, is specified. *United States v. Smith*, 2 Mason, 143. See *Buttman's case*, 8 Greenl. 113.

Where an indictment charged the offence to have been committed on a day which was subsequent to the trial, judgment was arrested. *Pennsylvania v. M'Kee*, Addis. 36; *Jacobs v. Com.*, 5 Serg. & R. 316; *State v. Munger*, 15 Vermont, 291.

Where an indictment alleges the day so long before that the crime appears to have been bound by the statute of limitations, this is not ground for arresting judgment. *People v. Santwort*, 9 Cowen, 655. But see *State v. Beckwith*, 1 Stewart, 318; *Shelton v. State*, 1 Stew. & Port. 208; *State v. Roach*, 2 Hayw. 552.

Where the crime was alleged to have been committed in the year 1030, the allegation was held bad. *Serpentine v. State*, 1 Howard, (Miss.) 260.

An indictment charging an offence on a particular day, and also on divers other days, is good, a day certain being alleged; the residue will be surplusage. *People v. Adams*, 17 Wend. 475; *State v. May*, 4 Dev. 328.

UNITED STATES.—If an indictment charge the perjury to be committed at the circuit court, held on the 19th day of May, and the record show the court to have been held on the 20th day of May, the variance is fatal. 1 Gal. 387. See *United States v. Bowman*, 2 Wash. C. C. 328.

See *Jacobs v. Com.*, 5 Serg. & Rawle, 315; *State v. Johnson*, 1 Walker, 392.

If two times or places have been previously mentioned, and afterwards a part only is laid "then and there," the indictment is defective, because it is uncertain to which it refers. *Jane v. State*, 3 Missouri, 61.

Under the act of North Carolina, 1811, ch. 6, an indictment for murder may contain enough to induce the court to proceed to judgment, if the time and place of making the assault be set forth, although they be not repeated as to the final blow. *State v. Cherry*, 2 Murphey, 7.

In this country, it may be laid down as a general rule, that the time of committing an offence (except where the time enters into the nature of the offence,) may be laid on any day previous to the finding of the bill, during the period within which it may be prosecuted. *Shelton v. State*, 1 Stew. & Port. 208.

which the offence was committed, in any case where time is not of the essence of the offence,—nor for stating the time imperfectly,—nor for stating the offence to have been committed on a day subsequent to the finding of the indictment,—or on an impossible day,—or on a day that never happened.” The like defects were cured after verdict, by a previous statute.(a)[2]

But although the statement of time may now be dispensed with, in all cases where it is not of the essence of the offence, yet as it will be more satisfactory perhaps to the grand jury that some time should be stated, it will be advisable still to retain it, particularly in cases where the prosecution is limited to a certain time after the commission of the offence, as in treason, and in the case of murder, where the death must appear to have taken place within a year and day after the cause of it,(b) and the like. The manner of stating it is, by stating that the defendant, “on the — day of —, in the year of our Lord —,” or “in the — year of the reign of our Sovereign Lady Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith,” did so and so, stating the act done; and the facts subsequently mentioned may be stated to have been done, “then,” referring to the time before specifically stated.(c) The year of the reign, or the year of our Lord, is stated indifferently: in the prosecutions of regicides, in the reign of Charles the 2nd, every step in which was guided by the advice of the first lawyers in the kingdom, the year of our Lord, not the year of the reign, was stated in the indictments;(d) and as mistakes often occur in using the year of the reign, it may be convenient in all cases to state the year of our Lord.

But whether the day and year stated be the true date of [\*85] the fact, is immaterial, unless it be of the essence of the of-

(a) 7 G. 4, c. 64, s. 21.

(c) 2 Hawk. c. 25, s. 78.

(b) 4 Bl. Com. 306.

(d) 2 Hawk. c. 25, s. 80.

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Though the allegation of time is important, it is in no case necessary to prove the precise day, or even year, laid in the indictment, except where the time enters into the nature of the offence. 1 Chitty's Cr. L. 223; 9 Cowen, 655; 2 Mason, 49.

[2] It will not be necessary to prove the time precisely as laid, unless that particular time is material. This is the constant course of proceeding in criminal prosecutions, from the highest offence to the lowest. In high treason, evidence may be given of an overt act before or after the day specified in the indictment; the particular day is not material in point of proof, and is merely matter of form. Objections of this kind, on behalf of the prisoner, have been repeatedly overruled. See Phillipps on Ev. vol. 1, p. 514.

The authorities are uniform in support of the above doctrine. 2 Hawks P. C. b. 2, ch. 46; 2 Inst. 218; 3 Ib. 230; 1 Hale's P. C. 361; 2 Ib. 179; MacNally's Ev. 496-7, *et seq.*; *The State v. Hanney*, 1 Hawks Rep. 460; *Com. v. Harrington*, 3 Pick. 26; 4 Starkie's Ev. 1568; Starkie's Crim. Pl. 58. But where the date of a particular fact is necessary to ascertain with precision the offence charged, it must be proved as alleged. So where a day is averred by way of describing a written instrument. See *post*, p. 119.

fence; in other cases a variance between the time stated and that proved, will not be matter of objection.(a) And by stat. 14 & 15 Vict. c. 100, s. 17, if upon the trial of an indictment for larceny, it shall appear that the property alleged to have been stolen at one time, was taken at different times, the prosecutor shall be at liberty to give in evidence three takings, within the period of six months between the first and the last of them.[1]

(c) *Place.*

It was necessary formerly to state a place by way of special venue, where every material fact was stated to have occurred;(b) and not only the county must have been stated, but some parish or place within it. But as by the Jury Act,(c) the jury, in criminal cases as well as civil, are returned as the body of the county generally, and not *de vicineto*

(a) 2 Hawk. c. 25, s. 81.

(c) 6 G. 4, c. 50, s. 13.

(b) 2 Hawk. c. 25, s. 83.

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[1] In setting forth the time when the facts occurred, as well as place, number, quantity, &c. it is very usual, in criminal as well as civil proceedings, to introduce the statement under what is termed a *videlicet* or *scilicet*, as, "that afterwards, to wit, on, &c. at, &c." the defendant did, &c. or a fact occurred, which it is thought proper to mention. Lord Hobart, speaking of a *videlicet*, says, (Hob. 172; 5 East, 252; see also, 2 Wils. 335,) "that its use is to particularize that which was before general, or to explain that which was before doubtful or obscure; that it must not be contrary to the premises, and neither increase nor diminish, but that it may work a restriction where the former words were not express and special, but so indifferent that they might receive such a restriction, without apparent injury." Respecting the use of this mode of statement, it has been said, that where the time when a fact happened is immaterial, and it might as well have happened at another day there, if alleged under a *scilicet*, it is absolutely nugatory, and therefore, not traversable; and if it be repugnant to the premises, it will not vitiate, but the *scilicet* itself will be rejected as superfluous and void, but that where the precise time, &c. is material, and enters into the substance of the description of the offence, there the time, &c. though laid under a *scilicet*, is conclusive and traversable, and it will be intended to be the true time, and no other, and if impossible or repugnant to the premises, it will vitiate. 1 Bla. Rep. 495; 2 Saund. 291, note 1; 1 Saund. 169; 1 Stra. 233; 2 Wils. 332; 6 T. R. 462; 3 Burr. 1730; 4 T. R. 590; 4 Esp. Rep. 152; 5 T. R. 71; 3 T. R. 68; 2 B. & P. 118; 2 Campb. 231; 5 East, 244. Either the allegation must exactly correspond with the fact, or it may vary; if the former, it will be well laid with a *scilicet*, which may be rejected; and if the latter, though the *scilicet* were omitted, evidence of a different day, quantity, or place, may be admitted. Thus, in indictments for extortion, or taking a greater sum for brokerage than is allowed by act of parliament, though the sum be stated without a *videlicet*, it is not necessary to prove it with precision. 6 T. R. 265; 1 Chitty on Pleading, 4th ed. 276, note (g); 1 Rsp. Rep. 285. And, on the other hand, where the true sum must be set forth, it will not relieve the prosecutor from strict proof, though he allege a different sum under a *scilicet*. 6 T. R. 462; 4 T. R. 590; 1 Chitty on Pleading, 4th ed. 276, n. (g.) There are, however, authorities which afford an inference that the adoption of a *scilicet* will, in the description of a contract, excuse the party from strict proof, when, if it were omitted, it would be otherwise. 3 T. R. 67; 3 M. & S. 173.

as formerly, it became no longer necessary to state the parish or place, but the county merely.(a)[2]

And now, by stat. 14 & 15 Vict. c. 100, s. 23, it shall not be necessary to state any venue in the body of any indictment, but the county, city, or other jurisdiction named in the margin thereof, shall be taken to be the venue for all the facts stated in the body of such indictment: provided, that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment: and provided also, that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue.

(a) 1 Arch. Peel's Acts, 181, n.

[2] The general practice in the United States, is to lay the offence to be committed in the county where it took place, and in many cases such a description has been held sufficient. The rule, however, admits of much variation. In Massachusetts, it has been laid down, that not only the town must be averred, but also the county where an offence is committed, if, from the terms of the location of the town, or district, by the act of incorporation, the court cannot conclude that the whole town, district, or unincorporated place, lies in one county. *Com. v. Springfield*, 7 Mass. 9. It seems that an indictment for a capital offence, in all cases, should lay both the county and town. *Ibid.* 13. The venue must correspond with the jurisdiction of the court. *People v. Barrett*, 1 Johns. Rep. 66; *State v. G. S.* 1 Tyler, 295; *State v. Jones*, 4 Halst. 357. Where an offence is committed within the county of A., and, after the commission of the offence, the county is divided, and the part of the new county in which the offence was committed, is erected a new county called B., the latter county has jurisdiction over the offence. *State v. Jones*, 4 Halst. 357.

The offence must be charged in the body of the bill, to have been committed within the district over which the court has jurisdiction; it is not sufficient that the caption names the district. Therefore, where the offence in a district court in North Carolina, was laid to have been committed in Beaufort county, without adding in the district of Newborn, judgment was arrested. *State v. Adams*, Murphy, 30. In the city of New York, the practice is to charge the ward as part of the venue—thus, "in the first ward of the city of New York;" in New Orleans, to name the parish. If, however, the offence is shown to be within the jurisdiction of the court, the particular place need not be proved. 2 Hale, 179, 244, 245; 4 Bla. Com. 306; Hawk. b. 2, c. 25, sec. 84, c. 46, sec. 181, 182; 1 East, P. C. 125; Holt, 534.

But when the offence is in its nature local, and the place is stated by way of local description, and not as venue merely, the slightest variance between the description in the indictment and the evidence will be fatal. Thus, where an indictment for arson states the tenement to have been situated in the sixth ward, and the evidence shows it to have been in the fifth, this will be a fatal variance. *People v. Slater*, 5 Hill, 401. Yet, where an indictment for larceny on board ship charged the offence to have been committed in the first ward of the city of New York, and it appeared to have been in the third ward, the variance was held not to be material. *People v. Honeyman*, 3 Denio, 121. It would be different if the offence took place in a dwelling house, because that is strictly local; but a ship is not. *Ibid.*

The cases where local description is necessary, as above mentioned, are such as indictments for burglary, house-breaking, stealing in a dwelling-house, and the like, where the indictment must state the parish and county by way of local description; or indictments for not repairing highways, which must state the highway to be within the parish, &c.; and in these cases the matter of local description must be proved as laid. As to a variance, however, between the statement and proof, in this respect the indictment may now be amended, by stat. 14 & 15 Vict. c. 100, s. 1.

(d) *Statement of the offence.*

Every offence must of course consist of certain facts and circumstances: in the case of an offence at common law, the facts, &c., are defined by the rule of the common law upon the subject; in offences against statutes, by the statute creating the offence.

And the general rule of \*pleading, with respect to this part of [\*86] the indictment, is, that all the material facts and circumstances comprised in the definition of the offence, whether by a rule of the common law or by statute, must be stated; if any one material fact or circumstance be omitted, the indictment will be bad.[1]

[1] It is a general rule in indictments, that the special manner of the whole fact ought to set forth with such certainty, and so specifically that it may judicially appear to the court, that the debtors have gone upon sufficient premises, in order that the court may know what judgment is to be pronounced upon conviction, that the defendant may clearly understand the charge he is called upon to answer, and that posterity may know what law is to be derived from the record. 2 Hale, 183, 184; Hawk. b. 2, c. 25, sec. 57; Cro. Eliz. 147, 201; Bac. Ab. Indictment, G. 1; Com. Dig. Indictment, G. 3; 5 T. R. 634; 5 East, 258. *Lambert v. The People*, 9 Cowen, 578. General charges of violating public decency are insufficient to authorize any judgment against the defendant. The specific acts and circumstances of decency must be set out. *State v. Branson*, 2 Bailey, 149; see *Commonwealth v. Maxwell*, 2 Pick. 139; *State v. Scribner*, 2 Gill & Johns. 246; *Randolph v. Commonwealth*, 6 Serg. & Rawle, 398; *Commonwealth v. Gillespie*, 7 id. 469; *Updegraff v. Commonwealth*, 6 id. 5; *State v. Dent*, 3 Gill & Johns. 8. Where, in an indictment for a riot, the charge was, that the defendants made a great noise and disturbance of the peace, it was held to be too vague and uncertain, and the indictment therefore defective. *Whitesides v. People*, Breese, 4.

But it is not necessary to charge in an indictment anything more than is necessary to make out the offence. *State v. Ballard*, 2 Murphey, 186.

In cases of extortion or false pretences, where the money is paid by an agent, it is sufficient to allege that the money was paid by the principal. *Commonwealth v. Bagley*, 7 Pick. 279; *Dame v. Call*, 21 Pick. 515.

Where an act is charged to have been committed with a certain intent, as an assault with intent to rob or to murder, it is not necessary to state the instrument or means used to effectuate the intent. *Commonwealth v. Rogers*, 5 Serg. & R. 463; *State v. Dart*, 3 Gill & Johns. 8; see also *People v. Bush*, 4 Hill (N. Y.) 133. On the other hand, as observed by Mr. Justice Buller, it is the duty of a good pleader not to clog the record with unnecessary matter, and thereby throw a greater burthen of proof on his client than the law requires; and it is still more his duty not to state things which on the face of the indictment are repugnant, inconsistent, or absurd, (2 Leach, 660,) and the statement of unnecessary matter is censur-



If, for instance, in larceny, the indictment were merely to state that the defendant feloniously took the goods in question, without stating

able and dangerous. The indictment must charge the crime with certainty and precision, and must contain a complete description of such facts and circumstances as will constitute the crime, a statement of a legal result is bad. As an instance of this rule, it has been holden, that an indictment for escaping from prison without showing the original cause of imprisonment, is not maintainable. \ Stra. 1226; Hawk. b. 2, ch. 25, sec. 57; Bac. Abr. Indictment, G. 1. So, an indictment for traitorously coining alchemy like to the current coin of the realm, is bad, unless it show the particular kind of money the metal was intended to resemble. Hawk. b. 2, c. 25, s. 57; Bac. Abr. Indictment. So, in the case of perjury, it is necessary to set out the oath as an oath taken in a judicial proceeding and before a proper person, in order to see whether it was an oath which the court had jurisdiction to administer. Cro. Eliz. 137; Cowp. 683. *State v. Ammons*, 2 Murphey, 123; *State v. Street*, 1 Murphey, 156. And in the prosecution of a constable for not serving, it is necessary to set out the mode of his election, because if he was not legally elected to the office he cannot be guilty of the crime in refusing to execute its duties; and in an indictment for the disobedience of a justice's order, it must appear that the order disobeyed was a legal one, and such previous acts as were the foundation of the magistrate's authority must be recited, or at least referred to. Cald. 183, when defect in this respect cured, id. 536. And where the circumstances are constituent parts of the offence, they must be set out, but where the crime exists without them, they may be alleged in aggravation, but are not absolutely requisite. Cowp. 683; 5 Mod. 96. \ And it is a general rule that where the act is not, in itself, necessarily unlawful, but becomes so by its peculiar circumstances and relations, all the matters must be set forth in which its illegality consists, Hawk. b. 2, c. 25, sec. 57; Bac. Abr. Indictment, G. 1; Cowp. 683. Thus, in an indictment for a nuisance in the erecting an inn, some circumstances must be shown which render it a nuisance, (Ibid.; Palm. 368, 374; 2 Roll. Rep. 345;) but where the act is manifestly an offence, as for keeping a house of ill-fame, this precaution is needless. Hawk. b. 2, c. 25, sec. 57; Cowp. 683.

It is also a general rule, that all indictments ought to charge a man with a particular specified offence, and not with being an offender in general, for no one can know what defence to make to a charge which is thus uncertain; it cannot be pleaded in bar or abatement of a subsequent prosecution, nor can it appear that the facts given in evidence against a defendant on such a general accusation are the same of which the indictors have accused him, nor will it judicially appear to the court what punishment is proper upon conviction. 2 Hale, 182; Hawk. b. 2, c. 25, sec. 59; Com. Dig. Indictment, G. 3; Bac. Abr. Indictment, G. 1; Cro. C. C. 37; 6 T. R. 754; 3 T. R. 100; 1 Carth. 226; 2 Bailey, 149. It is, therefore, insufficient to charge the defendant with having spoken false and scandalous words of the mayor of a certain city. 1 Roll. Rep. 79; 2 Roll. Abr. 79; 2 Stra. 699; Hawk. b. 2, c. 25, sec. 59; Com. Dig. Indictment, G. 8; Bac. Abr. Indictment, G. 1. So, it is bad to accuse him with being a common defamer, vexer, or oppressor, of many men, (2 Roll. Abr. 79; 1 Mod. 71; 2 Stra. 848; 2 Stra. 1246-7; 2 Hale, 182; Hawk. b. 2, c. 25, sec. 59; Com. Dig. Indictment, G. 3; Bac. Abr. Indictment, G. 1,) or with being a common disturber of the peace, and having stirred up divers quarrels, (Ibid.) or with being a common forestaller, (Moore, 302; Hawk. b. 2, c. 25, sec. 59; Bac. Abr. Indictment, G. 1,) a common thief, (Ibid.; 2 Roll. Abr. 59; 2 Hale, 182; Cro. C. C. 37,) or with being a common evil doer, (Hawk. b. 2, c. 25, sec. 59; Bac. Abr. Indictment, G. 1,) a common champertor, (2 Hale, 182; Hawk. b. 2, c. 25, sec. 59; Bac. Abr. Indictment, G. 1,) or with being a common conspirator, or any other such indistinct accusation, (Ibid.;) and an indictment for a libel must set forth the libel itself. 3 M. & S. 116; 8 Taunt, 169; 1 M. & S. 287. Upon the same principle, in an indictment for obtaining money by false pretences, it will not suffice merely to state that the defendant falsely pretended certain allegations, but it must also be stated by express averment what parts of the representation were false, for otherwise the defendant will not know to what circumstances the charge of falsehood is intended to apply. 2 M. & S. 379. And in cases of indictments for forgery and threatening letters, the law requires an exact copy of

also that he carried them away, the indictment would be bad; as the carrying them away is a material part of the definition of larceny. So,

the instrument to be inserted in the indictment, in order that the court may see that it is the subject of forgery, or threat, within the meaning of the statutes. 2 Leach, 661. In an indictment for forging a promissory note, if the note be lost or destroyed, it is sufficient to set forth the substance thereof, alleging the loss or destruction of the instrument. *People v. Badgley*, 16 Wend. 53; *Pendleton v. Commonwealth*, 4 Leigh, 694; *State v. Parker*, 1 Chip. 298; *State v. Potts*, 4 Halst. 293; *United States v. Britton*, 2 Mason, 468; *People v. Kingsley*, 3 Cowen, 522; *State v. Squires*, 1 Tyler, 147. The indictment will be sustained, although it does not allege that the note purported to be signed by the person whose name was forged, if it set forth the purport of the note, giving the name of the maker as part of the description, it is sufficient. *Ibid.*

An indictment for uttering a forged promissory note need not set forth the date of the note nor when it is payable. *Commonwealth v. Ross*, 2 Mass. 373. Nor an indorsement, if there is one, as it is no part of the note. *Commonwealth v. Ward*, 2 Mass. 397.

Every offence consists of certain acts done or omitted under certain circumstances; and in an indictment for the offence, it is not sufficient to charge the defendant generally with having committed it, as, that he murdered J. S., or stole the goods of J., or committed burglary in the house of J. S., or the like; but all the facts and circumstances constituting the offence must be specifically set forth. So, the offence must appear upon the face of the indictment to be a distinct substantive offence: you cannot charge a man with being a common thief, a common champertor, conspirator, common malefactor, or common robber; but if he have committed a larceny, robbery, &c., the indictment must set forth every fact and circumstance which is a necessary ingredient in the offence. Thus, an indictment for extortion, charging that the defendant took extorsively for every horse so much, and for every twenty sheep so much, was holden bad, because it charged the defendant, with extortion generally, and not upon any particular occasion. *R. v. Roberts*, 4 Mod. 103. So, that the defendant was a calumniator, and a common and turbulent breaker of the peace, &c. was holden bad, for the same reason. *R. v. Taylor*, 2 Str. 849, 1246; 2 Hale, 182. And the same where a constable was indicted for behaving badly and negligently in the execution of his office, without specifying any particular instance of negligence, &c. *R. v. Witherington*, 1 Str. 2. The only exceptions to this rule are,—1. That a man may be indicted for being a "common barretor," without detailing the particulars of the barrettry. 2. That a woman may be indicted for being "a common scold," without detailing the particulars of her conduct. 3. That a person may be indicted for keeping a common gambling house, or bawdy-house, without stating those circumstances, which it may be necessary to give in evidence to show that it is a house of that description. See 2 Hawk. c. 26, ss. 57, 59. 4. That in an indictment for soliciting or inciting to the commission of a crime, (*R. v. Higgins*, 2 East, 5,) or for aiding and assisting in the commission of it, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance. But see *Reg. v. Rowell*, 3 Q. B. 180; 2 G. & D. 518. In all other cases, every fact or circumstance which is a necessary ingredient in the offence must be set forth in the indictment. /

In Pennsylvania, a count in an indictment charging that the defendant sold a lottery ticket and tickets in a lottery not authorized by the laws of the commonwealth, is bad, not being sufficiently certain. *Com. v. Gillespie*, 7 Serg. & Rawle, 469. So an indictment charging a man with being a common cheat, is bad, and is not helped by an averment that by divers false pretences and false tickets, he deceived and defrauded divers good citizens of the said state. 1 Chipman, 129. An indictment for an assault with an intent to steal from the pocket, without stealing the goods or money intended to be stolen, is good. *Com. v. Rogers*, 5 Serg. & Rawle, 463. In an indictment for an assault, with intent to murder, it is not necessary to state the instrument, or means made use of by the assailant, to effectuate the murderous intent. *State v. John, alias Jack Dent*, 3 Gill & John. 8. The means of effecting the criminal intent or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to the jury to demonstrate the intent, and not

an indictment for murder, omitting the words *ex malitia premeditata*, would be bad, even although it charge the defendant with having feloniously murdered the deceased, which implies malice.(a) And the like in indictments upon statutes: if any one, fact or circumstance, which is a material ingredient in the offence, as defined by the statute, be omitted, the indictment will be bad.(b)[2]

(a) 2 Hawk. c. 25, s. 110.

(b) 2 Hawk. c. 25, s. 110—112.

necessary to be incorporated in an indictment. *State v. Dent*, 3 Har. & John. 8. In New York, in an indictment under the statute, (2 R. S. 698, sect. 3,) for attempting to commit an offence, the particular manner in which the attempt was made is immaterial, and need not be alleged. *People v. Bush*, 4 Hill's N. Y. R. 133.

There are some instances when, by intendment of law, what might otherwise be a variance, is made good. Thus, when in an indictment for extortion, or obtaining goods on false pretences where the money is paid by an agent, the indictment is right in alleging it to have been paid by the principal. *Com. v. Bagley*, 7 Pick. 279; *Com. v. Call*, 21 Pick. 515. *Commonwealth v. Ray*, 13 Pick. Rep. 362; *James v. Commonwealth*, 12 Serg. & Rawle, 220; *Com. v. Davis*, 11 Pick. 434; *State v. Chitty*, 1 Bailey, S. Car. Rep. 379; 6 Russel, 185, 186; *State v. O'Bannon*, 1 Bailey, 144.

[2] Whether the statute be *public*, or *private*, the indictment must state all the circumstances which constitutes the definition of the offence in the act, so as to bring the defendant precisely within it: and must with certainty and precision charge him with having committed or omitted the acts constituting the offence, under the circumstances and with the intent mentioned in the statute. 1 Hale, 517, 526, 535. The defect will not be aided by verdict; (2 East's Rep. 333,) nor by a conclusion *contra formam statuti*. 2 Hale, 170; Fost. 423, 424; See 8 T. R. 536. Nor will the fullest description and legal definition of the offence be sufficient without keeping close to the expressions of the statute; (Fost. 424,) which should be pursued in the precise and technical language used in the statute. *Id. ib*; 2 Hawk. ch. 25, sec. 110. Thus, for rape, no expressions of force and carnal knowledge will excuse the omission of the word "*ravished*." 2 Hawk. ch. 23, § 77. So if a statute make it criminal to do an act "unlawfully and maliciously," it must be stated to have been done "*unlawfully*." "Feloniously, voluntarily and maliciously" is not enough. *Ry. & Moo. C. C.* 239, 247. But where a word not in the statute is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than it, and includes it, the indictment will be sufficient. As, if the word "knowingly" be in the statute, and the word "advisedly" substituted for it in the indictment; (1 Bos. & P. 181,) or the word "wilfully" in the statute, and "maliciously" in the indictment, (the words "advisedly" and "maliciously" not being also therein) the indictment would be sufficient. Yet it is better to pursue strictly the words of the statute; as the court, *in favorem vite*, are sometimes inclined to listen to and countenance very nice distinctions upon the subject. Where the subject of the indictment cannot be brought within the meaning of the statute without the aid of extrinsic evidence, it is necessary, besides charging the offence in the words of the statute, to aver such facts and circumstances as may be necessary to bring the matter within the meaning of it. *Matt. Dig.* 200, 275; 2 Leach, 664; 2 East's P. C. 928.

And if there be any exception contained in the same clause of the act which creates the offence, the indictment must show, negatively, that the defendant, or the subject of the indictment, does not come within the exception. *Id.* 275; 1 T. R. 141; 15 East, 456; 1 *id.* 643; Leach, 580; *Russ. & Ry. C. C.* 174, 321. But if an exception or proviso be in a subsequent clause or statute; (1 T. R. 320,) or although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, (1 Barn. & Ald. 94,) it is in

But in an indictment on a statute, it is not necessary to aver that the defendant is not within the benefit of a proviso in it, even in cases where the statute in its purview expressly notices the proviso, as by saying that none shall do the thing prohibited, otherwise than in such special cases as are mentioned in this Act,<sup>(a)</sup> or the like. Nor shall any indictment be deemed insufficient, for want of the averment of any matter unnecessary to be proved,<sup>(b)</sup> or for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence.<sup>(c)</sup>

And the statement should be such as can be proved by the evidence in the case. But by stat. 14 & 15 Vict. c. 100, s. 1, whenever on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof,—in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment,—or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein,—or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged by the commission of such offence,—or in the christian name or sur-

(a) 2 Hawk. c. 25, s. 113.

(c) 14 & 15 Vict. c. 100, s. 24.

(b) 14 & 15 Vict. c. 100, s. 24.

that case matter of defence for the other party, and need not be negatived in the pleading. Matt. Dig. 275; Arch. Cr. Pl. 48; 3 Chit. Burn, 456.

It is generally, but not always, sufficient, in an indictment for a misdemeanor created by statute, to describe the offence in the words of the statute. *The People v Taylor*, 3 Denio. 91. In an indictment for setting on foot a lottery, contrary to the statute, it is essential to specify the *purpose* for which the lottery was made; that being a part of the statute description of the offence. But a general statement of the purpose for which the lottery was made is not enough. Some further description must be given, where it is practicable to do so. *Ibid.*

There is no necessity to recite any public statute on which the indictment is founded; for the judges, *ex officio*, take notice of all public statutes. Dyer, 155, a.; 2 Hawk. ch. 25, § 100; 1 Saund. 153, n. (3.) But if it be recited with a material variance and the indictment conclude "contrary to the form of the *said* statute," it will be fatal; though if it conclude generally, as, "contrary to the form of the statute in such case made and provided," without referring to the recited statute, the recital may be rejected as surplusage. 2 Hawk. ch. 25, § 101; 6 T. R. 776. But the parts of a *private* act on which an indictment is framed, must be set out specially, as other facts, and a variance properly shown to the court will be fatal. 2 Hawk. ch. 25, § 103. Neither the day on which a private statute was enacted, nor the title or preamble, need in any case be stated. But if set forth it must be done with correctness, or, if the indictment conclude contrary to the statute *aforesaid*, the variance will be fatal. 1 Chit. Cr. L. 277; Holt, 662; 2 Hawk. ch. 25, § 106.

name, or both christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described,—or in the name or description of any matter or thing whatsoever therein named or described,—or in the ownership of any property named or described therein,—it shall and may be lawful for the [\*87] court \*before which the trial shall be had, if it shall consider such variance not material on the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs, and in every other part of the indictment which it may become necessary to amend, on such terms as to postpone the trial, to be had before the same or another jury, as such court shall think reasonable; and after any such amendment, the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had occurred.

(e) *Intent.*

The intent with which an act is done, is often made a material ingredient in the offence, as defined either by the common law or by statute; and when it is so, care must be taken to state in the indictment that the offence was committed with that intent, otherwise the indictment will be bad.[1]

[1] The intention of the party at the time he committed the offence is often a necessary ingredient in it; and in such cases it is as necessary to state the intention in the indictment, as any other of the facts and circumstances which constitute the offence. See *R. v. Phillips*, 6 East, 454. In some cases, the law has adopted certain technical expressions to indicate the intention with which an offence is committed; and in such cases the intention must be expressed by the technical word prescribed, and no other. Thus, treason must be laid to have been done "*traitorously*;" all felonies to have been done "*feloniously*;" burglary is laid to have been done "*feloniously and burglariously*," and with intent to commit a particular felony; murder, "*feloniously, and of his malice aforethought*;" 2 Hale, 184, 187; forgery, "*feloniously*;" if made felony by statute, and with intent to defraud, &c.

Where an *evil intent* accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment and proved. See *The People v. Petit*, 3 J. R. 511. See also *Fergus v. State*, 6 Yerger, 334; *Coffee v. State*, 3 Yerger, 283; 2 Stark. Ev. (5th Amer. ed.) 416—419. Thus where a libel has not been published, but merely sent to the prosecutor, it is necessary to state in the indictment that it was sent to him with an intention to provoke him to a breach of the peace; so where a letter containing a libel is sent to the wife, the indictment ought to allege it was sent with intent to disturb the domestic harmony of the parties; (2 Stark. Rep. 245. See 7 Conn. R. 266,) and in an indictment on the 43 Geo. 3, c. 58, where the intent laid in several counts, was to murder, to disable, or do some grievous bodily harm, and the intent found by the jury was, to prevent being apprehended, it was held bad, and that the intention should be stated according to the fact: (*Russ. and Ry. C. C.* 365; *Roscoe's Dig. Cr. Ev.* 653, 657,) so in burglary, if the entry be alleged

But in forgery (which is defined to be the forging or uttering of certain instruments, "with intent to defraud any person whatsoever,") and in false pretences (which is defined to be the obtaining from another by a false pretence, any chattel, money, or valuable security, "with intent to cheat or defraud any person of the same,") it is sufficient to allege the act to have been done "with intent to defraud," without alleging the intent to defraud any particular persons.<sup>(a)</sup> And in all cases within stat. 7 & 8 G. 4, c. 30,<sup>(b)</sup> as to the malicious injuries, it is immaterial whether the offence shall be committed from malice conceived against the owners of the property in respect of which it shall be committed, or otherwise.<sup>(c)</sup>

(f) *Statement must be positive.*

The charge must be laid positively, and not inferentially or by way of recital merely.<sup>(d)</sup> Therefore a material fact laid in an indictment

(a) 14 & 15 Vict. c. 100, s. 8.

(c) 7 & 8 G. 4, c. 30, s. 25.

(b) Peel's Act.

(d) 2 Hawk. c. 25, s. 60.

to have been made with intent to commit a specific felony, the indictment will not be supported by evidence of an entry with intent to commit another kind of felony. 1 Hale, 561; 2 East, P. C. 51; 2 Leach, 774, 702; Roscoe's Dig. Cr. Ev. 281, 282. It is usual, therefore, in these cases, to lay the same fact with different intents, as one count for a burglarious entry, with intent to steal the goods of P. D. and another count for the same entry with intent to kill and murder him. 2 East P. C. 515. If an indictment omit to state that defendant committed the burglary *with intent to steal, &c.*, the defendant may be convicted of the burglary, if the larceny be proved, but not so if the larceny be not. Russ. & Ry. C. C. 445. It is not necessary in an indictment for burglary to charge the prisoner with having broken and entered the prosecutor's house *with an intent* to commit a felony. *Commonwealth v. Brown*, 3 Rawle, 207. And if the intention is necessary to constitute the offence, it must be alleged in every material part where it so constitutes it, (see *Curtis v. People*, Breese, 199; S. C. 1 Scammon, 285,) and where an indictment for presenting a forged order to W. L. treasurer, &c. pretending it was genuine, and obtaining from W. L. under it 4*l.* 10*s.* 6*d.* after charging that the prisoner, with intent to cheat, &c. the treasurer presented the order, that he knowingly, &c. pretended it was a genuine order, proceeded "and so the jurors, &c. say, that the prisoner, on the day and year, &c. at, &c. did obtain the said sum of 4*l.* 10*s.* 6*d.*" but the intent to cheat and defraud W. L. was not stated in that part of the indictment, nor was the obtaining charged to have been effected knowingly and designedly, the indictment was held bad. 1 Stark. Rep. 396; Russ. & Ry. C. C. 317, S. C. Where the act is in itself unlawful, an evil intent will be presumed, and need not be averred, and if averred, is a mere formal allegation which need not be proved by extrinsic evidence. 6 East, 474; 1 B. & P. 186, 7; and Russ. & Ry. C. C. 207. Thus in an indictment for seditious words, it need not be shown that they were uttered with intent to alienate his majesty's subjects, for it is manifest they have the tendency. 2 Ld. Raym. 879. And it is not necessary to prove the whole intention as stated in the indictment, if it be divisible, it will suffice to prove that necessary to constitute the offence; and on an indictment charging an assault, with intent to abuse and carnally know, the defendant may be convicted of an assault with an intent to abuse simply. 3 Stark. 62. So where a libel is stated to have been published with intent to defame certain magistrates, and also to bring the administration of justice into contempt, it is sufficient to prove a publication with either of those intentions. 3 Stark. 35.

after a "whereas," would render the indictment bad.(a) So, the want of a direct allegation of anything material in the description of the substance, nature, or manner of the offence, cannot be supplied by any indictment or implication whatsoever; and, therefore, in an indictment for murder, the omission of the words "*ex malitia præcogitata*," is not supplied by the words, "*felonice murderavit*," although the latter words imply them.(b)[2] And the like, in other cases. But "*existens*" is a good introduction of an averment, when it has reference to the time of committing the offence.(c)

(g) *Statement must be certain.*

It has already been mentioned(d) that the indictment must [\*88] state all the facts and \*circumstances comprised in the definition of the offence, by the rule of the common law or statute on which the indictment is founded. And these must be stated with clearness and certainty, otherwise the indictment will be bad.

The principal rule as to the certainty required in an indictment, may, I think, be correctly laid down thus: that where the definition of an offence, whether by a rule of the common law or by statute, includes generic terms, (as it necessarily must,) it is not sufficient that the indictment should charge the offence in the same generic terms as in the definition, but it must state the species,—it must descend to particulars.[1] Wherefore, an indictment for stealing "*bona et catalla*" of J.

(a) 2 Hawk. c. 25, s. 60.

(c) 2 Hawk. c. 25, s. 61.

(b) *Id.*

(d) *Ante*, p. 86.

[2] In New York, where an attorney of the court of common pleas was charged with extortion, and the indictment averred that on ——— he obtained a judgment in favor of one J. R. v. A. C., and that he did extort and receive from the said A. C. \$11 over and above the fees usually paid for such services, and due in the suit aforesaid, &c., it was held that the indictment was not sufficiently precise, it not specifying how much he received on his own account, and how much on that of the officers and members of the court. *People v. Rust*, 1 Caines' R. 133.

The description of the offence must be technically exact, thus, an indictment, charging the defendant with forging a receipt against a book account, is too indefinite. The term is not known to the law; and in common parlance, may mean money, goods, labour, or whatever may be brought into account. Had the charge been forging an acquittance for goods, the evidence of forging the paper, described in the indictment, would, it was said by the court, have been proper for the jury. The paper described was, "Sept. 3, 1816. Received of James Dalton, his book account, in full, John Logan." *State v. Dalton*, 2 Murphy 379. So in an indictment for fornication and bastardy, it is held, that the sex of the child must be stated. *Com. v. Pintard*, 1 Browne, 59; *Simmons v. Com.* 1 Rawle, 142.

[1] The objects for which particularity in setting out the offence is required, are stated by Mr. Starkie, (1 Starkie's C. P. 73,) as follows:

1st. In order to identify the charge, lest the grand jury should send a bill for one offence, and the defendant be put upon his trial in chief for another, without any authority. Staunf. 181.

S., without further describing them, by stating that goods or chattels were intended, would be bad.(a) So, where a person was indicted for stealing "three eggs of the value of twopence," Tindal, C. J., held the indictment to be bad, for not stating what sort of eggs they were; for all that appeared in the indictment, they might be adder's eggs or other eggs, which could not be the subject of larceny.(b) But where

(a) 2 Hawk. c. 25, s. 4; *R. v. Powell*, 1 Str. 8. (b) *R. v. Cox*, 1 Car. & K. 494.

2d. That the defendant's conviction or acquittal may enure to his subsequent protection, should he be again questioned on the same grounds: the offence therefore should be defined by such circumstances, as will, in such case, enable him to plead a previous conviction or acquittal of the same offence. *Ib.*

3d. To warrant the court in granting or refusing any particular right or indulgence, which the defendant claims as incident to the nature of the case. *Ib.*

4th. To enable the defendant to prepare for his defence in particular cases, and to plead in all, or if he prefer it to submit to the court, by demurrer, whether the facts alleged (supposing them to be true) so support the conclusion in law, as to render it necessary for him to make any answer to the charge.

5th. To enable the court, looking at the record after conviction, to decide whether the facts charged are sufficient to support a conviction of the particular crime and to warrant their judgment; and also, in some instances, to guide them in the infliction of a proportionate measure of punishment upon the offender.

Matters of inducement or aggravation, as a general rule, do not require so much certainty as the statement of the gist of the offence. So where the offence cannot be stated with complete certainty, it is sufficient to state it with such certainty as it is capable of. As in the case of a conspiracy to defraud a person of goods, it is not necessary to describe the goods as in an indictment for stealing them; stating them as "divers goods" has been holden sufficient. Wharton's Cr. Law, p. 81, citing *R. v. —*, 1 Chit. Rep. 698; *Rex v. Eccles*, 1 Leach, 274; *King v. Gilk*, 2 Barn. & Ald. 204; *Com. v. Judd*, 2 Mass. 329; *Com. v. Collins*, 3 Serg. & Rawle, 220; *Com. v. Mifflin*, 5 Watt. & Serg. 461.

Where a statute on which an indictment is founded, enumerates the offences, or the intent necessary to constitute such offences disjunctively, the indictment must charge them conjunctively; as where the statute against unlawful shooting in Virginia, &c., affixes a penalty when the act is done with intent to maim, disfigure, disable, or kill, (in the disjunctive,) the indictment should charge the intent conjunctively. *Angel v. Com.* 2 Virg. C. 231; *Jones v. State*, 1 McMullen, 236; *State v. Price*, 6 Halstead, 203. So in England, under statutes describing the offences disjunctively, it was held fatal to say that the defendant forged, or caused to be forged, an instrument, (1 Burr. 399; 1 Salk. 342, 371; 8 Mod. 33; 5 Mod. 137,) or that he carried and conveyed, or caused to be carried and conveyed, two persons having the small pox, so as to burthen a certain parish. 1 Sess. Cases, 307.

If the indictment charge the defendant with one or other of two offences, in the disjunctive, as that he murdered, or caused to be murdered, forged, or caused to be forged, (2 Hawk. c. 25, s. 58; *R. v. Stocker*, 1 Salk. 342, 371,) *levavit vel levare causavit*, (*R. v. Stoughton*, 2 Str. 900,) conveyed, or caused to be conveyed, &c., (*R. v. Flint*, Hardw. 370, see *R. v. Morley*, 1 Y. & J. 22,) it is bad for uncertainty; and the same, if it charge him in two different characters, in the disjunctive, as *quod A. existens servus sive deputatus*, took, &c. *Smith v. Mall*, 2 Ro. Rep. 263. So, an indictment which may apply to either of two definite offences, and does not specify which, is bad. *R. v. Marshall*, 1 Mood. C. C. 158. But in Vermont it was held not to be a fatal objection, that the indictment charged the defendant with the larceny of a horse, described as being either of a "brown or bay colour." *State v. Gilbert*, 13 Vermont R. 647. And in Pennsylvania, an indictment laying a nuisance to be in the "high-way or road," &c., was held good. *Res. v. Caldwell*, 1 Dallas, 150.



a man was indicted for stealing "one ham of the value of 10s., of the goods and chattles of Thomas Keighway," and it was objected that the description was not sufficient, as it might be the ham of some wild animal, which would not be the subject of larceny: the judges however held it to be sufficient, for even if it were the ham of a wild animal, it might be of value, and the subject of larceny, the rule as to animals *feræ naturæ* applying only to the live animal.(a) So, where a man was indicted for stealing "one sheep," and it appeared that the animal was between nine and twelve months old, and some of the witnesses called it a sheep, some a lamb, but the jury said that in common parlance it was called a lamb; the prisoner being convicted, the judges held the conviction to be right, as the word "sheep" being general, was applicable to one of that age, whatever it might in common parlance be called.(b) So, where the prisoner was indicted for receiving "twenty-eight pounds of tin," and it appeared that what he had received were two lumps of tin, called in the trade ingots; and it was then objected that they ought to have been so called in the indictment: but Coleridge, J., held that they were properly described as so many pounds weight of tin; if the ingots were some article which in ordinary parlance was called by a particular name of its own, it would be improper to call it by the name of the material of which it was composed; in speaking of a piece of cloth, you could not call it so many pounds of wool, in speaking of sovereigns you could not call them so many ounces of gold; but here this is the material itself, and is properly described as so many pounds weight of tin; so in larceny of [\*89] \*a bar of iron, it would be properly described as so many pounds weight of iron.(c) But where a man was indicted for stealing "ten pounds in money numbered," the judges held the conviction to be wrong, because the indictment did not specify the species of coin stolen.(d)[1] So, it has been holden bad, to charge a man with

(a) *R. v. Gallears*, 2 Car. & K. 981; 19 Law J. 13, m.

(b) *R. v. Spicer*, 1 Car. & K. 690.

(c) *R. v. Mansfield*, Car. & M. 140.

(d) *R. v. Fry*, R. & Ry. 482; but see now stat. 14 & 15 Vict. c. 100, s. 18, *post* p. 91.

[1] It is frequently necessary, in the description of an offence, to state the quantity, number, kind and value of the personal property which is essential to the constitution of the offence, or necessary to the right understanding of the indictment. 2 Hale, 128, 3; Bac. Abr. Indictment, G. 3; Hawk. b. 2, c. 25, s. 74; Burn. J. Indictment, IX. In this statement, certainty, to a common intent, as it is technically termed, is generally sufficient, which seems to mean such certainty as will enable the jury to decide in case of theft, whether the chattel proved to have been stolen, is the very same with that upon which the indictment is founded, and show judicially to the court that it could have been the subject-matter of the offence charged, and thus secure the defendant from any subsequent proceedings, for the same cause after a conviction or acquittal. And in general, at least as great a degree of certainty is required in an indictment respecting goods, as in trespass, for what will be defective in the latter, will be still more material in the former. 2 Hale, 183. Where the *number* or *quan-*

"speaking divers false and scandalous words" of the mayor of a town, without setting out the words.(a) So, where an indictment, at the

(a) 2 Hawk. c. 25, s. 59.

ity of any property should be stated, it should be done with certainty; thus an indictment for regrating, &c. stating that defendant regrated "a great quantity" of goods, &c. will be bad. 1 East, 583; 1 Ld. Raym. 475. So an indictment for stealing twenty sheep and ewes is bad, because the number of each sort is not stated. 2 Hale, P. C. 182. So it is bad to say *felonice furatus est oves* or *columbas*, without expressing their number, (Id. 183; see *Steward v. Commonwealth*, 4 Serg. & Rawle, 194; *Commonwealth v. Maxwell*, 2 Pick. 143,) but, an indictment for murder with stones need not state the number of them. 13 Price, 172. An indictment stating that defendant stole "six handkerchiefs" is supported in evidence, though the handkerchiefs were in one piece, the pattern designating each handkerchief, and thus being described in the trade, as so many handkerchiefs. 1 Ry. & Moo. C. C. 25.

The acceptance of the name of property governs the descriptions. *Reed's case*, 2 Rogers' Rec. 168; *Commonwealth v. Wentz*, 1 Ashmead, 269; *Commonwealth v. James*, 1 Pick. 375.

It is sufficiently certain in an indictment to describe the property stolen as one hide of the value, &c. *State v. Dowell*, 3 Gill & Johns 310.

So a charge of stealing a "parcel of oats" is sufficiently certain. *State v. Brown*, 1 Deveaux, 137. See *State v. Logan*, Missouri, 377; *State v. Toole*, 2 Harr. Del. 541; *State v. Sausorn*, 3 Brevard, 5.

It is not necessary to prove the whole of the property stated, if by the rejection of the part not proved the offence would be complete; and on an indictment for embezzeling one pound notes, and other moneys, &c. describing them, though the evidence be that other property than that described was embezzled; yet if it be proved that one pound notes were embezzled, it will suffice. Russ. & Ry. C. C. 303, and see 3 M. & S. 548. So in an indictment for usury it is not necessary to prove the exact sum laid in the indictment; (6 T. R. 265,) nor is it necessary in an indictment for extortion to prove the precise sum alleged to have been extorted; (1 Ld. Raym. 149; 6 T. R. 267,) but if the whole property stated be necessary to constitute the offence, the whole must be proved as stated. *Semb.* Russ. & Ry. C. C. 274. The description of the property itself should be with certainty; thus an indictment that the defendant took and carried away such a person's goods and chattels, without showing what in certain, as one horse, one cow, &c. is not good. 2 Hale, 182.

See *State v. Dowell*, 3 Gill & John. 310; *Missouri v. Logan*, 1 Miss. 532.

An indictment, that "the defendant stole, took and carried away, sundry promissory notes for the payment of money, to the value of \$80, the chattels of A," is too vague. *Stewart v. Commonwealth*, 4 Serg. & R. 194. See *State v. Dowell*, 3 Gill & John. 310; *Commonwealth v. Roger*, 1 Binn. 201.

And in an indictment on the 9 Geo. 1, c. 22, it was held necessary that it should state the species of the cattle wounded or injured, and stating that the prisoner wounded certain cattle was insufficient. Russ. & Ry. C. C. 258. So an indictment against a bankrupt for concealing his effects, stating part of the effects concealed to be "100 other articles of household furniture," and "a certain debt due from one A. B. to the said prisoner to the value of 20*l.* and upwards" was held bad. *Ibid.* 274. In an indictment for larceny of bank notes, it seems sufficient to describe them as "bank notes" without adding for the payment of money. 3 M. & S. 547, 8.

See *Commonwealth v. Boyer*, 1 Binn. 201; *Commonwealth v. M'Dowell*, 1 Browne, 360; *Salisbury v. State* 6 Conn. 101; *State v. Cassell*, 2 Har. & Gill, 406; *Commonwealth v. Richards*, 1 Mass. 337; *M'Millan v. State*, 5 Ohio, 269; *State v. Wilson*, 2 Const. Ct. Rep. 495.

*Danewood v. State*, 1 How. (Miss.) 262; *Hill v. State*, 9 Yerger, 357; *M'Millan v. State*, 5 Ohio, 269; *People v. Wiley*, 3 Hill, 194; *People v. Holbrook*, 13 John. 90; *Commonwealth v. Messenger*, 1 Binn. 274; *Spangler v. Commonwealth*, 3 Binn. 533; *Stewart v. Same*, 4 Serg.

instance of a justice of the peace, charged a defendant that "*per diversa scandalosa, minacia et contemptuosu verba abusus fuit, et ipsum in executione officii sui predicti vi et armis illicite retardavit*," and it was demurred to as being too general; on the part of the prosecutor, it was admitted that the indictment was bad as to the words, but it was argued that it was sufficiently certain as to the obstruction: the court however held

& Rawle, 194; *McLaughlin v. Same*, 4 Rawle, 464; *State v. Root*, 3 Hawks, 618; *State v. Allen*, R. M. Charl. 518; *Wilson v. State*, 1 Porter, 118.

A charge, that the defendant set up and kept a faro bank, at which money was bet, lost and won, is not sustained by proof, that bank notes were bet, lost and won. *Pryor v. Commonwealth*, 2 Dana, 298. See *Stone's case*, 3 Roger's Rec. 3.

An indictment for horse-stealing should give the animal stolen one of the descriptions mentioned in the statute, and stating it was a colt, without saying it was a horse or a mare would not suffice. Russ. & Ry. C. C. 416.

In larceny for stealing a gray horse, the property was proved to be a gray gelding, and the variance was held fatal. *Hooker v. State*, 4 Ohio, 350. See *Ware v. Juda*, 2 Carr. & Payne, 351, where it was decided, that the allegation of the loan of a horse is supported by the proof, that it was a mare.

In *Baldwin v. People*, 1 Scammon, 304, it was held that proof of stealing a mare or gelding will sustain an indictment for stealing a horse. See *Halkeen v. Commonwealth*, 2 Virginia Cas. 4; *Turley v. State*, 3 Humph 323; *Regina v. Connell*, 1 Carr. & Kirwan, 190; *State v. Dunnaverit*, 3 Brevard, 9. An indictment for stealing a pig cannot be supported under an act against stealing hogs. *State v. M'Lean*, 2 Brevard, 443.

An indictment for stealing a dead animal should state that it was dead, (Russ. & Ry. C. C. 797; 1 Carr. N. P. Rep. 128.) See *Gibson v. Jenny*, 15 Mass. (Rand's ed.) 206, n. (a,) and cases there collected; 2 Russell, 171, 172. The description of the property, at least as to part of it, must be borne out in evidence, and a variance would be fatal, stating that the prisoner embezzled "one pound eleven shillings, without showing in evidence it was a one pound note and eleven shillings, or any part of it in silver, would be bad. Russ. & Ry. C. C. 335; and see id. 403. In an indictment on the black act 9 Geo. 1, c. 22. (repealed by 4 Geo. 4, c. 54,) stating that the defendant maimed certain cattle, to wit, a mare, it was held necessary to prove that the cattle maimed was a mare; (Russ. & Ry. C. C. 258,) and in larceny for stealing a live animal, evidence cannot be given of stealing a dead one. Russ. & Ry. C. C. 497; 1 Carr. N. P. Rep. 128. But in the case of murder, if the act of the prisoner, and the means of the death proved, agree in substance with those alleged, a mere variance in the description of the instrument used will be immaterial. Upon an indictment for having in possession a die made of iron and steal, proof of a die made of either material is sufficient. Russ. & Ry. C. C. 282. Where the property is of a nature to warrant that description, it should be termed "the goods or chattels" of the owner, and without these, or equivalent words, the indictment will be defective. Cro. Eliz. 490. See *Commonwealth v. Morse*, 14 Mass. 217; *Commonwealth v. Manley*, 13 Pick. 173, 174. On the same principle, it should be averred to be, "of the money's" "of the cattle," &c. when those terms apply, at all events, if these words be unnecessary, they might be rejected as surplusage, and it is best to insert them. 1 Leach, 468. [13 Pick. 361.] We have already considered how the prosecutor's and other third person's names are to be stated, and it will be unnecessary here to repeat it. Where the value is essential to constitute the offence, it must be stated; thus in the case of theft, the value must be shown, that it may appear whether the offence is grand or petit larceny. 2 Hale 185; 1 Hale P. C. 531; Russ. & Ry. C. C. 407.

So also, that it may appear, that the property stolen was of some value. Roscoe's Dig. Cr. Ev. 512; *Payne v. People*, 6 Johns. 103; *State v. Bryant*, 2 Car. Law Repos. 269; *State v. Tillery*, 1 Nott & M'Cord, 9; *State v. Thomas*, 2 M'Cord, 527; 2 Stark. Ev. (5th Amer. ed.) 444, n. *State v. Wilson*, 1 Porter, 110; *State v. Allen*, R. M. Charl. 518; *People v. Wiley*, 3 Hill, 194.

that it was bad as to that also; for it was not sufficient to say generally *retardavit*, but the act should have been specially set out.(a) So, where a defendant was convicted on an indictment, charging him with having obtained a certain promissory note by false tokens, the court upon motion arrested the judgment, because the false tokens were not specified in the indictment.(b) So, an indictment against a constable, charging that *male et negligenter se gessit* in the execution of his office, was quashed by the court of King's Bench upon motion, as being too general.(c) So, an indictment charging a man with being a common defamer, vexer, and oppressor; or a common disturber of the peace; or a common deceiver of the Queen's people,—or the like,—would be bad.(d)

The following exceptions to this rule as to the certainty required in indictments, have recently been made by stat. 14 & 15 Vict. c. 100.

1. In an indictment for murder or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused; but it shall be sufficient in every indictment for murder, to charge that the defendant did wilfully, feloniously, and of his malice aforethought kill and murder the deceased; and it shall be sufficient in every indictment for manslaughter, to charge that the defendant did feloniously kill and slay the deceased.(e)[2]

2. In an indictment for forging, uttering, stealing, embezzling, destroying, or concealing, or for obtaining by false pretences any instrument, it shall be sufficient to describe such instrument by any

(a) *R. v. How*, 2 Str. 699.

(b) *R. v. Munce*, 5 Str. 1127.

(c) *R. v. Winteringham*, 1 Str. 2; see also, *R. v. Robe*, 2 Str. 999.

(d) 2 Hawk. c. 25, s. 59; 2 Hale, 182; see

*R. v. Brian et al.*, 1 Ad. & El. 436, m.

(e) 14 & 15 Vict. c. 100, s. 4.

[2] At common law in an indictment for homicide, the means by which the death was effected must be stated. A mere statement that the defendant killed, &c. will not suffice; (2 Hawk. ch. 23, s. 84,) unless the whole tenor of the charge furnish an intelligible description of the manner of committing the offence. 13 Price, 172. The kind of death must not be essentially different from that alleged. Thus, on a charge of murder by stabbing, if it prove to be by drowning or poisoning, the prisoner must be acquitted. 2 Hale, 185. But an indictment for murder by one description of poison, will be supported by proof of murder by another description of poison. 3 Camp. 75; 1 East's P. O. 341. When the cause of death is knocking a person down with the fist, upon any substance, the charge should be accordingly; and not that the prisoner with a stone that he held in his hand gave and struck, &c. Ry. & Moo. C. C. 113.

If the act of the prisoner and the means of death be proved in substance as alleged, the violence and death being of the same kind as alleged, a mere variance in the name or kind of instrument used will not be material; (Bulst. 87,) if the instrument was capable of producing the same kind of death. 9 Co. 67, a.; Gilb. Ev. 231. So, under an indictment for murder, containing a count charging the crime to have been committed by striking and cutting the deceased with a hatchet, and another count charging it to have been committed by striking and cutting him with an instrument to the jurors &c. unknown, it is competent for the public prosecutor to prove that the killing was by the discharge of a pistol. *The People v. Coll*, 3 Hill 432.

[\*90] name or designation by which the same may \*be usually known or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof.(a)[1]

3. In an indictment for engraving or making the whole or any part of any instrument, matter, or thing whatsoever,—or for using or having the unlawful possession of any plate or other material upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been engraved or made,—or for having the unlawful possession of any paper upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been made or printed,—it shall be sufficient to describe such instrument, matter or thing by any name or designation by which the same may be usually known, without setting out any copy or fac-simile of the whole or any part of such instrument matter, or thing.(b)[2]

(a) 14 & 15 Vict. c. 100, s. 5.

(b) 14 & 15 Vict. c. 100, s. 6.

[1] There is no judicial decision that, in an indictment for forgery, the purport and the tenor should both be stated. Purport means the substance of an instrument as it appears on the face of it to every eye that reads it; tenor means an exact copy of it. 2 Leach, 661. The words "in manner and form following, that is to say," do not profess to give more than the substance, and are proper in an indictment for perjury; (1 Leach, 192; Dougl. 193, 4,) but the word "aforesaid," binds the party to an exact recital. Id. ibid. Dougl. 97. In forgery the indictment may run, that the prisoner forged a paper writing, stating what it was, (Russ. & Ry. C. C. 50,) to the tenor and effect following, &c. 2 Leach, 660, 1. An exact copy (2 Leach, 624; 2 East, P. C. 928, 977,) of the instrument, in words and figures, (1 Leach, 78, 145; 2 East, P. C. 976,) must then be set forth to enable the court to see that it is one of those instruments the false making of which the law considers as forgery; (2 Leach, 624, 657, 661; 2 East, P. C. 975,) and if the instrument be in a foreign language, it must be translated; (7 J. B. Moore, 1; 3 Brod. & Bing. 201; Russ. & Ry. C. C. 473, S. C.,) and the same rule applies to indictments for threatening letters. 2 East, P. C. 976; 1 Marsh. 522; 6 East, 418. But in setting forth even the *tenor* of an instrument a mere variance of a letter will not vitiate, provided the meaning be not altered by changing the word mis-spelt into another of a different meaning; thus, in an indictment for forging a bill of exchange the tenor was "value received," the bill as produced in evidence, was "for value received," and the judges upon the reserved question were of opinion that the variance was not material because it did not change one word into another, so as to alter the meaning. 1 Leach, 145; 5 Pick. 297. And in an indictment for perjury, it was assigned for perjury that the defendant swore he "understood and believed," instead of "understood," and the mistake was held to be immaterial, (1 Leach, 133; Dougl. 193, 195,) and where in setting forth a libel the word "not" was inserted for "nor," the variance was held immaterial; (2 Salk. 660; 3 Salk. 224; 2 Marsh. 98,) but "William" for "Wm." is a fatal variance. 3 Stark. on Evid. App. to p. 859. When the *purport* may be adopted instead of *tenor*, it is not necessary to state the matter with such verbal accuracy, as the former term merely signifies *substance*, while the latter imports an exact copy. 2 East, P. C. 983. But if the paper forged does not on the face of it appear to be that which the indictment states it *purports* to be, the proceedings will be invalid. Dougl. 300.

[2] See *Commonwealth v. Stow*, 1 Mass. 54; *Commonwealth v. Bailey*, 1 Mass. 62; *Commonwealth v. Stevens*, 1 Mass. 203; *Commonwealth v. Gillespie*, 7 Serg. & Rawle, 469; *State v. Stevens*, Wright, Ohio, 73; *State v. Farrand*, 3 Halstead, 333; *State v. Gustin*, 2 South. 749;

4. In all other cases, wherever it shall be necessary to make any averment in any indictment as to any instrument, whether the same consist wholly or in part of writing, print, or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile of the whole or any part thereof. (a) [3]

(a) 14 & 15 Vict. c. 100, s. 7.

*State v. Street*, Taylor, 158; *People v. Franklin*, 3 John. Cas. 299; *Commonwealth v. Searle*, 2 Binney, 232; *State v. Carro*, 5 N. Hamp. 367; *State v. Morlier*, 1 Dev. 263; *State v. Carter*, Cowp. N. C. 210; *State v. Wimberly*, 3 M'Cord, 190; *Commonwealth v. Kearns*, 1 Virg. Ca. 109.

An indictment should not only set out the tenor of the writing but it should profess to do so. *State v. Tritty*, 2 Hawkes, 487.

As to the necessity for setting out words, where words are the gist of the offence, see *Updegraff v. Commonwealth*, 11 Serg. & R. 394; *Commonwealth v. Kneeland*, 20 Pick. 206; *State v. Bradley*, 1 Hayw. 403; *State v. Coffee*, 1 N. Carolina, 272. And where an instrument is described by name in an indictment, the instrument set out in the indictment must correspond therewith. *State v. Farrand*, 3 Halstead, 333.

It is a general rule, that in an indictment for forgery, the instrument forged should be particularly described; unless there be a sufficient reason to the contrary, which must be alleged. *People v. Kingsley*, 2 Cowen, 522. See *Commonwealth v. Houghton*, 8 Mass. 107; *State v. Potts*, 4 Halstead, 26; *Pendleton v. Commonwealth*, 4 Leigh, 694; *State v. Parker*, 1 Chipman, 298; *United States v. Britton*, 2 Mason, 468; *People v. Kingsley*, 2 Cowen, 522; *State v. Justin*, 2 Southard, 744; *Rex v. Hunter*, 3 Carr. & Payne, 591; 2 Russell, 359, n. 1. 317, n.

The indictment need not set forth the date of a forged note, nor when it is payable. *Commonwealth v. Ross*, 2 Mass. 373;—nor the endorsement; *Commonwealth v. Ward*, 2 Mass. 397; *Hess v. State*, 5 Ohio, 8.

*Commonwealth v. Sweeney*, 10 Serg. & Rawle, 173; *State v. Walsh*, 2 M'Cord, 248. In an indictment for publishing an obscene book or picture it is not necessary that the libel should be set out at large. *Commonwealth v. Holmes*, 17 Mass. 336; See *Commonwealth v. Sharpless*, 2 Serg. & Rawle, 91.

*People v. Kingsley*, 2 Cowen, 322; *People v. Wright*, 9 Wendell, 193; *United States v. Britton*, 2 Mason, 464; *State v. Gustin*, 2 South. 749.

If descriptive words be used though unnecessarily, they must be proved; *U. States v. Keene*, 1 M'Lean, 441. A draft signed "Jos. Johnson," was not admitted in evidence under a count stating it to have been signed by "Joseph Johnson, President." *U. States v. Keene*, 1 M'Lean, 441.

Where an indictment alleged that a forged certificate purported to be signed by Bowling Starke, and the signature was by B. Starke, and the true name was Bolling Starke, the variance was held to be fatal. *Commonwealth v. Kearns*, 1 Virginia Cases, 109. See also, 2 Stark. Ev. (5 Amer. ed.) 336, n. 1; *State v. Waters*, 2 Const. Ct. R. 169. But see *Brown v. Commonwealth*, 8 Mass. 63, 64.

In an indictment for perjury it is not necessary to set forth more than the substance of the oath. *People v. Warner*, 5 Wendell, 271, and that part in which the perjury is alleged to have been committed. *Campbell v. People*, 8 Wendell, 636. *State v. Hayward*, 1 Nott. & M'C. 546; *Weathers v. State*, 2 Blackf. 278; *People v. Phelps*, 5 Wendell, 9; *State v. M'Kennan*, Harper, 302.

[3] When a written instrument forms a part of the gist of the offence charged, it must be set out verbatim, unless where a statute declares that it shall not be necessary. When neces-

5. In every indictment in which it shall be necessary to make any averment as to any money, or any note of the bank of England or any other bank, it shall be sufficient to describe such money or bank note simply as money, without specifying any particular coin or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or of any bank note although the particular species of coin of which such amount was composed, or the particular nature of the bank note shall not be proved,—and, in cases of embezzlement,—and obtaining money or bank notes by false pretences,—by proof that the offender embezzled or obtained any piece of coin or any bank note, or any portion of the value thereof, although such piece of coin or bank note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any person, and such part shall have been returned accordingly.(a)

In the time laid to each material fact, also, uncertainty was formerly as fatal as in the statement of the facts themselves; and therefore an indictment, charging the owner of a ferry with extorting several sums of money from several persons, between such a day and such a day, was holden void.(b) But this defect, as far as respects the time laid,

(a) 14 & 15 Vict. c. 100, s. 18.

(b) 4 Hawk. c. 25, s. 82.

sary it is usually introduced by the words "according to the tenor following," or "of the tenor following," or "in the words and figures following," or "the false &c., words and matter following," or other words which imply that a correct recital is intended. On the other hand, when the substance only is intended to be set out, it should be introduced by such words as "in substance as follows," "to the effect following," or the like. *Matt. Dig.* 275. The word "tenor" implies that a correct copy is set out; and a variance in such a case would be fatal; (2 *East's P. C.* 976,) even although more than the substance need not in that particular case have been set out. And the same as to "the words and figures following," &c. The words "to the tenor and effect following" have been holden sufficient; as the word *effect*, in such a case, may be rejected as surplusage. The word "effect," however, by itself, implies that the substance only is set out; (2 *Salk.* 417,) and the same, of course, of the words "in substance as follows." 3 *Barn. & Ald.* 503. It seems also to have been holden that the words "in manner and form following" require the substance only to be set out. *Leach*, 227; 1 *Doug.* 193. "Purport" means the substance of an instrument as it appears on the face of it to every eye that reads it. "Tenor" means an exact copy of it. *Matt. Dig.* 276.

An instrument in a foreign language must be set out first in the original; otherwise the defendant may demur, move in arrest of judgment, or bring a writ of error; (6 *T. R.* 162,) and secondly in a translation, which must be proved at the trial to be correct. 7 *Moore*, 1; *Russ. & Ry. C. C.* 473.

In stating records as part of the offence, and not merely as inducement, the record must be referred to, or the omission is bad, on demurrer. *Ry. & Moo. C. C.* 47.

When a written instrument, or parts of it, are professed to be set out verbatim, the slightest variance between the indictment and the evidence in this respect would be fatal. A mere literal variance, however, (where the omission or addition of a letter does not alter or change a word so as to make it another word, (2 *Salk.* 661; 2 *Camp.* 229,) will not be material; as "received" for "received;" (*Leach*, 145; 2 *East's P. C.* 977,) "undertood" for "understood;" (*Cowp.* 229,) "Messrs" for "Messrs." or the like. *Matt. Dig.* 276.

would now, it should seem, be cured by stat. 14 & 15 Vict. c. 100, s. 24.(a)

\*Besides uncertainty, arising from too great generality of [\*91] statement, an indictment may be uncertain in other respects and therefore bad. As, for instance, where an indictment charged a miller, in the same count, with having received two several parcels of barley, of four bushels each to be ground at his mill, and that he delivered three bushels of oat and barley meal other and different from the produce of the said four bushels: the indictment was holden bad for uncertainty, as not showing as to which of the parcels of barley the offence was committed.(b)

A charge also in the alternative, charging a defendant with having done so *or* so,—as that he murdered or caused to be murdered,—is bad for uncertainty.(c)[1]

(h) *Statement must not be repugnant.*

One material part of an indictment, must not be repugnant to another, otherwise the indictment will be bad.(d) Therefore if an indictment charge a man with forging an instrument by which A. was bound to B., it is bad, for A. could not be bound by the instrument if it were forged.(e) So, if an indictment for forcible entry charge that A. disseised B., and it appear on the face of the indictment that B. was not seised in fee: it is bad.(g)[2] So, an indictment for selling iron by false weights and measures, has been holden bad for repugnancy, for it was absurd to say that it could be sold both by weight and measure at the same time.(h) But where an indictment charged Francis Morris as a receiver, "he the said *Thomas Morris*, well knowing," &c., it was holden that the words, "the said *Thomas Morris*," might be rejected as surplusage, and so the indictment be good.(i) So where an indictment charged the defendant that he on one *Henry Bennett* did

(a) *Ante*, p. 85.

(b) *R. v. Haynes*, 4 M. & S. 214.

(c) 2 Hawk. c. 25, s. 58.

(d) 2 Hawk. c. 25, s. 62.

(e) 2 Hawk. c. 25, s. 62.

(g) *Id.*

(h) *Id.*; 2 Ro. Abr. 18.

(i) *R. v. Morris*, 1 Leach, 103.

[1] So to say that the defendant forged *or* caused to be forged an instrument; that he erected *or* caused to be erected a nuisance; that he carried and conveyed *or* caused to be carried and conveyed two persons having the small pox, so as to burthen the town, are not sufficiently positive. But in an information for stealing a horse, it is no ground for arrasting judgment that the horse is described as of a "brown or bay color," for they are the same. *State v. Gilbert*, 13 Vermont Rep. 647.

[2] The same error has been held to exist where an indictment charged an offence to have been committed in November, 1801, and in the 25th year of American Independence, and where the crime was laid to have been committed A. D. 1830. *Serpentine v. State*, 1 How. Miss. Rep. 260.



make an assault, "and him the said *William Bennett* did beat," &c., this was holden good in arrest of judgment, for the same reason.(a)[3]

(i) *Technical words.*

In some cases certain technical words are required, such as "treasonably and against his allegiance," in indictments for treason,(b)—"murder," and "of his malice aforethought," in an indictment for murder,(c)—"ravish," in an indictment for rape,(d)—"burglariously," in an indictment for burglary,—"feloniously," in an indictment for felony,(e) and the like: in these cases, no other words, nor any periphrasis whatever, would be deemed equivalent to them, and an indictment omitting them would be bad. So, an indictment upon statutes, where the definition of the offence contained in them, includes such adverbs as "unlawfully," "wilfully," "maliciously," &c., the offence must be [\*92] charged \*to have been committed "unlawfully," "wilfully," or "maliciously," accordingly, otherwise the indictment will be bad. The word "unlawfully" is not essentially necessary in indictments at common law,(g) although very generally used. The words, "with force and arms," were formerly always used in all indictments for offences with force, and indeed for all felonies, for a felony was deemed to include a trespass; and the words "as appears by the record"

(a) *R. v. Crispin*, 12 Shaw's J. P. 323.

(b) 2 Hawk. c. 25, s. 55; 4 Bl. Com. 307.

(c) Id. s. 60; 4 Bl. Com. 307.

(d) 2 Hawk. c. 25, s. 56.

(e) Id. s. 55; 2 Hale, 184.

(g) Id. s. 96.

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[3] A variance in the name will not be fatal, if the name be immaterial to constituting the offence, and may be rejected as surplusage. 1 Ry. & Moo. C. C. 1; 2 East, P. C. 593; Roscoe's Dig. Cr. Ev. 82. But where there is a repugnancy or absurdity in the description of the party injured, the error will be fatal, as where one is indicted for stealing the goods and chattels of *the said I. S.*, where I. S. had not been previously mentioned, (Hawk. b. 2, ch. 25, sec. 72,) although those words have in some cases been rejected as surplusage. 1 Leach, 109. And it should be observed, that a material error in the names of the persons aggrieved, or in whom property stolen ought to be laid, is much more important than a mistake in the name or addition of the defendant; for the latter can only be objected by a plea in abatement, which can only delay the trial, while the former will be sufficient ground for arresting the judgment, when the objection appears on the face of the indictment; or, if it be an error in fact, will be a ground of acquittal on the trial at least, as far as respects that part of the charge, (1 East P. C. 514; 2 Leach, 774; 1 Leach, 252, 286, 351, 390; 1 East P. C. 415,) though the mistake only affects the higher offence, the indictment may still be valid as to the inferior crime, as if a party be indicted for burglariously breaking and entering the dwelling house of Jno. Snoxalt, and stealing therein goods, the property of Ann Lock; if the name of the owner of the house be mistaken, the defendant cannot be found guilty of the capital part of the indictment, viz. the burglary, yet he may be convicted of the simple larceny, (Leach, 252, 339, n. (a); see 1 Blackford R. 37;) so in an indictment for stealing to the amount of forty shillings in the dwelling house of A. B., under the 12 Ann. ch. 7, the defendant may be acquitted of the capital part of the charge, when not strictly proved, and found guilty of the simple larceny. Leach, 339, n. (a.)

were always used, where a matter of record was pleaded: but now, by stat. 14 & 15 Vict. c. 100, s. 24, no indictment for any offence shall be held insufficient for the omission of the words, "as appears by the record," or of the words, "with force and arms." [1]

[1] The words "*with force and arms*," anciently "*vi et armis*," where, by the common law, necessary in indictments for offences which amount to an actual disturbance of the peace, or consist, in any way, of acts of violence, (Cro. Jac. 472, 473; 2 Hale, 187; Hawk. b. 2, ch. 25, sec. 90; Bac. Abr. Indictment, G. 6; Cro. C. C. 42;) but it seems to be the better opinion, that they were never necessary where the offence consisted of a cheat, or non-feasance, or a mere consequential injury. 7 T. R. 4, 5; 1 Keb. 652; Poph. 206; Hawk. b. 2, ch. 25, sec. 90; Bac. Abr. Indictment, G. 1. Formerly, they were followed by the words "*videlicet baculis arcubus et sagittis*." Hawk. b. 2, ch. 25, sec. 90. But the statute 27 Hen. 8, ch. 8, (this statute is in force in Pennsylvania. Roberts' Dig. 324. In New Hampshire, *State v. Kean*, 10 N. Hamp. 347. In Vermont, *State v. Munger*, 15 Vermont, 290. In Tennessee, *Tipton v. State*, 2 Yerger, 542. And in Louisiana, *Territory v. McFarlane*, 1 Martin, 224,) reciting, that several indictments had been deemed void for want of these words, when in fact no such weapons had been employed, enacted, "that the words, *vi et armis videlicet cum baculis arcubus et cullellis sagittis*," shall not of necessity be put in any indictment or inquisition. Upon the construction of this statute, there seems to have been entertained very great doubts, whether the whole of the terms were intended to be abolished in all indictments, or whether the words following the *videlicet*, were alone excluded. Many indictments for trespasses and other wrongs accompanied with actual violence, have been deemed insufficient for want of the words "*with force and arms*," (2 Lev. 221; 1 Sid. 140; 1 Bulst. 205; 1 Keb. 101; 2 Keb. 154;) and, on the other hand, the court has frequently refused to quash the proceedings where they have been omitted, (1 Lev. 126; 2 Bulst. 208; 3 P. Wms. 464, 498;) and the last seems to be the better opinion, for otherwise the terms of the statute appear to be destitute of meaning. It seems to be generally agreed, that where there are any other words implying force, as in an indictment for a rescue, the word "rescued," the omission of *vi et armis*, is sufficiently supplied. Cro. Jac. 345; 2 Bulst. 208; 3 P. Wms. 464; Hawk. b. 2, ch. 25, sec. 90, n. 16; Bac. Abr. Indictment, G. 1. But it is at all times, safe and proper to insert them, whenever the offence is attended with an actual or constructive force, or affects the interests of the public. Cro. Car. 3, 7, 8; Hawk. b. 2, c. 25, sec. 90; Bac. Abr. Indictment, G. 1; Burn. J. Indictment, IX. As to words "force and arms," see 4 Burr. 2557-8, et alii.

The term "*unlawfully*," which is frequently used in the description of the offence, is unnecessary, wherever the crime existed at common law, and is manifestly illegal. Hawk. b. 2, ch. 25, sec. 96; Bac. Abr. Indictment, G. 1; Cro. C. C. 38. See *Jerry v. State*, 1 Blackf. 396; *State v. Bray*, 1 Missouri, 180; *Curtis v. People*, Breese, 197. So, it has been adjudged, that it need not be used in an indictment for a riot, because the illegality is sufficiently apparent, without being expressly averred. 2 Rol. Abr. 82; Hawk. b. 2, ch. 25, sec. 96; Bac. Abr. Indictment, G. 1; Cro. C. C. 43. But if a statute, in describing an offence which it creates, uses the word, the indictment founded on the act will be bad, if it be omitted, (Hawk. b. 2, ch. 25, sec. 96; Bac. Abr. Indictment, G. 1; Cro. C. C. 43; *sed quare*, see 2 Marsh. 362;) and it is, in general, best to insert it, especially as it precludes all legal cause of excuse for the crime. See 4 M. & S. 274.

The word "*knowingly*," or "well knowing," will supply the place of a positive averment, that the defendant knew the facts subsequently stated. 2 Stra. 904; Com. Dig. Indictment, G. 6; see Russ. & Ry. C. C. 317; 1 Stark. C. N. P. 390. It is absolutely necessary to constitute guilt, as in indictments for uttering forged tokens, or other attempts to defraud, or for receiving stolen goods, and offences of a similar description. An indictment at common law for aiding a prisoner's escape, should state that the party knew of his offence. *Rez v. Young*, 1 Russel, 391; see *United States v. Kean*, 5 Mason, 453.

An indictment for stealing bank bills in Ohio, must aver that the defendant knew the bills

4. *Conclusion of the Indictment.*(a) *Against the peace.*

All indictments, whether for offences at common law or by statute, conclude "against the peace of our Lady the Queen, her crown and

to be *bank bills*, or the indictment is defective. *Gatewood v. State*, 4 Ohio, 386; see *State v. Wilson*, 2 Const. Ct. 135; *Anderson v. State*, 7 Ohio, 250; *Birney v. State*, 8 Ohio, 230; *Rich v. State*, 8 Ohio, 111; *State v. Gardner*, 2 Missouri, 23.

But if notice or knowledge be unnecessarily stated, the allegation may be rejected as surplusage. 2 East, 452.

There are certain terms which are usually inserted in the part of the indictment we are now examining, which mark out the color of the offence with precision, and which are absolutely necessary to determine the judgment. 3 Inst. 15; Carth. 319; 2 Hale, 172, 184; 4 Bla. Com. 307; Hawk. b. 2, ch. 25, sec. 55; 1 East P. C. 115; Bac. Abr. Indictment, G. 1; Com. Dig. Indictment, G. 6; Cro. C. C. 37. In an indictment against A. S. as one of the wardens of the city of Portland, for receiving at a general election, the vote of a person, whose name was not borne on the list of voters, it was held to be necessary to allege that the act so done and committed was "*unreasonable, corrupt, or wilfully oppressive*." *State v. Small*, 1 Fairfield, 109.

Thus, every indictment for *treason* must contain the word "traitorously," (Cro. 37;) every indictment for burglary, "*burglariously*," (4 Co. 39, 40; 5 Co. 121; Cro. Eliz. 920; 2 Hale, 172, 184; Bac. Abr. Indictment, G. 1; Com. Dig. Indictment, G. 6; Cro. C. C. 37; Burn, J. Indictment, IX;) and "*feloniously*" must be introduced in every indictment for felony. 2 Hale, 171, 184; Cro. Eliz. 193; 5 Co. 121; Hawk. b. 2, c. 26, sec. 55; Com. Dig. G. 6; Bac. Abr. Indictment, G. 1; Cro. C. C. 37; Burn, J. Indictment, IX; Williams, J. Indictment, IV; Russ. & Ry. C. C. 62. See *Stuart v. Commonwealth*, 12 Serg. & R. 177; *Curtis v. People*, Breese, 199.

And these words are so essential, that if the word *feloniously* be omitted in an indictment for stealing a horse, it will be only a trespass, (3 Hale, 184; Bac. Abr. Indictment, G. 1; Cro. C. C. 37,) or a misdemeanor of which the defendant may be convicted under such indictment. Cald. 400, 1.

The crime of *murder*, which is next in point of degree, has, as well as treason, terms peculiarly appropriate to its own description.

PENNSYLVANIA.—In an indictment for murder, it is not necessary so to describe the offence, as to show whether it be murder of the first or second degree; nor is it necessary that the indictment should conclude against the form of the act of assembly. 6 Binney, 179; 1 Russell, 466—471.

Like other felonies, the word "feloniously" must be inserted. Cro. Eliz. 193. In an indictment for assault and battery, with intent to kill, it is indispensably necessary that the offence should be alleged to be *unlawful* and *felonious*. *Curtis v. People*, 1 Breese, (Ill.) 199; *Curtis v. People*, 1 Scammon, 120.

As a conclusion from the facts averred, it must be stated, that so the defendant feloniously of his malice aforethought did kill and murder the deceased; for without the terms "malice aforethought," and the artificial phrase *murder*, the indictment will be taken to charge manslaughter only. Fost. 424; Yelv. 205; 2 Hale, 184; Cro. Jac. 283; 1 Bulst. 144; Dyer, 69, a, 261; Cro. Eliz. 920; Kel. 124; 1 Hale, 450, 466; 2 Hale, 187; Hawk. b. 2, ch. 25, sec. 55; Com. Dig. Indictment, G. 6; Bac. Abr. Indictment, G. 1; 4 Bla. Com. 307; 1 East, P. C. 345; Cro. C. C. 37; Burn, J. Indictment, IX; Williams, J. Indictment, IV. Where the death arises from any wounding, beating, or bruising, it is said that the word "*struck*" is essential. 1 Bulst. 184; 5 Co. 122; 3 Mod. 202; Cro. Jac. 655; Palm. 282; 2 Hale, 184, 186, 187; Hawk. b. 2, ch. 23, sec. 82.

In Pennsylvania, in an indictment charging the defendant with a certain stone, which he

dignity.”(a) The words “against the peace of our Lady the Queen,” are in all cases deemed necessary; the words “her crown and dignity” not.(b)

(a) 2 Hawk. c. 25, s. 92.

(b) 2 Hawk. c. 25, s. 94.

held in his right hand, in and upon the right side of the head of the deceased, feloniously, &c. *did cast and throw*, and that the defendant with the stone aforesaid, the deceased in and upon the right side of the head, feloniously, &c. *did strike*, sufficiently charges that the defendant threw the stone and struck the deceased. *White v. Commonwealth*, 6 Bin. 179.

And the wound or bruise must be alleged to have been *mortal*; nor is the latter word supplied by the allegation, which is at all times necessary that the deceased died in consequence of the violence inflicted upon him. 1 Leach, 96; Kel. 125; 2 Hale, 186; Hawk. b. 2, ch. 23, sec. 82; Cro. C. C. 38; 3 M'Cord, 190.

In Pennsylvania, the omission of technical epithets in an indictment for murder is fatal. 2 Dall. 228.

The allegation that the person murdered was, at the time, *in the king's peace*, is sufficient to show that he was a British subject. Russ. & Ry. C. C. 294.

So also in indictment for *rapes*, the words “*feloniously ravished*” and “*carnally knew*” are necessary: nor is the want of the former supplied by the insertion of the latter. 1 Hale, 628; 2 Hale, 184; Co. Lit. 124, n. p.; 2 Inst. 180; 1 East, P. C. 447; Com. Dig. Indictment, G. 1; Bac. Abr. Indictment, G. 1; Hawk. b. 2, c. 25, sec. 56; Cro. C. C. 37. But in an indictment for an assault and battery with an intent to commit a rape, the omission of the word *feloniously* does not vitiate. *Skout v. Commonwealth*, 11 Serg. & Rawle, 177.

And though some have inclined to think that the words “*carnally knew*” are not absolutely necessary, it would certainly be very unsafe to omit them. 1 East P. C. 448. But it is not necessary to allege that the offence was committed *forcibly and against the will of the woman*. It is sufficient, if it charge that the defendant *feloniously did ravish and carnally did know her*. *Harman v. Commonwealth*, 13 Serg. & Rawle, 69; but see *State v. Jim*, 1 Devereux, 142.

And in an indictment for an *unnatural crime*, the word of the statutes taking away clergy, must be followed. Fost. 424; Co. Ent. 351, b.; 3 Inst. 59; Hawk. b. 1, ch. 4, sec. 2; 5 Eliz. ch. 17; 3 & 4 W. & M. ch. 9, sec. 2.

In Maryland, it is held necessary in such case to prove the *carnaliter cognovit* in the indictment. *Davis v. State*, 3 Harr. & Johns. 154.

So also in all indictments of *mayhem*, the words “*feloniously did maim*,” must, of necessity, be inserted. 3 Inst. 118; Hawk. b. 2, ch. 23, sec. 17, 18, 77; Hawk. b. 2, ch. 25, sec. 55; 7 Mass. Rep. 247.

In Massachusetts, an indictment for administering a potion, with intent to procure an abortion, must contain an allegation that an abortion ensued, and that the woman was quick with child. 9 Mass. 387.

The essential words in an indictment for *burglary*, are “*feloniously and burglariously broke and entered the dwelling house in the night time*,” about a named hour. 4 Co. 39, b.; 1 Hale, 549, 550; 2 Hale, 184; Hawk. b. 2, ch. 25, sec. 55; Com. Dig. Indictment, G. 6; Bac. Abr. Indictment, G. 1; Cro. C. C. 37. And besides these requisites, the felony committed or intended, must be set forth in technical language, (1 Hale, 550; 3 Rawle, 207;) so in an indictment for *simple larceny*, the words “*feloniously took and carried away the goods*,” or “*took and led away the cattle*,” are necessary, (1 Hale, 504; 2 Hale, 184; Bac. Abr. Indictment, G. 1; Cro. C. C. 37;) and in case of *robbery* from the person, the words “*feloniously and against the will*,” must be introduced; and it is usual to aver a *putting in fear*, though this does not seem to be requisite. 3 Inst. 68; Fost. 128; 1 Hale, 535; 2 East P. C. 283. And the word “*violently*” was formerly regarded as essential, but has been holden not to be necessary. 2 East P. C. 784; 3 Russ. 89–91. And *feloniously*, and *piratically*, are both necessary in an indictment for *piracy*. Hawk. b. 1, ch. 37, sec. 15; 3 Inst. 112.

If the offence be committed in the reign of one King, and the offender be indicted in the reign of his successor, the indictment should conclude, against the peace of the late King; (a) or if commenced in the reign of one King, and continued into the reign of another, it seems that a conclusion, against the peace of both Kings, would be good. (b) By stat. 14 & 15 Vict. c. 100, s. 24, however, no indictment shall be held insufficient, for the omissions of the words "against the peace." And the like omission was before cured by verdict, or judgment by confessions, &c., by stat. 7 G. 4, c. 64, s. 20; which Act was holden to apply to the case of an indictment, in the reign of William the fourth, for an offence committed in the reign of George the fourth, concluding against the peace of our lord the King, &c., instead of our late lord the King. (c) [2]

(a) *R. v. Lookup*, 3 Burr. 1901.  
(b) 2 Hawk. c. 25, s. 93.

(c) *R. v. Chalmers*, Ry. & M. 352; and  
see *R. v. Scott*, Ry. & M. 415.

There are also some *misdeameanors* which require to be described with particular language. If an indictment under the statute of Ohio, against having counterfeit bank notes in possession and making sale of them, allege such acts to be *felonious*, (the statute using the term *misdeameanor*;) it is not error, and the term "*felonious*" may be rejected as surplusage. *Hess v. State*, 5 Ohio, 12; see *Commonwealth v. Squire*, 1 Metcalf, 258.

Thus, common *barretors* and *scolds* must be indicted as such. 6 Mod. 11, 178, 213, 239; Com. Dig. Indictment, G. 6. The word "*riot*" must be inserted in all indictments for rioting, and *maintained* in all indictments for *maintenance*, (1 Wils. 325,) and "*with strong hand*" in an indictment for a *forcible entry*. 8 T. R. 357; 2 Russ. 289.

The words "*wickedly, maliciously, of his own wicked and corrupt mind, being a person of evil disposition, &c.*" are in general mere matter of aggravation, and not material. 6 East, 472. But where an act must be done with a particular *intent*, in order to render it criminal, an evil intention must be averred upon the record, (6 East, 473; 2 East P. C. 1031; Andr. 162;) and we have already seen what would be a variance in the statement of the intent, and when it is advisable to insert counts to meet the case in this respect.

[2] In the United States Courts, a conclusion "*contrary to the true intent and meaning of the act of Congress, in such case made and provided,*" has been held sufficient. *U. S. v. La Coste*, 2 Mason, 129; *U. S. v. Smith*, 2 Mason, 143. The Constitution of Vermont provides that all indictments shall conclude with these words, "against the peace and dignity of the state." Const. part 2, sec. 32. In New Hampshire, the constitution requires all indictments to terminate "against the peace and dignity of the state; and it has been held, that it is sufficiently complied with by an indictment concluding, "against the peace and dignity of our said State." *State v. Kean*, 10 New Hamp. Rep. 347. The Constitution of Pennsylvania provides that all prosecutions shall be carried on in the name and by the authority of the Commonwealth of Pennsylvania, and conclude against the peace and dignity of the same. Const. art. 5, sec. 11; see *Com. v. Rogers*, 5 Serg. & Rawle, 463.

In South Carolina, an indictment stating an offence against the state, and concluding with the words, against the peace and dignity of the same, is not faulty, but good within the terms of the constitution of 1790. *State v. Washington*, 1 Bay, 120. Where an indictment commenced "South Carolina," and not the "State of South Carolina," and concluded against the peace and dignity of the said state and not against the peace and dignity of the same, the court held the termination good. *State v. Anthony*, 1 M'Cord, 285. By the constitution of Arkansas, indictments must conclude, "against the peace and dignity of the State of Arkansas;" but the interpolation upon this form of the words, "people of the," will not vitiate. "The form adopted by the constitution," it was said, "is merely declaratory, and in

In misdemeanors to the person or property of an individual, it is very usual to conclude "*To the great damage of the said J. S. to the evil example of all others in the like case offending, and against the peace*" &c.; but the above words in italics are unnecessary.[3]

(b) *Against the form of the statute.*

Indictments for offences against a statute or statutes, conclude "against the form of the statute [or statutes] in such case made and provided," and against the peace of our Lady the Queen, her crown and dignity. This is material to be observed; for where the *contra formam statuti* is omitted, if the offence be one punishable by statute only, no judgment can be given, although otherwise if the offence be also punishable at common law.(a) As the conclusion *contra formam statuti* to an indictment for an offence at common law, therefore, does not affect the validity of the indictment, I understand that the judges about fifteen years since, intimated to the clerks of indictments on the different circuits, that it would be advisable to conclude their indictments, generally, as for offences against a statute. Formerly nice distinctions were taken, as to cases where the conclusion should be *contra formam statuti*, and where *statutorum*; but this is now immaterial; for by stat. 14 & 15 Vict. c. 100, s. 24, no indictment shall be deemed insufficient, for the insertion of the words "against the form of the statute" instead of "against the form of the statutes," or *vice versa*. [1]

(a) 2 Hawk. c. 25, s. 116.

affirmance of an old principle, not the creation of a new one." *Anderson v. State*, 5 Pike, 445. In South Carolina, an indictment was held good, though it concluded against "the peace and dignity of this state," instead of concluding "against the peace and dignity of the same state." *State v. Yancey*, 1 Tr. Con. Rep. 237. In Mississippi, an indictment commencing with the words "the State of Mississippi," and concluding, "against the peace and dignity of the same," is sufficient. *State v. Johnson*, 1 Walker, 392.

[3] Indictments for nuisances usually conclude "to the great damage and common nuisance of all the people of said state as well as against the peace, &c." But this conclusion "to the common nuisance" does not seem to be essential. *Matt. Dig. Cr. Law*, 278. The words "against the peace of the people," seem to be essential in all cases, excepting in indictments for non-feasance and even in these, they are uniformly used.

[1] In a common law indictment the words *contra-formam statuti* may be rejected as surplusage. *State v. Buckman*, 8 New. Hamp. Rep. 203; *Knowles v. State*, 3 Day, 103; *Com. v. Gregory*, 2 Dana, 417; *State v. Cruizer*, 3 Harrison, 108; *Southworth v. State*, 9 Conn. 560; *Com. v. Hoxey*, 16 Mass. 385; *Pennsyl. v. Bell*, Add. 171; *Resp. v. Newell*, 3 Yeates, 407; *Haslip v. State*, 4 Haywood, 273. Where an offence both by statute and common law is badly laid under the statute, the judgment may be given at common law. *State v. Phelps*, 11 Verm. Rep. 117; *Com. v. Lanigan*, 2 Bost. Law. Rep. 49.

Though there is but one statute prohibiting an offence, it is not fatal for the indictment to conclude contrary to the "statutes." *Tereonley v. State*, 3 Harrison, 311; but see *State v. Cassal*, 2 Har. & Gill, 407.

One count concluding "*contra formam*," &c., does not cure another without the proper conclusion. *State v. Soule*, 20 Maine R. 19. Where the offence is governed or limited by

(b) *Want of a proper conclusion.*

By stat. 14 & 15 Vict. c. 100, s. 24, no indictment shall be held insufficient "for want of a proper or formal conclusion."

two statutes, there have been various distinctions taken respecting the conclusions against the form of the statutes in the plural, or statute in the singular only. The rule given by the older writers is, that where an offence is prohibited by several independent statutes, it was necessary to conclude in the plural; but now the better opinion seems to be, that a conclusion in the singular will suffice. 1 Hale, 173; Sid. 348; Owen, 135; 2 Leach, 827; 1 Dyer, 347, a. 4 Co. 48; Hawk. b. 2 c. 25, s. 117; *Kane v. People*, 9 Wend. 203; *Dufman's case*, 8 Greenleaf, 113; *State v. Jones*, 4 Halstead, 357. The general practice now is, to conclude in the singular in all cases, though in Maryland it was held that when an offence is committed by one act of assembly, and the punishment prescribed or affixed by another, the conclusion should be against the acts of assembly. *State v. Calias, alias Baker*, 2 Har. & Gill, 407; see also *Stat. v. Pool*, 2 Devereux, 202. Wharton's Cr. Law, 105.

Where a statute only inflicts a punishment on that which was an offence before, judgment may be given for the punishment prescribed therein, though the judgment does not conclude *contra formam statuti*, &c. *Com. v. Searle*, 3 Binney, 332; *Russel v. Com.* 7 Serg. & Rawle, 177; *White v. Com.* 6 Binney, 179; 2 Hale, 190; 1 Saund. 135, a. n. 6; 2 Roll. Abr. 82; 2 Hale, 190; 1 Saund. 135, a. n. 3. If a statute create an offence, or alter an offence at common law, as by turning a misdemeanor into a felony, the indictment must conclude against the form of the statute; and if an offence be made so, not by one statute only, but by two or more taken together, the strict conclusion formerly was against the form of the statutes. *State v. Jim*, 3 Murphy, 3. The reason of the rule, it is said, is that the indictment should refer clearly and explicitly to the statute as the foundation of the suit. *Browne's case*, 3 Greenleaf, 177; *Com. v. Springfield*, 7 Mass. 9; *State v. Soule*, 20 Maine, R. 19; *Chapman v. Com.* 5 Wharton, 427; 1 Hale, 172, 189, 192; Dougl. 441; 1 Salk. 370; 13 East, 258; 5 Mod. 307; 2 Ld. Raym. 1104; 1 Saund. 135, a. n. 3, 4; Hawk. b. 2, c. 25, s. 116, c. 23, s. 99; Bac. Ab. Indictment, H. 4; Burn J. Indictment, ix; Cro. C. C. 39; 1 Chitty on Pleading, 358; 2 Hale, 189; Hawk. b. 2, c. 25, s. 116; 1 Salk. 370; *Com. v. Stockbridge*, 11 Mass. 279; *Com. v. Northampton*, 2 Mass. 116; *Com. v. Cooley*, 10 Pick. 37; *Com. v. Searle*, 3 Binney, 332. In such case, "against the peace and dignity of the commonwealth" merely, is bad. *Com. v. Northampton*, 2 Mass. 116; *Com. v. Springfield*, 7 Mass. 9. But in Massachusetts, a conclusion "against the peace and the statute," is good, (*Com. v. Caldwell*, 14 Mass. 330;) though in the same state it was held insufficient to charge the offence as committed against the law in such case made and provided. *Com. v. Stockbridge*, 11 Mass. 279. The proper office of the conclusion, *contra formam statuti*, is to show the court the action is founded on the statute, and is not an action at common law. *Crain v. State*, 2 Yerger, 390. Wharton's Cr. Law, 105.

MASSACHUSETTS.—It is not sufficient in an indictment for an offence created by statute, to allege the same to have been committed *against the law in such case made and provided*. 11 Mass. 279. See *Commonwealth v. Springfield*, 7 Mass. 9. In SOUTH CAROLINA, it has been decided, that where an indictment concluded "contrary to the act of assembly of the State of South Carolina," whereas the act under which the indictment was prosecuted, was an act of the Province of South Carolina, that the indictment was nevertheless good. *State v. Turnage*, 2 Nott & N'Cord, 158. But where an indictment (since the revolution) concluded against "a British act of Parliament made of force in this State;" the indictment was held to be bad; although there be an act of assembly against the offence committed, which is an exact transcript of the English statute. *State v. Holley*, 2 Bay, 262. In MARYLAND, it has been determined that where an offence is punishable either at common law, or under an act of assembly, and the common law judgment is entered, but is stated to be according to the act of assembly, that the unmeaning expressions following the judgment of the court may be rejected as surplusage. *Davis v. State*, 3 Har. & J. 154.

## 5. Joinder of Offences.

## (a) Several counts for the same offence.

There is no objection to stating the same offence, in different ways, in as many different counts of the indictment as you may think necessary, even although the judgment on the several counts be different, (a) provided all the counts be for felonies, or all for misdemeanors. [2]

(a) *R. v. Galloway*, Ry. & M. 234; see *R. v. Powell*, 2 B. & Ad. 75.

*United States*.—If an indictment founded on a statute conclude "contrary to the true intent and meaning of the act of Congress in such case made and provided," it is good and equivalent to a conclusion "against the form of the statute in such case made and provided." *United States v. Smith*, 2 Mason, 143.

*Maine*.—It is held, that if an indictment for an offence against the statutes of *Massachusetts*, committed before the separation of *Maine*, does not charge the offence to have been committed against the peace of *Massachusetts*, and the laws of the Commonwealth, the omission will be fatal. *Damon's case*, 6 Greenl. 148.

*Massachusetts*.—If an indictment, for a breach of a by-law, conclude against the by-law, without also concluding against the statute, it will be bad. *Commonwealth v. Gay*, 5 Pick. 44. A complaint purporting to be made pursuant to stat. of Mass. 1785, ch. 66, § 2, for the maintenance of a bastard child, but not concluding *contra formam statuti*, was held sufficient. *Commonwealth v. Moore*, 3 Pick. 197. So in an action on the case upon a statute, brought by a party aggrieved to recover damages merely, it is not necessary to allege in the declaration that the injurious act or neglect of the defendant was *contra formam statuti*. *Reed v. Northfield*, 13 Pick. 94.

And now in *Massachusetts*, no indictment shall be quashed or be deemed invalid, nor shall the judgment thereon be arrested or affected by the omission of the words "contrary to the form of the statute." Rev. Stat. ch. 137, § 14. Before this statute the indictment for offences created by statute must conclude *contra formam statuti* absolutely, or at least refer clearly and explicitly to the statute as the foundation of the suit. *Commonwealth v. Springfield*, 7 Mass. 9; *Same v. Stockbridge*, 11 Mass. 279; *Same v. Northampton*, 2 Mass. 116; *Same v. Cooley*, 10 Pick. 37. Thus a conclusion "against the peace and dignity of the Commonwealth," was held bad. *Commonwealth v. Northampton*, 2 Mass. 116; *Same v. Springfield*, 7 Mass. 9. So of a conclusion "against the law in such case provided." *Commonwealth v. Stockbridge*, 11 Mass. 279. But a conclusion "against the peace and the statute," was held good. *Commonwealth v. Caldwell*, 14 Mass. 330.

*New Jersey*.—An indictment for assault and battery will not be quashed because it does not conclude "contrary to the form of the statute in such case made and provided." *State v. Berry*, 4 Halst. 374.

*Kentucky*.—No indictment upon a statute can be supported unless the offence is stated to have been committed against the statute. *M'Callough v. Commonwealth*, Hardin, 95. See *State v. Humphrey*, 1 Overton's (Tenn.) 307.

*Indiana*.—Where an indictment for murder concluded "contrary to law" instead of "contrary to the statute," it was held sufficient. *Hudson v. State*, 1 Blackford, 318; *Fuller v. State*, Ib. 65.

[2] The introduction of several counts, which merely describe the same transaction in different ways, cannot, in general, be made the subject of objection. Nor will the defect of some of the counts affect the validity of the remainder, for judgment may be given against the defendant upon those which are valid. *United States v. La Coite*, 2 Mason, 139; *Curtis v. People*, 1 Breese, 200; *U. S. v. Pirates*, 5 Wheat. 184; *Brown v. Com.* 8 Mass. 63; *Hudson v. State*, 1 Blackf. 318; *State v. Boyes*, 1 M'Mullan, 190; *Harman v. Com.* 12 Serg. &



And the judges have, upon more than one occasion, censured the practice of sending two bills before the grand jury, at the same time, against the same person, as for two different offences, founded on the same evidence of facts, even in cases where the two offences could not be joined in the same indictment, such as an indictment for stealing, and another for receiving the same goods. In this particular case, however, the indictor is now relieved of all difficulty; for by stat. 11 & 12 Vict. c. 46, s. 3, after reciting that according to the practice of courts of criminal jurisdiction, it was not then permitted in an indictment for stealing property to add a count for receiving the same property knowing it to have been stolen, or in an indictment for receiving stolen property to add a count for stealing the same property, and that justice was thereby often defeated,—it was enacted that in every indictment for feloniously stealing property, it shall be lawful to add a count for feloniously receiving the same property, knowing it to have been stolen; and in an indictment for feloniously receiving property knowing it to have been stolen, it shall be lawful to add a count for feloniously stealing the same property; and where any such indictment shall [\*94] be preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty, either of stealing the property, or of receiving it knowing it to have been stolen; and if such indictment shall be found against two or more persons, it shall be lawful for the jury who shall try the same, to find all or any of the said persons guilty, either of stealing the property or of receiving it knowing it to have been stolen, or to find one or more of the said per-

Rawle, 69; *State v. Crank*, 2 Bailey, 66; *State v. Pool*, 2 Const. Ct. 691; *Jennings v. Com.* 17 Pick. 80; *Townsend v. People*, 3 Scammon. 328; *Turk. v. State*, 7 Ohio, 340; *Kane v. People*, 3 Wendell, 363.

The rule in England in regard to the joinder of offences is, that a felony cannot be joined with a misdemeanor, in the same indictment. The reason which is assigned for this, that the defendant would thereby lose the benefit of having a copy of the indictment, a special jury, and of making his full defence by counsel, has no application at all in this country; on the contrary, the defendant would gain by being indicted for felony, as he would have the right of challenge, in addition to the other privileges, which are equally secured to all defendants, in criminal prosecutions. From analogy to the rule of pleading in civil actions, I suppose that whenever the same plea may be pleaded, and the same judgment given, the offences may be joined. No doubt two felonies may be joined, so far as regards the objection in point of law, as matter of form. And so of several misdemeanors. (3 T. R. 98.) And by the English practice, larceny and receiving stolen goods may be joined. 1 Cr. Ca. 234. But here the receiving is charged as a felony. A case is cited by Mr. Rice, in his digest, tit. Indictment, 52, *State v. Smith*, MSS, where it is said there is a repugnancy in charging a felony in one count, and a misdemeanor in another, which would be fatal. But, if fatal at all, I should suppose it would be so on demurrer, or in arrest of judgment; and yet the judgment there was not arrested, although the defendant was convicted only of the receiving. McMullan's Rep. 190.

sons guilty of stealing the property, and the other or others of them guilty of receiving it knowing it to have been stolen.[1]

So, where it was doubtful whether the accused party was an accessory before the fact, or the principal felon, you could not send two bills before the grand jury, one for each offence, being contrary to the injunction of the judges as above mentioned; but as the accessory may now be indicted in the same manner as a principal,(a) he may now be convicted as a principal or accessory on the same count.[2]

So, there are several cases where a greater offence includes a less, and upon an indictment for the greater offence, the prisoner may be found guilty of the less,—as for instance, upon an indictment for murder, the prisoner may be found guilty of manslaughter,—upon an indictment for burglary and larceny, the prisoner may be acquitted of the burglary, and found guilty of the larceny,—upon an indictment for breaking and entering a church, house, shop, or warehouse, and stealing therein, the prisoner may be acquitted of the breaking and entering, and convicted of the larceny,—in an indictment for stealing from a dwelling house to the value of five pounds, or some person in the house being put in fear, the prisoner may be convicted of the simple larceny,—and the like in these cases, it is not necessary to have a separate bill, or even a separate count, for the less offence.[3]

(a) See *ant*, p. 15, 17.

[1] The right of election in this country is confined to cases where the indictment contains charges which are actually distinct, and grow out of different transactions. *Com v. Mason*, 2 Ashmead, 31; *State v. Hogan*, Charlton Rep. 474. In Georgia, the court will not compel the prosecutor to elect upon an indictment charging the prisoner with larceny, and receiving stolen goods, &c., where it appears by the indictment that the charges relate to the same transaction, modified to meet the proof. *State v. Hogan*, Charlton. And the law has been similarly stated in New York. *Hane v. The People*, 8 Wendell, 203.

[2] The prosecutor will not be compelled to elect where a count charging a person with being accessory before the fact is joined with one charging him with being accessory after. *Rex v. Blackson*, 8 C. & P. 43. And the defendant may be indicted as a principal in the first degree in one count, and as principal in the second degree in another count. On the same principle, where there are counts in an indictment for forging a bill, acceptance, and indorsement, the prosecutor is not driven to elect on which he will proceed. *Add. Cas.* 228.

[4] It is a general rule which runs through the whole criminal law, that it is sufficient to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified. 2 Campb. 584, 646; 1 Burr. 399.

See Roscoe's Dig. Cr. Ev. 74; 1 Stark. Ev. (5th Amer. ed.) 418; *Hudson v. State*, 1 Blackf. 318; *Durham v. State*, id. 33; *Morris v. State*, id. 37; *Stewart v. State*, 5 Ohio, 242; *State v. Coy*, 2 Aiken's (Vermont) 181.

In *Massachusetts* it is enacted, that whenever any person indicted for a felony shall on the trial be acquitted by verdict of part of the offence charged in the indictment and convicted of the residue thereof, such verdict may be received and recorded by the court; and thereupon the person indicted shall be adjudged guilty of the offence, if any, which shall appear to the court to be substantially charged by the residue of such indictment, and shall be sentenced and punished accordingly. Rev. Stat. ch. 137, § 11. Under this section of the statute of *Massachusetts*, it has been decided, that the prisoner under an indictment for a rape

Where a prisoner is indicted for a felony, it is not necessary to prefer a separate bill against him for an attempt to commit it,—or where

committed upon his own daughter, may be acquitted of the rape and convicted of incest. *Commonwealth v. Goodhue*, 2 Metcalf, 103.

A defendant indicted for assault and battery with intent to murder, may be convicted of a simple assault and battery. Greater offences include the lesser of a kindred character. *State v. Stedman*, 7 Porter, 495. See *Stewart v. State*, 5 Ohio, 242; *State v. Goffney*, Rice, 431; *Commonwealth v. Drum*, 19 Pick. 479; *Same v. Hope*, 22 Pick. 1, 7; *Same v. Griffin*, 21 Pick. 523; *People v. Jackson*, 3 Hill, 92.

And in the case of redundant allegations it is sufficient to prove part of what is alleged according to its legal effect, provided that which is alleged, but not proved, be neither essential to the charge, nor describe or limit that which is essential. See observations of Abbott, C. J., 2 B. & A. 363.

Thus, if an indictment for burglary be laid, also, with a felony to the amount of forty shillings, the prisoner may be acquitted of the former, and convicted of the latter. 1 Leach, 88. 2 Leach, 711, 2 Hale, 302. [1 Hayw. 12.] And under an indictment for burglariously breaking in and stealing, the charge may be modified by showing a stealing alone, and the burglarious entry be abandoned. 2 Leach, 711. 2 East P. C. 515, 16. Chit. Cr. L. 638. [1 Blackford, 37.] So under an indictment for a highway robbery, the offender may be found guilty only of larceny. 1 Hale, 534, 5. 2 East P. C. 736, 784. So also if the prisoner be indicted for stealing in a dwelling-house and putting in fear, he may be convicted of simple larceny. 2 Leach, 671. Or if he be indicted for horse-stealing, he may be convicted of simple larceny. Russ & Ry. C. C. 416. And, on an indictment for petit treason, he may be found guilty of murder or of manslaughter only, for both these offences are included in the charge. Fost. 329. 3 Hale, 184. 2 Hale, 302. Hawk. b. 2, c. 47, s. 6. As is also the offence of manslaughter in a charge of murder. 1 Hale, 449. 2 Hale, 302. And see the 43 G. 3, c. 113, s. 6, containing an enactment to this effect.

See *State v. Parish*, 2 Hayw. 73. But on a charge of murder the prisoner cannot be convicted of involuntary manslaughter. *Commonwealth v. Gable*, 7 Serg. & Rawle, 423.

So also on an indictment for privately stealing from the person the defendant may be found guilty of stealing generally. 1 Leach, 473. 2 Hale, 203. Hawk. b. 2, c. 47, s. 6. On an indictment upon the statute 1 James 1, c. 8, for stabbing "contrary to the form of the statute," may be acquitted as to the offence against the statute, and found guilty of manslaughter at common law. 2 Hale, 302. Hawk. b. 2, c. 47, s. 6. And, upon an indictment for stealing above the value of a shilling, may be convicted of stealing to a less amount. *Id. ibid.* Under an indictment charging an assault with intent to abuse and carnally know, the defendant may be convicted of an assault with intent to abuse simply. 3 Stark. C. N. P. 62.

So where one is indicted for a rape he may be found guilty of an assault with an intent to commit a rape. *Commonwealth v. Cooper*, 16 Mass. 187. *State v. Shepard*, 7 Conn. 54. But see *Commonwealth v. Koby*, 12 Pick. 507, where the correctness of the above doctrine is doubted.

So where a libel is alleged to have been published with intent to defame certain magistrates, and also to bring the administration of justice into contempt, it is sufficient to prove a publication of either of these intentions. 3 Stark. C. N. P. 35. And if an indictment for treason charge several overt acts, it is sufficient to prove one. Fost. 194.

Upon an indictment for obtaining money under false pretences, it is not necessary to prove the whole of the pretence charged, proof of part of the pretence, and that the money was obtained by such part, will suffice; (Russ. & Ry. C. C. 190; See *People v. Haynes*, 11 Wendell, 557; Roscoe's Dig. Cr. Ev. 368;) and, in case of perjury, it will suffice, to prove one of the assignments to authorize a conviction. 2 Ld. Raym. 887. An indictment on the 7 Geo. 3, c. 59, s. 1, stating the prisoner to have been employed in two branches of the post-office, proof of his having been employed in either will be sufficient; and if the letter embezzled

he is indicted for a misdemeanor, it is not necessary to add another count for an attempt to commit it,—because upon an indictment for the felony or misdemeanor, if upon the trial it appear that the defendant merely attempted to commit the offence, but did not complete it, the jury may acquit him of the offence charged, and find him guilty of the attempt.(a) So, upon an indictment for robbery, the prisoner may now be found guilty of an assault with intent to rob.(b) So, upon an indictment for embezzlement, if the offence upon the evidence appear to be a larceny, the jury may acquit the prisoner of the embezzlement, and find him guilty of simple larceny, or of larceny as clerk or servant.(c)

Or upon an indictment for larceny, if upon the evidence it appear to be embezzlement, the jury may acquit of the larceny, and find the par-

(a) 14 & 15 Vict. c. 100, s. 9.

(c) 14 & 15 Vict. c. 100, s. 13.

(b) *Id.* s. 11.

is described as having contained several notes, proof of its having contained any one of them will suffice. *Russ. & Ry. C. C.* 189. When the prisoner was described in two counts as a person employed in sorting and charging letters, he was found guilty, though it was proved he was a sorter only. 2 *Bla. Rep.* 789; 3 *M. & S.* 371. We have already (*Chit. Cr. L.* 238) seen how far it is unnecessary to prove the entire number, description, or value of property, according to the statement of it in the indictment. If an indictment charge that the defendant did, and caused to be done, a particular act, it is enough to prove either. 2 *Campb.* 584; 1 *Burr.* 399. See 12 *Wendell*, 430. Thus, under an indictment for forgery, stating that the defendant forged, and caused to be forged, it suffices to prove either. 1 *Burr.* 399; *Dick. J. Distress*, 411. So a defendant may be found guilty upon a count in an information, which charges him with having composed, printed, and published a libel, if he be proved to have published without having composed it. 2 *Campb.* 584, 646.

A person indicted for breaking and entering a warehouse with intent to steal, and also with stealing, may be convicted of the larceny simply. *State v. Cocker*, 3 *Harrington*, 554; *State v. Grisham*, 1 *Haywood*, 12. In *State v. Cowell*, 4 *Iredell Rep.* 231, on an indictment for fornication and adultery, the jury having found that the defendants were guilty of fornication but not of adultery, it was held the state was entitled to judgment. In an indictment for assault with intent to kill, the defendant may be convicted of assault and battery, or assault alone. *Stewart v. State of Ohio*, 5 *Ohio Rep.* 242.

An indictment under the South Carolina Act of 1821, includes the inferior offence of "killing in sudden heat and passion," to the same extent and for the same reasons that murder at common law includes manslaughter; and therefore, on such an indictment, the prisoner may be convicted of the inferior offence described in the second clause of the same act. *State v. Gaffney*, *Rice*, 431. In Massachusetts, it was held that at common law, one charged with a felony could not be convicted of part of the charge, unless the part amounted to a felony. *Com. v. Newell*, 7 *Mass.* 245; *Com. v. Roby*, 12 *Pick.* 496; overruling *Com. v. Cooper*, 15 *Mass.* 187. But, by *Rev. Stat. c. 137, sec. 11*, on such an indictment, if the jury acquit a part of the charge, the defendant may be sentenced for any offence substantially charged by the residue of such indictment. *Com. v. Drum*, 19 *Pick.* 479. Thus, on an indictment for rape, one may be convicted of assault and battery, (*Ibid.*) or, on the same charge, of incest, (*Com. v. Goodhue*, 2 *Metcalfe*, 193;) or on an indictment for manslaughter, of assault and battery. *Com. v. Drum*, 19 *Pick.* 479. see also, *Com. v. Hope*, 22 *Pick.* 1, 7; *Com. v. Griffin*, 21 *Pick.* 523. And in New York it has been determined that under an indictment for procuring an abortion of a quick child, which, by the revised statutes is a felony, the prisoner may be convicted, though it turn out the child was not quick, and the offence, therefore, a mere misdemeanor. *People v. Jackson*, 3 *Hill's N. Y. R.* 92.

ty guilty of the embezzlement.(a) So, if upon an indictment [\*95] for obtaining money or \*goods by false pretences, the offence upon the evidence turn out to be larceny, the defendant notwithstanding may be convicted of the false pretences.(b) So, upon an indictment for any misdemeanor, if the facts given in evidence amount to a felony, the defendant shall not on that account be acquitted of the misdemeanor, unless the court think fit to discharge the jury, and order the defendant to be indicted for the felony.(c)

In these several cases it is unnecessary and useless to prefer a second bill, or to add a second count (where that can be done,) for the offence of which the defendant may be thus convicted; indeed, if a second bill be preferred, and the defendant be acquitted on the first, he may plead *autrefois acquit* to the second.

(b) *Second count for a different offence.*

*one* If different felonies or misdemeanors be stated in several counts of an indictment, no objection can be made to the indictment on that account in point of law. In cases of felony, indeed, the judge in his discretion, may require the counsel for the prosecution to select one of the felonies, and confine himself to that. This is what is technically termed putting the prosecutor to his election.[1] But this practice has

(a) 14 & 15 Vict. c. 100, s. 13.

(c) 14 & 15 Vict. c. 100, s. 12.

(b) 7 & 8 G. 4, c. 29, s. 53.

[1] In cases of felony, no more than one distinct offence or criminal transaction at one time should regularly be charged upon the prisoner in one indictment, lest it should confound the prisoner in his defence. But this is only matter of prudence and discretion which it rests with the judges to exercise. 2 Hale, 173; 2 Leach, 1103; *People v. Rynders*, 12 Wendell, 425; *Kane v. People*, 8 Wendell, 203; *Burk v. State*, 2 Harr. & Johns. 426; *Com. v. Symonds*, 2 Mass. 163; *Stowers v. State*, 3 Miss. 9; *Baker v. State*, 4 Pike, 56.

In the case of *misdemeanors*, the joinder of several offences will not, in general, vitiate in any stage of the prosecution. 3 T. R. 105, 6; 2 Campb. 132; 5 Burr. 984; 8 East, 41; Burn, J. Indictment, IV; Cro. C. C. 41; [8 Wendell, 211.] For, in offences inferior to felony, the practice of quashing the indictment or calling upon the prosecutor to elect on which charge he will proceed, does not exist. 2 Camp 132. But on the contrary, it is the constant practice to receive evidence of several libels and assaults upon the same indictment. *Id. ibid.* It was indeed formerly held that assaults on more than one individual could not be joined in the same proceeding, (2 Stra. 870; 2 Ld. Raym. 1575; 2 Sess. Cas. 24; but this is now exploded; 2 Burr. 984; Com. Dig. Indictment, E; Burn, J. Indictment, IV;) for though two persons cannot join in a civil action, the reason is, that the damages are several, which cannot apply to criminal proceedings where no compensation is given to the prosecutor, and public security is the object to be obtained.

For the same reason an indictment for a libel on a body of trustees will be good, though it profess to be for a libel on three of them only. 1 Sess. Cas. 262. And it has been held, that it is no objection on demurrer that several defendants are charged in different counts of the same indictment with several offences of the same nature, (see *Redman v. State*, 1 Blackford, 431; *Commonwealth v. Gillespie*, 7 Serg. & R. 469; Arch. Cr. Pl. (4 Lon. ed.) 55, 56. As to charging the defendant with two or more offences in any *one count* of the indict-

never been extended to misdemeanors.(a) We have seen, however,(b) that where a count for larceny, and a count for receiving the same

(a) Per Lord Ellenborough, C. J. in *Young v. Rex, in error*, 3 T. R. 98. (b) *Ank*, p. 94.

ment, see Arch. Cr. Pl. (4 Lon. ed.) 49; *Commonwealth v. Symonds*, 2 Mass. 163.) though it may be a ground for applying to the court in its discretion to quash the indictment. 8 East, 41; 7 Serg. & R. 469. But care must be taken that the offences be not charged in such a manner as to confound the evidence, and that no counts be joined upon which the judgments must necessarily be different, (as in New York, where the forging of a mortgage and of a receipt endorsed thereon are both charged in the same count, and the defendant be convicted, the judgment will be arrested. *People v. Wright*, 9 Wendell, 193; see *State v. Montague*, 2 M'Cord, 287. An indictment, which charges in the same count an offence made capital by one section of a statute, and another offence declared by the same law to be a misdemeanor, is bad. *United States v. Sharp*, 1 Peters' C. C. 118; see *State v. Coleman* 5 Porter, 32,) as a charge of felony with another of mere misdemeanor, (but in Maryland, an indictment containing two counts, one charging felony and the other a misdemeanor, was held to be good. *Buck v. State*, 2 Harr. & Johns. 426,) for it may operate like a misjoinder in civil actions, and if so, the indictment will be bad on demurrer, or on motion in arrest of judgment. 3 T. R. 103, 435; but see 1 East P. C. 408-9-10. But the rule that where there is a different judgment counts cannot be joined, is not always the criterion whether the offence may not be laid in different ways; at all events it does not apply to all cases; for instance, in the offence of embezzling naval stores, the having in possession new stores, or stores not more than one third worn, is subject to transportation for fourteen years, (see 39 & 40 Geo. 3, c. 89, s. 1;) but if they be not new or more than one third worn, the punishment is different, (Id. s. 2;) yet counts for both these offences may be included in the same indictment. 3 M. & S. 550. So in conspiracy, the judgment upon conviction is, that the party is infamous, and yet nothing is more familiar than to add to counts for a conspiracy other counts which do not include a charge of conspiracy, (Id. ;) and according to Lord Hale, a person who commits petit treason, may be indicted for murder; yet there are different judgments upon each, as well as different challenges. 1 Hale P. C. 378; *Fost*, 325, 328; but the circumstances there stated do not sufficiently show whether it was the same person. But when the prosecutor wishes to prevent the removal of an indictment from the sessions, for obtaining goods by false pretences under 30 Geo. 2, c. 24, he should not insert counts for conspiracy, as that would take the case out of that statute. *The King v. Godfrey and others*, 1825. It is no objection to an indictment that the punishment for one of the offences is positive, and for the other discretionary, (4 East, 174; 1 East P. C. 408, 9, 10; 2 M. & S. 533;) and after a general verdict the objection of misjoinder may be avoided by entering up judgment upon a particular count. 4 East, 179; 1 East P. C. 408, 9, 10. And, therefore, where a defendant was indicted on 9 Anne, c. 14, for an assault, on account of money won at gaming, the punishment of which is prescribed by the statute, and for an assault at common law, after a general verdict, a motion in arrest of judgment was abandoned by the counsel for a prisoner. 4 East, 179. And if two distinct offences are charged, and one of them is not indictable or laid without sufficient precision, judgment will be given for the crown if the other be sufficient upon general demurrer; for we have already seen, that part of an indictment may be good, though the other part be defective. 2 Sess. Cas. 32. See *Commonwealth v. Gable*, 7 Serg. & R. 423; *U. States v. Sharp*, 1 Peters' C. C. 131; *State v. Nelson*, 8 N. Hamp. 163; *Miller v. State*, 5 How. (Miss.) 250; *People v. Wright*, 9 Wendell, 193; *State v. Cowell*, 4 Ged. 231.

Breaking and entering without intent to steal, and actually stealing, may both be stated in the same indictment, *Commonwealth v. Tuck*, 20 Pick. 356; *State v. Brady*, 14 Vermont, 353; *State v. Crocker*, 3 Harr. Del. 554; *State v. Grisham*, 1 Hayw. 12; *Josselyn v. Commonwealth*, 6 Metcalf, 236.

goods, are joined in the same indictment, the prosecutor shall not be put to his election. So a prosecutor may insert three counts in the same indictment for separate acts of larceny, committed by the same person against the prosecutor within six months from the first to the last of such acts;(a) and he shall not, in that case, be put to his election. Or, if there be but one count, for a stealing at one time, the prosecutor may give in evidence three larcenies, committed by the prisoner at different times within six months from the first to the last of them, and he shall not be put to his election.(b) So, in an indictment for embezzlement by a clerk or servant, the prosecutor may insert three counts for separate acts of embezzlement, committed within six months from the first to the last of such acts;(c) and he shall not in that case be put to his election.[2]

(a) 14 & 15 Vict. c. 100, s. 16.

(c) 7 & 8 G. 4, c. 29, s. 48.

(b) *Id.* s. 17.

When charged in two counts and the defendant is convicted generally, he may be sentenced for both offences. *Josslyn v. Commonwealth*, 6 Metcalf, 236. But if the breaking and entering and the actually stealing, are charged in one count, only one offence is charged, and the defendant on conviction, can be sentenced to one penalty only. *Ib.*

[2] In Maryland, in Alabama, and in South Carolina, it has been held, in some cases, after extended argument, that in all cases felonies and misdemeanors, when relating to the same subject matter, may be properly joined. In Maryland the joinder of rape, with assault with intent to commit rape, was sanctioned by the court. *Buck v. State*, 2 Harr. & John. 426; *State v. Coleman*, 5 Porter, 52; *State v. Montague*, 2 M'Cord, 287; *State v. Gaffney*, Rice, 431.

In the case of *State v. Boyer & Shuke*, 1 M'Mullan, Rep. 190, decided in South Carolina, the court said: "The rule in England is that a felony cannot be joined with a misdemeanor, in the same indictment. The reason which is assigned for this, that the defendant would thereby lose the benefit of having a copy of the indictment, a special jury, and of making his full defence by counsel, has no application at all in this country; on the contrary, the defendant would gain by being indicted for felony, as he would have the right of challenge, in addition to the other privileges, which are equally secured to all defendants, in criminal prosecutions. From analogy to the rule of pleading in civil actions, I suppose that whenever the same plea may be pleaded, and the same judgment given, the offences may be joined. No doubt two felonies may be joined, so far as regards the objection in point of law, as matter of form. And so of several misdemeanors. 3 T. R. 98. And by the English practice, larceny, and receiving stolen goods may be joined. 1 Cr. Ca. 234. But here the receiving is charged as a felony. A case is cited by Mr. Rice in his Digest, tit. Indictment, 52. *State v. Smith, Mss.*, where it is said there is a repugnancy in charging a felony in one count, and a misdemeanor in another, which would be fatal. But, if fatal at all, I should suppose it would be so on demurrer, or in arrest of judgment; and yet the judgment there was not arrested, although the defendant was convicted only of the receiving. Since the Act of 1829, subjecting the receiver to the punishment of whipping, and that of 1834, imposing the same punishment for grand larceny, the Act of 1833 having abolished branding, I can perceive no greater incongruity or repugnancy in joining larceny and receiving stolen goods, in the indictment, than there is in joining any other distinct offences, where the same judgment must be accorded. It is true, the offences are technically of different natures. One is a felony, and the other a misdemeanor. A second conviction of the former would be capital; but as the formality of praying the benefit of the clergy, on the first conviction, is

But two offences cannot be charged in the same count; the count in such a case would be bad for duplicity. Where, however, in one count of an indictment on stat. 37 G. 3, c. 70, the defendant was charged with endeavoring to incite a soldier "to commit an act of mutiny, and to commit traitorous and mutinous practices,"—it was objected in arrest of judgment that the count was bad, as charging two offences; but the judges seemed to think it good, for there might be only one endeavour to incite to the two offences; the point however was [\*96] not decided, as there were other counts which were unobjectionable.(a) So, where the lessee of a coal pit was charged in one count with stealing coal, the property of thirty different persons, who had mines in the vicinity of his, into which he caused his men to work and take the coal,—the prisoner's counsel moved that the counsel for the prosecution should select some particular act, done on a particular day, and confine his statement and evidence to that; but the judge (Erle, J.) refused to interfere; the case was then gone into, and proved, and the prisoner's counsel again objected to the count, as charging a stealing of the coal of several persons, in different places, and at different times: but the judge held that the different workings might be relied on to show the felonious intent, although they extended into twenty different counties, and the coal belonged to twenty different persons, and extended over twenty years, if the mining operations were continuous for that time.(b) So, there is no objection to charging a defendant in one count with assaulting two persons, when the whole forms one transaction.(c) So, an indictment for robbery, which charged four prisoners with assaulting A. B. and C. D., and stealing two shillings

(a) *R. v. Fuller*, 1 Bos. & P. 180.

(c) See *R. v. Benfield and Skunders*, 2 Burr,

(b) *R. v. Bleasdale*, 2 Car. & K. 765.

984, per Lord Mansfield, C. J.

wholly dispensed with, and the punishment of whipping is peremptorily substituted, the offences are so far assimilated, that the technical objection which prevails in England, to their being joined, does not exist here."

In Pennsylvania, in the case of *Hurman v. Com.*, 12 Serg. & Rawle, Rep. 64, a count for an assault and battery, with intent to commit a rape. It was held that such a joinder could not be objected, after conviction, but that judgment would be entered upon the count that was good; and Tilghman, Ch. J., in an elaborate opinion, stated that the constant practice had been in Pennsylvania to join counts under similar circumstances, and that though perhaps in such a case the court might compel the commonwealth to elect before verdict, after conviction the indictment could not be shaken.

Mr. Wharton (Cr. Law, p. 108,) remarks that the Pennsylvania practice undoubtedly is to join counts for felonies and for misdemeanors, when relating to the same subject matter. Thus the ordinary form for larceny in most of the counties, contains a count for receiving stolen goods, though the latter offence is but a misdemeanor in Pennsylvania. In fact, the law has in that state been pushed to even greater lengths, it being held that it is not a valid objection in arrest of judgment, that several persons are charged in the same indictment in different counts, sometimes singly, and sometimes jointly, for different offences, though the court will at its discretion quash such indictments.



from A. B. and one shilling from C. D., the whole being one transaction,—was holden good by Tindal, C. J.(a)[1]

(a) *R. v. Giddins et al*, Car. & M. 634.

[1] Laying several overt acts in a count for high treason is not duplicity, (Kelyng, 8,) because the charge consists of the compassing, &c., and the overt acts are merely evidences of it; and the same as to conspiracy. A count in an indictment charging one endeavor or conspiracy to procure the commission of two offences, is not bad for duplicity, because the endeavor is the offence charged. *R. v. Fuller*, 1 B. & P. 181. A man may be indicted for the battery of two or more persons in the same count, (*R. v. Benefield*, 2 Burr. 984; see 2 Str. 890; 2 Ld. Raym. 1572, *contra*,) or for a libel upon two or more persons, where the publication is one single act, (*R. v. Jenner*, 7 Mod. 400; 2 Bur. 983,) without rendering the count bad for duplicity.

In all cases of larceny, and like offences, several articles may be joined in a count, the proof of either of which will sustain the indictment. It has even been ruled, that the same count may join the larceny of several distinct articles, belonging to different owners, where the time and the place of the taking of each are the same. *Com. v. Williams*, Thacher, C. C. 722. An indictment may, in a single count, charge the prisoner with stealing three negroes, and the offence is complete if he stole either of the negroes, and the conviction will be sustained. *State v. Johnson*, 3 Hill's S. C. R. 1.

Where in an indictment for forgery, two distinct offences, requiring different punishments, are joined in the same count, as where the forging of a mortgage, and of a receipt endorsed thereon, are both charged in the same count, and the defendant is convicted, the judgment will be arrested. *People v. Wright*, 9 Wendell Rep. 193.

In the case of *U. S. v. Sharp*, 1 Peters' C. C. Rep. 131, where the indictment charged in the same count a capital offence and a misdemeanor, it was quashed. In New Hampshire, where horse stealing and ordinary larceny, to which different penalties are affixed, are joined in one count, it is good cause for arresting judgment. *State v. Nelson*, 8 New Hamp. Rep. 163. Under the Mississippi statute against retailing spirituous liquors, making it unlawful to sell in less quantities than one gallon, and also declaring it unlawful for the person selling to suffer the same to be drunk in or about his house; a count in an indictment charging that the defendant sold in less quantities than one gallon, and suffered the same to be drunk in his house, was held bad for duplicity. *Miller v. State*, 5 How. Rep. 250.

A count stating that the defendant broke and entered into a shop with intent to commit a larceny, and did then and there commit a larceny, is not bad for duplicity. *Com. v. Tuck*, 20 Pick. Rep. 356. So where an indictment alleged that the defendant broke and entered into the dwelling-house of one person with intent to steal his goods, and having so entered, stole the goods of another person, &c. *State v. Brady*, 14 Vermont Rep. 353.

An indictment which charges a prisoner with the offences of falsely making, forging, and counterfeiting, of causing and procuring to be falsely made, forged and counterfeited, and of willingly acting and assisting in the said false making, forging and counterfeiting, is a good indictment, though all of these charges are contained in a single count; and as the words of the statute have been pursued, there being a general verdict of guilty, judgment ought not to be arrested on the ground that the offences are distinct. *Rasnic v. Com.* 2 Virg. C. 356; *State v. Houseall*, 2 Rice's Dig. 346.

Setting up a gaming table, it has been said, may be an entire offence; keeping a gaming table, and inducing others to bet upon it may also constitute a distinct offence; for either, unconnected with the other, an indictment will lie. Yet when both are perpetrated by the same person at the same time, they constitute but one offence, for which one count is sufficient, and for which but one penalty can be inflicted. *Hinckle v. Com.*, 4 Dana, 518. In this country, it has been held that it is no objection to an indictment, especially after verdict that charges which might have been the subject of distinct counts, or of distinct indictments,

## 6. Joinder of defendants.

If several be engaged in the commission of the same offence, they may be joined in the same indictment, or each may be separately indicted.(a)[2]

(a) 2 Hawk. c. 25, s. 89.

are included in one count. *State v. Johnson*, 3 Hill's So. Car. K. 1; *Com. v. Tuck*, 20 Pick. 356.

Duplicity, in criminal cases, may be objected to by special demurrer, perhaps by general demurrer, or the court in general, upon application, will quash the indictment; but it is extremely doubtful if it can be made the subject of a motion in arrest of judgment or of a writ of error; and it is cured by a verdict of guilty as to one of the offences, and not guilty as to the other. Wharton's Cr. Law, p. 98.

[2] Where the act is such as several may join in, all the offenders may be included in the same indictment. See generally, 2 Hale, 173; 2 Burr. 984; 1 Sess. Cas. 426; Hawk. b. 2, c. 25, s. 89; Com. Dig. Indictment F. Bac. Abr. Indictment, G. 5; Cro. C. C. 41, 2; Burn, J. Indictment, IV.

Where two or more persons are jointly indicted for a capital offence, as for murder, they are not as a matter of right, entitled to separate trials, but it is a matter of discretion to be decided by the court, under all the circumstances of the case. *United Stiles v. Merchant*, 4 Mason, 158; *Commonwealth v. Gillespie*, 7 Serg. & Rawle, 469; *Redman v. State*, 1 Blackford, 431. Parties to the crime of adultery may be indicted jointly. *Commonwealth v. Etwell*, 2 Metcalf, 190.

As to indictments for riot and conspiracy, which require more than one person to commit the offence, see *State v. Allison*, 3 Yerger, 428; *People v. Howell*, 4 John. 296; *Turpin v. State*, 4 Blackf. 72; *Commonwealth v. Mansen*, 2 Ashmead, 31; *Pennsylvania v. Hurton*, Addis. 334.

Thus, though torts are in their nature several, and each one must answer for his own individual crime; yet where several keep a common gaming or other disorderly house, or are guilty of deer stealing, maintenance, extortion, trespass, or other offences which admit agency of several, they may be either jointly or severally indicted. 2 Hale, 173, 4; 10 Mod. 335, 336; 1 Vent. 302; 1 Salk. 382; 2 Id. Raym. 1248; Hawk. b. 2, c. 25, s. 89; Com. Dig. Indictments, F. Bac. Abr. Indictment, G. 5 Burn, J. Indictment, IV. 8 East, 47. But where the criminality arose in consequence of some personal disqualification to do an act in itself lawful, as for exercising a trade under the stat. of Elizabeth, not having served an apprenticeship, each individual might have been prosecuted alone. 2 Roll. Abr. 81; 1 Stra. 623; 5 Mod. 181; 2 Sess. Cas. 221; 4 Burr. 2046; 10 Mod. 335, 6. 1 Vent. 302; 1 Salk. 382; 2 Hale, 184; Hawk. b. 2, c. 25, s. 89; Com. Dig. Indictment, F. Bac. Abr. Indictment, G. 5; Burn, J. Indictment, IV.; Chitty's Apprentice Law, 137. So also, several cannot be joined in an indictment for perjury, because the assignment must be of the very words spoken, and the words uttered by one cannot possibly be applied to those which proceed from another; besides, one of the defendants may be desirous of obtaining a certiorari, while the others are anxious for an immediate trial. 3 T. R. 103, 4; 2 Stra. 921; 1 Sess. Cas. 424; 2 Burr. 983, 984; 2 Barnard, 24; Hawk. b. 2, c. 25, s. 89 in notes; Bac. Abr. Indictment, G. 5; Com. Dig. Indictment, F. Upon the same principle, no indictment can be supported against several for being common scolds or barretors, (2 Stra. 921,) nor absenting themselves from church, (Temp. P. C. 267,) nor can several parishes be indicted together for suffering a highway to be out of repair. Rep. temp. Hardw. 105; Styles, 157. So neither can several individuals be jointly indicted for omitting to repair the pavement before their respective houses. 2 Roll. Abr. 81; Hawk. b. 2, c. 25, s. 89. But several may be indicted for the same libel, if they all join in publishing it. 2 Burr. 985; Burn, J. Indictment, IV. And the same persons being concerned as principals in the same offence, may

All principals in the first and second degree may be thus joined in the same indictment.(a) And where goods were obtained by false pretences, the pretence being by words spoken by one of the parties in the presence of the others, but all of them were acting in concert, it was holden that they might be jointly indicted.(b) So in all misdemeanors, where those who in felonies would be accessories before the fact are

(a) See *ante*, p. 14.

(b) *R. v. Youug, et al.*, 3 T. R. 98.

all be joined in the same indictment, though the degrees of guilt may differ. Thus, in case of felony, where several are present aiding and abetting, they may be joined with the principal in the first degree, and charged in the indictment either as actual perpetrators, or as aiders and abettors. 3 T. R. 305; 1 Leach, 64, 350, 505; Hawk. b. 2, c. 25, s. 64; Chit. Cr. L. 260. And in all cases of high treason, petit larceny, mayhem, and offences inferior to felony, the act of one being in law the act of the rest, they may all be charged as having jointly committed the offence; (7 East. 65; 1 Hale, 615, 521, 2; 4 Bla. Com. 36. except in the case of becoming a traitor, by harboring another traitor, in which case the indictment must be specially framed. Fost. 345. Where the principal in the second degree is charged as an aider or abettor, it is not necessary to set forth in the indictment the means or manner by which he became thus guilty, but merely to describe him generally as being present, aiding and abetting at the felony and murder (as the case may be) committed, in manner and form aforesaid. 2 Ld. Raym. 846; 1 Hale, 521, 2 Hawk. b. 2, c. 25, s. 64; Id. b. 2 c. 29, s. 17; 4 Co. 42; 3 Price, 145; 2 Marsh. 406; Russ. & Ry. C. C. 314, S. C. But merely to charge him with being present, will not suffice, because he may possibly be innocent. Hawk. b. 2, c. 25, s. 64; Fost. 351; 4 Co. Rep. 42. In indictments for homicide, it is safer to aver the abetment generally; but if it be laid specially, it should refer to the stroke, and not to the death. 4 Co. 42. And it seems proper to aver the abetting with malice prepeuse, and then to draw the conclusion that all present murdered the deceased. 9 Co. 62. But care must be taken, if the stroke and death were on different days, to lay the murder on the latter, though the abetting was on the former, for till then, no felony was completed. 4 Co. 42.

If money or goods be obtained upon false pretences, all who are present aiding may be included in one indictment under the statute. 1 Leach, 505; and so in the case of personating seamen, against the 57 Geo. 3. c. 127, s. 4; Russ. & Ry. C. C. 353. And if the crime arise out of the same act, though the parties stand in different relations, they may be joined in the same indictment; thus, if a wife join with a stranger in the murder of her husband, they may be prosecuted together, though the wife is guilty of petit treason, and the stranger of murder only. Fost. 106, 329; Com. Dig. Indictment, F.; Burn, J. Indictment, IV. And in that case the indictment may conclude that they "*feloniously, traitorously, and of their malice aforethought, did kill and murder,*" which will be good for both of them, applying to each their appropriate terms. Id. *ibid.* So, several present at the death of a man may be charged with different degrees of homicide in the same indictment; thus if A., with malice, abet B., who gives the blow *without malice*, it is murder in the former, and but manslaughter in the latter; and thus it may be stated in the proceedings. And in an indictment for burglary and larceny against two, one may be found guilty of the burglary and larceny, and the other of larceny only. Russ. & Ry. C. C. 520. And it seems that on the trial, if two be indicted for murder, the jury may find it murder as to one and manslaughter as to the other: but if this distinction appear to the grand inquest upon the evidence to support the bill, a new bill for the inferior offence should be presented against the less guilty individual. 3 Bulst. 206; 2 Hale, 162; 2 Roll. Rep. 408; 1 Sid. 230; Hawk. b. 2, c. 29, s. 7. And on an indictment against two, charging them with a joint offence, either may be found guilty, but they cannot be found guilty of the separate parts of the charge subjecting the prisoners to distinct punishments. Russ. & Ry. C. C. 344.

principals, and are so indicted, the party who commits the offence, and he who incited him to commit it, may be indicted together as principals, in the same manner as if they were both present and acting in the commission of it. Therefore, where A. advised and encouraged B. to set fire to a malt house, and B. attempted to do so, but did not succeed, it was holden by Williams, J., that both might be indicted jointly for the attempt.<sup>(a)</sup> So in felony, we have seen<sup>(b)</sup> that the accessory before \*the fact may be indicted with the principal; so may the [\*97] accessory after the fact;<sup>(c)</sup> or they may be tried separately.[1]

(a) *R. v. Clayton & Mooney*, 1 Car. & K. 128.

(b) *Ante*, p. 15.

(c) *Ante*, p. 18.

[1] Where the parties are thus joined in the same proceeding, the proper course is first to state the guilt of the principal as if he alone had been concerned, and then in case of accessories *before* the fact, to aver "that C. D., late of, &c. (the procurer) before the committing of the said felony and murder (or burglary, as the case is) in form aforesaid, to wit, on, &c. with force and arms, &c. did maliciously and feloniously incite, move, procure, aid, and abet (or 'counsel, hire, and command') the said A. B. (the principal felon,) to do and commit the said felony, in manner aforesaid against the peace, &c. See 1 Leach, 515; Williams, J. Accessories, V. 2 Chit. Cr. L. 5." And where a man is indicted as an accessory *after* the fact together with his principal, the original felony is to be stated in the same way, and the conclusion must aver that the accessory *did receive, harbor and maintain, &c.* the principal felon, *well knowing* that he had committed the felony. *Id. Ibid.* See 2 Chit. Cr. Law, 5. As to proof of guilty knowledge in this case, see Roscoe's Dig. Cr. Ev. 720, *et seq.* The averment of knowledge is indispensably requisite; because without it, the guilt does not manifestly appear. 1 Hale, 622; Com. Dig. Justices, T. 2. Hawk. b. 2, c. 29, s. 33; Burn, J. Indictment, III; Hawk. b. 2, c. 25, s. 67; 2 Lev. 208. But it is in no case necessary to use the word "*accessory*" in the indictment, (3 P. Wms. 477.) or to set forth the means by which the accessory before the fact incited the principal to commit the felony, or the accessory after, received, concealed, or comforted him; for it is perfectly immaterial in what way the purpose of the one was effected, or the harboring of the other secured; and as the means are frequently of a complicated nature, it would lead to great inconvenience and perplexity if they were always to be described upon the record. Co. Ent. 56, 57; Rast. Ent. 48, 51, 2; 9 Co. 114; Hawk. b. 2, c. 29, s. 17. The felony of which the principal was guilty must be set forth according to the facts; it has been questioned whether in an indictment against A., &c. for a burglary, and B. for being accessory thereto, that if A. is acquitted of the burglary, B. can be found guilty as accessory to the larceny. Russ. & Ry. C. C. 310; 2 Marsh. 571. S. C.

In an indictment against the *accessory alone*, after the conviction of the principal, it is not necessary to aver that the latter committed the felony, or on the trial to enter into a detail of the evidence adduced against him; but it is sufficient to recite with certainty the record of the conviction, (It is held not necessary in South Carolina to set out in an indictment against an accessory before the fact in a felony, the conviction or execution of the principal. *State v. Sims*, 2 Bailey, 29. See *State v. Crank*, 2 Bailey, 66; 1 Russell, 39,) because the court will presume everything on the former occasion to have been rightly and properly transacted. 7 T. R. 465; Fost. 365; Com. Dig. Justices, T. 3. See 2 Chit. Cr. Law, 5. Roscoe's Dig. Cr. Ev. 173; 2 Stark. Ev. (5th Amer. ed.) 7; 1 Russell, 39; *Commonwealth v. Knapp*, 10 Pick. 477. But this presumption must give way to positive evidence of the innocence of the principal, which it is fully competent to the supposed accessory to produce. Fost. 121. 365; 3 Campb. 265; Com. Dig. Justices, T. 3; 4 Bla. Com. 324. And, therefore, if it appear on the trial, that the principal was erroneously convicted, the defendant indicted as accessory is entitled to an acquittal. *Id. ibid.*

And by stat. 14 & 15 Vict. c. 100, s. 15, after reciting that it often happens that the principal in a felony is not in custody or amenable to justice, although several accessories to such felony, or receivers at different times of stolen property the subject of such felony, may be in custody and amenable to justice,—for the prevention of several trials, it is enacted that any number of such accessories or receivers may be charged with substantitive felonies in the same indictment, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.(a)

But this is the only case in which several persons can be joined in the same indictment for several offences committed by them, independently of each other; in all other cases it has been holden that, to convict all, a joint offence by all, either as principals in the first, or in the first and second degree, or as principals and accessories, must be proved.(b)

But although a joint offence is laid, and can be proved, the indictment is considered in law as a several indictment against each. And if only one of two defendants so indicted as principals, be in custody at the time of the assizes or sessions when the indictment ought to be tried he may be tried alone upon it, and whether he be convicted or acquitted, the other, when apprehended, may afterwards be tried upon it, and convicted. And so much is such an indictment considered a separate indictment against each, that where three were indicted for burglary and stealing in a dwelling house, and one pleaded guilty, and the two others were convicted of a larceny in the dwelling house only, the judges held that judgments should be entered against the three accordingly.(c)[5]

(a) See *ante*, p. 17.

212.

(b) See *R. v. McPhane et al*, Car. & M.

(c) *R. v. Butterworth et al*, B. & Ry. 520.

[2] Several offenders may also, for different offences of the same kind, be in some cases included in the same indictment, the word "*severally*" being inserted, which makes it several as to each of them, though the court will, in its discretion, quash the indictment if any material inconvenience appear to rise from the mode in which it is preferred. 3 T. R. 106; 8 East, 46; Burn, J. Indictment, IV. Thus it has been holden that four persons may be joined for erecting four inns, which prove to be common nuisances, if the word "*severally*" be inserted, though the want of that word will vitiate. 2 Rol. Rep. 345; 2 Hale, 174; 8 East, 47; Com. Dig. Indictment, F. Bac. Abr. Indictment, G. 5; Burn, J. Indictment, IV. *Commonwealth v. McCord*, 2 Dana, 242.

And the same rule applies to the keeping of disorderly houses, the same term being inserted. *Id. ibid.*; 2 Hale, 174; Burn, J. Indictment, IV. But it seems that to warrant such joinder, the offences must be of the same nature, and such as will admit of the same plea and sentence, or it may operate like a misjoinder in civil proceedings, and be bad upon demurrer, or after a general verdict, in arrest of judgment. 3 T. R. 103, 6; 1 East, 46; 2 Campb. 132. In all these cases, however, the charge is several against each individual, and the jury may acquit some, while others are found guilty. Kel. 9; Burn, J. Indictment, IV. But there are some exceptions to this rule, as in cases of conspiracy and riot, where one cannot be indicted for an offence committed by himself alone, and the acquittal of so many as shall render it impossible for the rest to have committed the offence must, of course, ex-

Where two persons were indicted for murder, A. in the first count being indicted as principal in the first degree, and B. present aiding and abetting, and in the second count B. was indicted as principal in the first degree, and A. with being present aiding and abetting; and the jury found them guilty, but said they were not satisfied as to which of them actually committed the murder: the judges (*Maule, J., dis.*) held that the jury were not bound to find the defendants guilty on one of the counts only, but might find them guilty on both.(a)

#### 7. *Indictment, how preferred and found.*

Bills of indictment in ordinary cases are prepared in the indictment office at the assizes or sessions, by the proper \*officer [\*98] there; they must be on parchment, and at quarter sessions are usually filled up on blank printed forms. But where the indictment is required to be special, or in any manner different from the common forms, or where any doubt or difficulty occurs as to the manner in which the indictment should be framed, it will be prudent to have it drawn, or at least settled by a barrister: and at the assizes, and at most quarter sessions, the fee paid in this respect is allowed to the prosecutor in costs. When drawn by a barrister, it must afterwards be engrossed on parchment, which is sometimes done by the prosecutor's attorney, but usually in the indictment office.[1]

(a) *R. v. Downing et al.*, 1 Den. C. C. 52.

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tend to him. 1 Stra. 193; 12 Mod. 262; 2 Salk. 593; Com. Dig. Information, D. 7; 13 East, 412. See *Penna. v. Hurton*, Addis. 334; *State v. O'Donald*, 1 McCord, 532; *State v. Allison*, 3 Yerger, 428; 1 Russell, 267; *People v. Howell*, 4 John. 296; *Turpin v. State*, 4 Blackf. 72; *Commonwealth v. Mansen*, 2 Ash. 31.

And if several be concerned in executing a treasonable or seditious design, it is best to include them in one proceeding, that the evidence for the crown may not be disjointed. Kel. 9. On the other hand, an indictment may be defective for including too many; as for indicting a woman for the murder of her illegitimate child, and another person being present aiding and abetting; if the only evidence of guilt be the concealment, both the prisoners might be acquitted. 1 East P. C. 229. As each individual is, in all cases, responsible only for his own criminal actions or omissions, the result whether the defendant be indicted alone or with others will be similar, and no inconvenience can arise to the defendants from being jointly indicted: for if, on the trial, the evidence affects them differently, the judge, in his discretion, will select such parts of it as are applicable to each, and leave their cases separately to the jury, in order that each individual may have an impartial trial, unprejudiced by the case of his associates. 3 T. R. 106; 8 East, 46. If two be improperly found guilty separately on a joint indictment, the objection may be cured by producing or entering a *nolle prosequi* as to the one of them who stands second on the verdict. Russ. & Ry. C. C. 344.

[1] In most cases, the district attorney, on being furnished with the particulars of the offence by the prosecutor, will draw the indictment. But in cases where more than ordinary care may be requisite in framing the indictment, it may be drawn by any other counsel. Arch. Cr. Pl. 63. The names of the witnesses intended to be examined before the grand jury should be indorsed on the indictment. *Id. ib*; Russ. & Ry. C. C. 401.

The names of the witnesses intended to be examined before the grand jury, are then indorsed upon the bill, and the words "*sworn in court*" added after them.[2]

The witnesses whose names are thus indorsed upon the bill, come into court; and the bill being given to the crier or other officer appointed for the purpose, he swears the witnesses, and the bill is then sent before the grand jury. The witnesses must be sworn in open court, and during the time the court is sitting.[3]

The indictment is next taken by the district attorney to the grand jury, and preferred before them. But two indictments for the same offence, one for a felony under a statute, and another for a misdemeanor at common law, ought not to be preferred or found at the same time. 1 Leach, 538.

It is said to be essential to the validity of an indictment, that it should be submitted to the grand jury by the prosecuting officer of the state. *Hile v. State*, 9 Yerger, 198; *Fort v. State*, 3 Haywood, 98. And it has also been said that his signature is necessary before such submission, though the point has been doubted. Whart. Cr. Law, p. 122.

[2] The examining magistrate has power, at common law, to bind over the witnesses as well as the defendant, to appear at the next court, and in default of bail, to commit them. 2 Hale, P. C. 52, 282. Where there has been a previous examination and binding over, it is customary, immediately at the opening of the court, to call their names; and in case of non-appearance, to secure their attendance by process. The presence of witnesses not under recognizance to attend, is obtained by the ordinary means of a subpoena. 2 N. Y. Rev. Stat. 729, s. 63, 64.

It is the practice for the prosecuting attorney to mark on the back of each bill the names of the witnesses belonging to it; though it has been held that the omission is not fatal. 4 M. & S. 208. In Mississippi, it is not necessary that the grand jury should return with the indictment the names of the witnesses examined or the evidence. *King v. State*, 5 How. Miss. Rep. 730. In Massachusetts, where the prisoner's counsel requested that a list of the witnesses before the grand jury should be given, the court granted the application without doubt, remarking that such a request had never been refused. *Com. v. Knapp*, 9 Pick. Rep. 498.

If a witness neglect to obey a subpoena, on an affidavit that he was material to the prosecutor's case, and was duly served with the subpoena, the court will grant an attachment against him. 8 Term Rep. 545; 6 ib. 295. If he neglect to appear after a recognizance entered into by him, the recognizance will be forfeited, and he will be subject to the consequences of such forfeiture. So if he be bound over to appear, and neglect to do so, he may be committed for a contempt. So if he appears, but refuses to be sworn, he may be committed for a contempt. But though, in general, all must obey a subpoena, it has been held that it is not incumbent on an attorney to deliver up papers confidentially entrusted to him by his client, on a subpoena duces tecum; though he ought to attend, and when called, object to their production. 3 Burr, 1687; 9 East, 485, 486.

[3] In Connecticut, witnesses before a grand jury, are sworn by a magistrate in the grand jury room, and not in court. *State v. Fassett*, 16 Conn. Rep. 457. In the United States Circuit Court for the Eastern District of Pennsylvania, it was formerly the practice to summon a justice of the peace as one of the grand jury, and to permit him to swear the witnesses in the jury room, (7 Smith's Laws, 686;) but now, the witnesses are sworn in court by the clerk. In Massachusetts, New York, and Pennsylvania, express authority is given by statute to the foreman, to swear witnesses whose names are given to him for the prosecution. Stat. of Mass. of 1807, ch. 140; N. Y. Rev. Stat., part 2, tit. 4, ch. 2, sec. 29; Penn. act of April 5, 1826.

Unless the witnesses are regularly sworn, the bill founded on their unsupported evidence will be quashed. In *U. S. v. Coolidge*, (2 Gallison, 384,) a bill was quashed by the court,

The witnesses are then called in before the grand jury and examined by them.[4]

which remarked that if such irregularities were allowed to creep into the practice of grand juries, the great object of their institution would be destroyed. And in North Carolina, in *State v. Comm*, (1 Hawk's Rep. 352,) it was held, that where a bill was found on the information of one of their own body, it was necessary that the prosecuting juror should be regularly sworn.

[4] The grand jury, in general, hear evidence only in support of the charge, and not in exculpation of the defendant; and it has been said that they ought never to hear any other than that which is produced for the crown. 2 Hale, 157; 4 Bla. Com. 303; Hawk. b. 2, c. 25, 145, in notes. As to the duty of a grand juror, see Gisb. Duties of Man, vol. ii. 419, 420. But it may be doubted whether, as they are sworn to present the truth which necessarily requires investigation, in case they may not be able to elicit truth from the witnesses for the prosecution, and are actually convinced of that circumstance, they may not require other testimony to assist them in forming their decision. Dick. Sess. 116, and see Jac. Dic. Indictment; Gisb. Duties of Man, vol. ii. 419, 420. The true intention seems to be, that *prima facie* the grand jury have no concern with any testimony but that which is regularly offered to them with the bill of indictment, on the back of which the names of the witnesses are inserted; their duty being merely to inquire whether there be sufficient ground for putting the accused party on his trial, before another jury of a different description. But if they are unable to satisfy themselves of the truth sufficiently to warrant their determination, they may properly seek other information relative to mere facts, but further than this they cannot proceed. Dick. J. Indictment, IV.; Dick. Sess. 117; Burn. J. Indictment, V. Formerly, indeed, it was laid down that the grand jury ought to find the bill if probable evidence can be adduced to support it, because it is only an accusation, and the prisoner will afterwards defend himself before a more public tribunal. 2 Hale, 157. But great authorities have taken a more merciful view of the subject, and considering the ignominy, the dangers of perjury, the anxiety of delay, and the misery of a prison, have argued that the grand inquest ought, as far as the evidence before them goes, to be convinced of the guilt of the defendant. Per Sir John Hawles, 4 St. Tr. 183; 3 St. Tr. 416; 5 St. Tr. 3; 4 Bla. Com. 303; 2 Woodes. 559; 2 Hale, 61. What was, therefore, anciently said respecting petit treason, (3 Inst. 25; and see Gisb. Duties of man, vol. ii. 419, 420,) may be applied to all other offences, that since it is preferred in the absence of the prisoner, it ought to be supported by substantial testimonies.

Judge Wilson, in examining the position that a *prima facie* case is all that is necessary for a grand juror's purpose, remarks: "It is a doctrine which may be applied to countenance and promote the vilest and most oppressive purposes. It may be used in pernicious rotation, as a snare in which the innocent may be entrapped, as a screen under cover of which the guilty may escape." Wilson's Works, ii. 365. Mr. Smith, editor of the Laws of Pennsylvania, (Smith's Laws, vol. 7, p. 687;) Mr. Daniel Davis, for many years solicitor-general of Massachusetts, (Davis' Precedents, 25;) and professor J. Davis, of Virginia, (Davis' Cr. Law, 426,) coincide in opinion with Judge Wilson. On the other hand, in *Resp. v. Schorffer*, (1 Dallas' Rep. 237,) M'Kean, C. J., in charging a grand jury in Pennsylvania, remarked: "The bills or presentments found by a grand jury amount to nothing more than an official accusation, in order to put the party accused upon his trial: till the bill is returned, there is, therefore, no charge from which he can be required to exculpate himself; and we know that many persons, against whom bills were returned, have been afterwards acquitted by a verdict of their country. Here, then, is the just line of discrimination. It is the duty of the grand jury to inquire into the nature and probable grounds of the charge; but it is the exclusive province of the petty jury, to hear and determine, with the assistance, and under the direction of the court, upon points of law, whether the defendant is or is not guilty, on the whole evidence, for and against him. You will, therefore, readily perceive, that if you examine the witnesses on both sides, you do not confine your consideration to the probable grounds



Sometimes a difficulty occurs before the grand jury, where the witness is not able to identify the prisoner by name, as the person who

of charge, but engage completely in the trial of the cause; and your return must consequently be tantamount to a verdict of acquittal or condemnation. But this would involve us in another difficulty; for, by the law, it is declared that no man shall be twice put in jeopardy for the same offence; and yet it is certain that the inquiry, now proposed by the grand jury, would necessarily introduce the oppression of a double trial. Nor is it merely upon maxims of law, but, I think, likewise upon principles of humanity, that this innovation should be opposed. Considering the bill as an accusation grounded entirely on the testimony in support of the prosecution, the petit jury receive no bias from the sanction which the endorsement of the grand jury has conferred upon it. But, on the other hand, would it not, in some degree prejudice the most upright mind against the defendant, that on a full hearing of his defence, another tribunal had pronounced it insufficient? which would then be the natural inference from every true bill. Upon the whole, the court is of opinion that it would be improper and illegal to examine the witnesses on behalf of the defendant, while the charge against him lies before the grand jury."

We are strongly of the opinion that a grand jury should use their discretion with great caution, and only indict upon the most ample and satisfactory testimony. It is unnecessary to comment upon the evil consequences that would flow from a different cause. Judge Blackstone, in speaking on the subject of finding of an indictment by a grand jury, says it is only in the nature of an accusation which is only to be tried and determined and the grand jury are only to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer it. But the same learned judge, in a subsequent sentence appears to qualify the preceding one, by saying that a grand jury however ought to be thoroughly persuaded of the truth of an indictment so far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine that might be applied to very oppressive purposes. 4 Black. Com. 303; 4 State Trials, 183.

The learned editor of Hale's History observes upon this subject, that Sir John Hawles, in his remarks on the case of the Earl of Shaftesbury, (4 St. Tr. p. 183,) unanswerably shows that the grand jury ought to have the same persuasion of the truth of the indictment, as a petty jury or a coroner's inquest; for they are sworn to present the truth, and nothing but the truth.

And Lord Coke in speaking on the same subject, says: that seeing indictments are the foundation of all, and are commonly found in the absence of the party accused, it is necessary there should be substantial proof. 3 Inst. 23.

Let the grand jury test the truth of the testimony as follows:

1. By a cross examination, in which if the prosecutor contradict himself on any material point, then by a rule of evidence this contradiction in his testimony, if it should not be sufficient to do away the force of it altogether, at least ought to create such doubts in the minds of the grand jury as to authorize them to dismiss the complaint.

2. By the examination of other witnesses who were present at the time of the commission of the alleged offence, and who might confirm or totally invalidate the testimony of the prosecutor.

3. By the examination of witnesses in order to ascertain the character of the prosecutor and of the defendant. Of the former, for varacity and truth, and of the latter for integrity and a peaceable demeanor.

Let us suppose the character of the prosecutor, somewhat doubtful as to truth and veracity.

Let us also suppose the charge brought against the defendant to be either of an ignominious or violent nature, and that it should turn out in evidence before the grand jury, that he was a man of integrity and of a peaceable demeanor; ought not a grand jury to require more than ordinary testimony to indict such a man; ought not his character for integrity and peaceable demeanor to have great effect in the minds of a grand jury in shielding him from such a prosecution, and will his acquittal by a jury always be a sufficient consolation

committed the offence. In a case of this kind, where five men were indicted for a rape and robbery, and the prosecutrix, although she could identify the prisoners upon seeing them did not know their names, —the grand jury feeling a difficulty from want of evidence of identity came into court and stated the matter to the judge: the judge (Tindal, C. J.,) told them, that they might call some other witness on the back of the bill, who was present when the prisoners were before the magistrates, and upon the prosecutrix describing the prisoners, that witness would probably be able to state their names; but if the prisoners, could not be identified in that mode, they should be brought before the grand jury.<sup>(a)</sup>

If a majority of the grand jury (amounting to twelve at the least) be of opinion that the evidence adduced before them, makes out a sufficient case against the prisoner, to warrant his being put upon his trial

(a) *R. v. Jenkins et al.*, 1 Car. & K. 536.

to an honest man who has undergone the pain and mortification of a trial in a court of justice.

With respect to the *kind* of evidence which a grand jury may receive, it should be observed, that they are bound to take the best legal proof of which the case admits, and it must be given on oath (Hawk. b. 2, c. 25, s. 138. If witnesses go before the grand jury without being sworn, and the bill is found, and the prisoner is tried and convicted, it is proper to recommend him for a free pardon, (Russ. & Ry. C. C. 401;) and, therefore, the jury cannot, on suspicion that a witness has been tampered with by the prisoner, receive in evidence his written examination in lieu of his parol testimony, and the court will resist an application for the depositions. 1 Leach, 514; Hawk. b. 2, c. 25, s. 138, 139. And, upon the same ground, on an indictment for perjury in an affidavit made in chancery, they should have the original document, and a mere office copy will not suffice; (1 Sch. & Lef. 232; 3 Camp. 401. As to what sufficient proof of the defendant's having been duly sworn, see 2 Burr. 1189; 3 Campb. 608,) so evidence of what third persons said will not be good, in order to support a bill before the grand inquest. 6 T. R. 294; Hawk. b. 2, c. 25, s. 139. But an accomplice may give evidence before them to support a bill of indictment against the partaker of his guilt; and a bill so found will be sufficient, even though he had not been previously admitted as king's evidence, but had been taken from prison to give evidence by means of an order altogether surreptitious and illegal. 1 Leach, 155. But the grand jury ought not to find an indictment upon the testimony of incompetent witnesses as of those who have been convicted of conspiracy, or other infamous crime; and, therefore, if in case a bill be presented to them, with such witnesses alone indorsed, on application to the court they will be directed to reject it. Hawk. b. 2, c. 25, s. 145, in notes. It may, however, be proper to observe, that the prosecutor, however injured by the crime alleged to have been committed, is, in general, a competent witness, except in a case of forgery, because the finding of the jury cannot be given in evidence in his favor upon the trial of a civil action, and the proceedings are regarded as for the public benefit, and not the gratification of private feelings, or the recovery of private property. Hawk. b. 2, c. 25, s. 145, in notes; 4 East, 582. And even in the excepted case of forgery, the party whom the fictitious instrument is intended to defraud, may be rendered competent by a release. 1 Leach, 150, 157; 2 East, P. C. 1003. If the jury have any doubt with respect to the propriety of admitting any part of the evidence offered to them, they may pray the advice of the court which is sitting. Hawk. b. 2, c. 25, s. 145, in notes; Dalt. J. c. 185, s. 9; 3 Harg. St. Trials, 417; 4 Bla. Com. 303, n. 1; 2 Hale, 159, 160.

before the petty jury, the foreman indorses on the bill "*a true bill*," and signs his name to it, "J. N., foreman." But if a majority of the grand jury be of a different opinion, then the words "*not a true bill*" are indorsed.[5] And here it may be necessary to remark, that it is not the

[5] After the grand jury have heard the evidence, they are to decide whether the bill shall be found or rejected. In the finding, twelve of the jurymen, at least, must concur, but if the rest of the jury dissent, the finding will still be valid. 2 Hale, 161; 4 Bla. Com. 306. Bac. Abr. Juries, A. The jury cannot find one part of the same charge to be true, and another false, but they must either maintain or reject the whole; and therefore, if they indorse a bill of indictment for murder, "*billa vera sa defendendo*," or *billa vera* for manslaughter and not for murder, the whole will be invalid, and may be quashed on motion. 2 Rol. Rep. 52; 3 Bulst. 206; 1 Rol. Rep. 407, 8; 1 Sid. 230; Cowp. 325; 2 Hale, 158; Hawk. b. 2, c. 25, s. 2; Com. Dig. Indictment, A.; Bac. Ab. Indictment, D. Cro. C. C. 32; Burn, J. Indictment, VII.; but in 3 Burn, J. 24th edit. 44, a case is cited where it is said the jury may find a true bill for manslaughter only on an indictment for murder. It has indeed been said, that if a grand jury find a bill for manslaughter on an indictment for murder, the words "of malice aforethought," and "did murder," may be struck out, and the indictment amended by reducing it to a mere accusation of the inferior offence in the presence of the jury. 2 Hale 162.; Bac. Abr. Indictment, D. This, however, seems questionable, and it is agreed, that it is the safer course to prefer a fresh indictment for manslaughter; and so where the bill is originally for burglary, to prefer an indictment for theft, which is, in substance, included. 2 Hale, 162; Bac. Abr. Indictment, D. This rule, however, does not extend to the finding of different counts; for, as each count contains a distinct charge, the jury may return a true bill upon one of them only, and the finding will be as valid as if no other had ever been inserted. 1 Cowp. 325; Hawk. b. 2, c. 25, s. 2; Com. Dig. Indictment, A. in notes; Bac. Abr. Indictment, D.; Cro. C. C. 32; Burn, J. Indictment, VII. and Jurors VI. And an indictment against several may be found against one or more, and rejected as to the rest. It is said indeed, that in case of an indictment for murder being presented, though it appears to the jury that the facts amount only to manslaughter or justifiable homicide, yet if the fact of the killing by the defendant be established, they ought to find the bill for murder, in order to ensure the future security of the defendant; for, if they throw out the bill, he may, at any distance of time, be again indicted, which can never take place after an open acquittal. 2 Hale, 158; Bac. Ab. Indictment, D. It is a rule, that the finding of the jury must be absolute and conditional; and therefore a finding "*si domus non fuit in possessione dominæ reginæ tunc billa vera*," is of no avail, and cannot be made the foundation of any further proceedings. Yelv. 15; Hawk. b. 2, c. 35, s. 2; Com. Dig. Indictment, A.; Bac. Abr. Indictment, D. So, if in case of libel, they find "*billa vera*," as to the words "*sed utrum maliciose ignoramus*," for nothing can be done upon such a presentment. 2 Leon. 287; Hawk. b. 2, c. 25, s. 2: Com. Dig. Indictment, A.; Bac. Abr. Indictment, D.

During the whole of their proceedings, the grand jury are protected in the discharge of their duty, and no action or prosecution can be supported against them in consequence of their finding, however, it may be dictated by malice, or destitute of probable foundation. Hawk. b. 1, c. 72, s. 5; 2 Hale, 162; 1 T. R. 513, 14, 535; 1 Lord Raym. 469.

When the grand jury are in session, they are completely under the control of the court, and the court may, at any time, re-commit an imperfect finding to them, or may poll them, or take any other method on the suggestion of a defendant, of determining whether twelve assented to the bill. *State v. Squire*, 2 New Hamp. Rep. 558; *Lewis' case*, 4 Greenl. Rep. 448.

The mode in which the grand jury formerly returned the result of their inquiries to the court, was, by indorsing on the back of the bill, if thrown out, "*ignoramus*," or "we know nothing of it," intimating, that though the accusation might possibly be true, no facts had appeared in evidence to warrant that conclusion; and if found "*billa vera*," or, if there were several returned at the same time, *quod separales presentes sunt billæ veræ*." Com. Dig. In-

duty, or within the province of a grand jury, to go so minutely into the case, as to satisfy themselves of the guilt or innocence of the prisoner,—or in other words, to try the case; their duty is confined simply to ascertaining whether there is sufficient evidence against him, to warrant his being put upon his trial; \*it is for the pet- [\*99] ty jury afterwards to declare upon his guilt or innocence. The grand jury, having found one or more bills, come into court, and hand them to the clerk of arraigns at the assizes, or the clerk of the peace at sessions, who thereupon addresses them thus: "*Gentlemen of the grand jury, you are content that the court shall amend all matters of form, altering no matter of substance:—Against A. B., for [felony or a misdemeanor] you find a true bill;—against C. D., for,*" &c. The indictments are then filed by the officer, in the order in which he has thus received and called them over; but in what order they are to be afterwards tried, will depend upon the directions of the judge or the practice of the court.[1]

dictment, A. And it was holden, that if the indorsement was "*quæ est billa vera,*" instead of "*quod est,*" the finding was defective. 8 Mod. 296; Com. Dig. Indictment, A. But, at the present day, the indorsement is in English absolutely; if found, "a true bill," and if rejected, "not a true bill," or, which is the better way, "not found;" in which case the party is discharged without further answer. 4 Bla. Com. 305. The indorsement "a true bill," made upon the bill, becomes part of the indictment, and renders it a complete accusation against the prisoner. Yelv. 89; Com. Dig. Indictment, A.

An indictment, without such endorsement signed by the foreman, is a nullity. *Nomaque v. People*, 1 Breese R. 119; *Webster's case*, 5 Greenl. 432; see *State v. Creighton*, 1 Nott & M'Cord, 256. The words "a true bill" must be indorsed on every bill so found; but there is no law (in Kentucky) requiring that they shall be signed by the foreman of the grand jury either with or without a designation of his character as foreman. The omission of the foreman to add "foreman" to his name in signing the indorsement upon a true bill, (which he had signed at the foot with that addition) is no ground for a quashal. *Commonwealth v. Walters*, 6 Dana, 290.

It has been held that if after the indictment is found, it is altered by the prosecuting attorney and submitted, thus changed to the grand jury who again return "true bill" thereon, such informality will not destroy the indictment. *State v. Allen*, Charlton's Geo. Rep. 518. It is better, however, in such case, for a new and more regular bill to be framed and sent to the grand jury for their finding.

[1] When the jury have made these endorsements on the bills, they bring them publicly into court, and the clerk of the court calls all the jurymen by name, who severally answer to signify that they are present; and then the clerk of the peace, or assize, asks the jury whether they have agreed upon any bills, and bids them present them to the court, (4 Bla. Com. 366; Cro. C. C. 7; see form, Cro. C. C. 7;) and then the foreman of the jury hands the indictments to the clerk, who asks them if they agree the court shall amend matter of form, altering no matter of substance to which they signify their assent. Cro. C. C. 7; Dick. Seas. 158; see form, Cro. C. C. 7; Dick. Seas. 158, last vol. London edit. This form is necessary, in order to enable the court to alter any clerical mistake, because they have no authority to change the form of the accusation, without the consent of the accusers. R. T. H. 203; 2 Stra. 1026; 1 Ch. C. L. 324. The finding should then be recorded by the clerk, and an omission in that respect cannot be supplied by the endorsement of the foreman, nor by the recital in the record, that the defendant stands indicted, nor by his arraignment, nor by his plea of not guilty. It cannot be intended that he was indicted; it must be shown

Where the bill is against two or more defendants, the grand jury may find a "a true bill" as to one or more, and "not a true bill" as to the others. So, where the bill contains two counts, the grand jury may find "a true bill" as to one count, and "not a true bill" as to the other. (a) They cannot however find a true bill as to part of a count, and ignore the rest of it. (b) It is laid down indeed in the old text books, that where a bill for murder is preferred to a grand jury at the assizes, they may find it a true bill for manslaughter. But this is not done in modern practice; if a grand jury now intimate to the court their wish to find a true bill for manslaughter only, the judge will order the bill to be altered, so as to make it a bill for manslaughter, and will direct it to be again laid before the grand jury. If the jury ignore a bill, no other bill against the same party for the same offence, can be preferred during the same assizes or sessions. (c)

(a) *In what cases defendant to have a copy.*

In all cases of prosecutions for misdemeanors, instituted by the attorney or solicitor general, the court shall, if required, order a copy of the information or indictment, free of expense, to be given to the party,

(a) *R. v. Fieldhouse*, Cowp. 325.

(c) *R. v. Humphreys*, Car. & M. 601.

(b) 2 Hawk. c. 25, s. 2.

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by the record of the finding. The recording of the finding of the grand jury, it is said, is as essential as the recording of the verdict of the petit jury. *Com. v. Cawood*, 2 Virg. Cases, 527. At common law, a member of the grand jury was incompetent to testify as to what had been the evidence of witnesses examined before them. But now, it seems a witness may be indicted for perjury on account of false testimony before a grand jury, and grand jurors are competent witnesses to prove the facts. *State v. Fassit*, 16 Conn. Rep. 457; *Thomas v. Com.* 2 Robinson, 795; *Crocker v. State*, Meig's Rep. 127. In New York, members of the grand jury may be required by any court, to testify whether the testimony of a witness examined before such jury, is consistent with or different from, the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person, upon a complaint against such person for perjury, or upon his trial for such offence; but in no case can a member of a grand jury be obliged or allowed to testify or declare, in what manner he or any other member of the jury voted on any question before them, or what opinions were expressed by any juror in relation to any such question. N. Y. Rev. Stat. pt. 4, ch. 2, tit. 4, art. 2, sec. 31. But in New Jersey, it has been held that a grand juror is not admissible to prove that a witness who had been examined, swore differently in the grand jury room. *Imlay v. Harris*, 2 Halst. 347.

In Massachusetts, it is provided by statute, "that no grand juror or officer of a court shall disclose the fact that an indictment for a felony, has been found against any person, not in custody or under recognizance, until such person is arrested; and that no grand juror shall be allowed to state, or to testify in any court, in what manner he, or any other member of the jury voted on any question before them, or what opinion was expressed by any juror in relation to such question." Rev. Stat. of Mass. ch. 136, secs. 13, 14.

Generally speaking, an affidavit of a grand juror will not be received to impeach or affect the finding of his fellows. But where a grand juror was guilty of gross intoxication while in discharge of his duty as such, the court, on a presentment of such fact, by the rest of the grand jury, ordered a bill to be preferred against him. *Penn. v. Keffer*, Addison Rep. 290.

after appearance.(a) And in prosecutions for high treason, a copy of his indictment shall be delivered to him ten days before his trial.(b) But in no other case is the defendant entitled to it. The court, indeed, at the time of his arraignment, will order the indictment to be read over slowly to him; but no more. If however a prisoner be defended, this will be of little importance, as his counsel will have free access to the indictment. As to the defendant's right to have a copy of the depositions taken before the committing magistrate;(c)[2]

### 8. *Indictment, in what cases amendable.*

An indictment could not be amended at common law; nor was it within any of the old statutes of amendments.(d) \*But [\*100] now, by some modern and recent statutes an indictment may be amended, for the defects I am now about to enumerate.[1]

(a) 1 G. 4, c. 4, s. 8.

(b) 7 Ann. c. 21, s. 11.

(c) See *ante*, p. 51.

(d) 2 Hawk. c. 25, ss. 97, 98.

[2] At common law the defendant was not, in cases of treason or felony, entitled to a copy of the indictment. 1 Lev. 68; 2 Hale, 236; 4 T. R. 692; 2 Hawk. ch. 29, § 13. Although a defendant acquitted of felony could not bring an action against the prosecutor of the indictment without obtaining a copy of the record of the indictment and acquittal, yet he could not have a copy without leave of the judge; and the judge would not grant it if there was a probable cause for the indictment. Matt. Dig. 282. Thus trying the whole question of the guilt or innocence of the party indicted, upon a motion for a copy of the indictment!

The revised statutes have done away with this unreasonable and harsh rule. Every person indicted for any offence, who shall have been arrested upon process issued upon such indictment, or who shall have duly entered into recognizance to appear and answer to such indictment, shall, on demand, and on paying the fees allowed by law therefor, be entitled to a copy of the indictment and of all indorsements thereon. 2 R. S. 728, § 53.

[1] At common law as the indictment is the finding of a jury upon oath, it cannot be amended without the concurrence of the grand inquest by whom it is presented. And it is the common practice for the grand jury to consent, at the time they are sworn, that the court shall amend matters of form, altering no matter of substance. Mere informalities may therefore be amended by the court, before the commencement of the trial; though it was formerly the practice to award process to the grand jury to come into court and amend them.

But though the caption like the indictment itself, may, if defective, be either quashed by the court or demurred to on the part of the defendant, it differs materially from it in its capacity of amendment, for the return to the court is merely a ministerial act, and ministerial acts may be amended at any time according to the common law. 1 Saund. 249, 250, a; 3 Mod. 167; Comb. 70, 73. It has, indeed, been frequently holden, that a mistake of the clerk in making up the record can be amended only in the term in which the return is made, and not at any subsequent period; (Sir W. Jones, 420; 1 Roll. Ab. 196; Style, 85; 8 Co. 156, 157; Bro. Ab. Amendment, 32; 2 Sess. Cas. 9; 1 Sid. 155, 175; 2 Hale, 168; 2 Ld. Raym. 968, 1039; 6 Mod. 273, 278; 1 Vent. 344; Hawk. b. 2, c. 25, s. 97; Bac. Abr. Indictment, G. 11,) but the contrary has also been often determined, (3 Mod. 167; Comb. 73, Cro. Jac. 592, 276, 7; 1 Stra. 138; 2 Ld. Raym. 1518; 4 Burr. 2527; 1 Sid. 244; 2 Bulstr. 35; 2 Stra. 843; 4 Bla. Com. 407; 2 Roll. Rep. 59,) and is so settled after considerable investigation, upon the ground that ministerial acts are at any time amendable, and that

*(a) For variance as to written instruments.*

By stat. 9 G. 4, c. 15, any court of oyer and terminer and general jail delivery, if such court shall see fit so to do, may cause the record on which any trial may be pending before any such court, in any indictment or information for any misdemeanor, [or for any offence whatever,] (a) when any variance shall appear between any matter in writting or in print produced in evidence and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular, by some officer of the court, on payment of such costs (if any) to the other party as such court shall think reasonable; and thereupon the trial shall proceed, as if no such variance had appeared. These two statutes expressly confined this power of amendment to courts of oyer and terminer and general jail delivery. They did not therefore extend to courts of quarter sessions; for although

(a) 11 & 12 Vict. c. 46, s. 4.

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the alteration in the caption is not to alter the return, but to make the copy correspond with the original. 1 Saund. 249, n. 1; 4 East, 175; 3 Mod. 167. And agreeably to this resolution the return to the writ of certiorari has been amended by rule of court, by inserting the time when the quarter sessions were holden, and the names of the justices who were present, and the names of the jurors by whom the indictment was presented, though the latter is now unnecessary; and the entry-roll and record of Nisi Prius have been altered to make them agree with the amended caption after the term in which the certiorari was returned, and even after a general verdict of guilty. 4 East, 175, 6; 3 Mod. 167. But it has been said, that the caption of an inquisition cannot be amended at any time after it is filed, any more than the body, because it is drawn at the time with the indictment itself, and forms a part of the accusation, while in other cases it is merely made up from the schedule by the clerk of the court, as its ministerial officer. Hawk. b. 2, c. 25, s. 97; but see Stark. 261.

Criminal informations which are not found upon the oath of a jury, may be amended by the court, and even by a single judge at chambers, at any time before trial. 4 Burr. 2527, 2568, 2569. And a mere clerical error in the caption, and not the body of the information, may be rectified even after verdict. 3 Mod. 167. The reason assigned for this difference is that informations are originally framed by the prosecuting officer, while indictments are the accusations of a number of men sworn to inquire and decide according to evidence.

This reason seems decidedly to establish the position, that no indictment is amendable by the court without leave of those by whom it is found; but it has been said, that whenever amendments are made by the common law, there is no distinction between criminal and civil cases; (1 Saund. 250, d. note 1,) and a distinction has been suggested between felonies and misdemeanors, and that an amendment is allowable in the latter, though not in the former. Stark. 252, 3, 4, 5. But it is manifest that every description of indictment is alike the finding of a grand jury, and the reason being similar, the conclusion cannot vary. It must indeed be granted, that instances are to be found where the court have taken upon themselves to amend; (11 Hen. 6 f. 2, and f. 14; 2 Bulst. 35; 6 Mod. 285. See also cases, 1 Saund. 250, d. c. note 1,) but these cases prove nothing in favor of the distinction, as they are for capital felonies; and, therefore, if they show anything, they prove that criminal proceedings may, in any case be amended, which can never be contended at the present day. Upon principle, therefore, as well as the current of authorities, it seems, that no indictment can be amended without the consent of the jury, who act as accusers.

justices of the peace by their commission have a power to hear and determine, the court of quarter sessions is not in law a court of oyer and terminer. But this was remedied, and the above statutes extended to the court of quarter sessions, by stat. 12 & 13 Vict. c. 45, s. 10.

*(b) For variance in other respects.*

By stat. 14 & 15 Vict. c. 100, s. 1, whenever on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof,—in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment,—or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein,—or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence,—or in the christian name or surname, or both christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described,—or in the name or description of any matter or thing whatsoever therein named or described,—or in the ownership of any property named or described therein,—it shall and may be lawful for the court, before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on \*such [\*101] merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs, and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment, the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at nisi prius, the order for the amendment shall be endorsed on the postea, and returned together with the record, and thereupon such papers, rolls, or other records of the court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer; and in all other cases, the order for the amendment shall either be endorsed on the indictment, or shall be engrossed on parchment, and filed together with the indictment, among the records of the court: provided that in all such cases where



the trial shall be so postponed as aforesaid, it shall be lawful for such court to respite the recognizances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as if they were originally bound by their recognizances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed: provided also, that where any such trial shall be to be had before another jury, the crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn.[1]

[1] In New York it is provided by statute, that no indictment shall be deemed invalid, nor shall the trial, judgment, or proceedings therein be affected: 1st. By reason of having omitted the addition of the defendant's title, occupation estate or degree; or by reason of the mis-statement of such matter, or of the town or county of his residence, when the defendant shall not be misled or prejudiced by such mis-statement; or, 2d. By the omission of the words "with force and arms," or words of similar import; or 3d. By reason of omitting to charge any offence to have been committed contrary to a statute or several statutes, notwithstanding such offence may have been created or the punishment thereof may have been declared, by any statute; or 4th. By reason of any other defect or imperfection in matter of form, which shall not tend to the prejudice of the defendant. 2 N. Y. Rev. Sta. p. 728, sec. 52.

There are statutes similar to the foregoing, in Massachusetts, Michigan, and Wisconsin. Rev. Stat. of Mass. ch. 137, sec. 14; Rev. Stat. of Mich. ch. 164, sec. 34; Rev. Stat. of Wis., ch. 148, sec. 15. In Virginia the statute (Rev. Code of Virginia of 1849, p. 770,) provides: "No indictment or other accusation shall be quashed or deemed invalid for omitting to set forth, that it is upon the oaths of the jurors, or upon their oaths and affirmation; or for the insertion of the words "*upon their oath*," instead of "*upon their oaths*," or for not in terms alleging, that the offence was committed "*within the jurisdiction of the court*," when the averments show that the case is one of which the court has jurisdiction; or for the omission or mis-statement of the title, occupation, estate or degree of the accused, or of the name or place of his residence; or for omitting the words "*with force and arms*," or the statement of any particular kind of force and arms; or for omitting to state, or stating imperfectly the time at which the offence was committed, when time is not the essence of the offence; or for failing to allege the value of an instrument which caused death, or to allege that it was of no value; or for omitting to charge the offence to be "*against the form of the statute*," or *statutes*; or for the omission or insertion of any other words of mere form or surplusage. Nor shall it be abated for any misnomer of the accused; but the court may, in case of a misnomer appearing before or in the course of a trial, forthwith cause the indictment or accusation to be amended according to the fact.

"Judgment in any criminal case, after a verdict, shall not be arrested or reversed, upon any exception to the indictment or other accusation, if the offence be charged therein with sufficient certainty for judgment to be given thereon, according to the very right of the case."

In Mississippi the statute (Hutchinson's Miss. Code, 1005,) provides that: "No person accused of any criminal offence, shall be set at liberty before his trial, on account of any irregularity or informality in the warrant of commitment; nor after conviction, on account

And by sect. 2, every verdict and judgment which shall be given after the making of any amendment under the provisions of this Act, shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it was after such amendment was made.

By sect. 3, if it shall become necessary at any time for any purpose whatsoever to draw up a formal record in any case where any amendment shall have been made under the provisions of this Act, such record shall be drawn up in the form in which the indictment was after such amendment was made, without taking any notice of the fact of such amendment having been made.

\*9. *Indictments, when and how quashed.*

[\*102]

In all cases where an indictment is so defective, that any judgment to be given upon it against the defendant would be erroneous, the court in its discretion may quash it.<sup>(a)</sup> This may be done on the application either of the defendant or of the the prosecutor.[1] But the court will

(a) 2 Hawk. c. 25, s. 146.

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of any legal error or imperfection in the indictment or information, but the same proceedings shall be had again, as though such person had never been arraigned; nor shall the words "force and arms" or the words "contrary to the form of the statute," be deemed necessary in any indictment or information, for treason, felony, or any other criminal offence; nor shall the party indicted have any advantage by writ of error, or plea, or otherwise, for the want of these or the like words, but such indictment or information shall be judged as effectual, to all intents and purposes, as if the same words were therein contained."

[1] When the indictment or the caption (to induce the court to quash an indictment for a defect in the caption, the defect must be of a clear and decisive character. *State v. Hickman*, 3 Halsted, 299; *Respublica v. Clever*, 4 Yeates, 69. An indictment founded on the evidence of an interested person will be quashed. *State v. Fellows*, 2 Hayw. 340; see also, *State v. Com*, 1 Hawks. 352. So where the grand jury received the testimony of a person not under oath. *United States v. Cookidge*, 2 Gall. 364) is defective, the court have a discretionary power to quash it immediately, or to oblige the defendant to plead or demur, which rests entirely with the court. 2 Burr. 1127; 1 Sid. 54, 247; 1 Salk. 372; 2 Keb. 128; Cro. Car. 584; Palm. 389; 1 Wils. 325; 2 East, 226; 2 Sess. Cas.; 1 Hawk. b. 2, c. 25, § 146; Com. Dig. Indictment, H.; Bac. Abr. Indictment, K. But though this is matter for their discretion, they are guided by certain rules, in its exercise, which we shall proceed to examine. 4 Burr. 2539. The application may be made to the court either by the prosecutor or the defendant; or, any one as *amicus curiae*, may suggest the error to the court, in order that they may exercise their discretion. Comb. 13.

When the application is made by the *prosecutor*, the court will not quash the indictment as a matter of course, unless it appear to be clearly insufficient, (Dougl. 240; Com. Dig. Indictment H;) nor even then after the defendant has pleaded, unless another good indictment has been found against him, (2 East Rep. 226; 1 Leach, 11; 6 Mod. 262;) nor where he has been put to extra expense, unless the costs are first paid him. 3 Burr. 1469; 2 Stra. 946; Com. Dig. Indictment H.; Bac. Abr. Indictment K; MSS. Mich. Term, 53 Geo. 3; Stark. 282, note h. But where the indictment is insufficient, and the defendant is not put to inconvenience, the court will quash it upon the motion of the prosecutor without the

seldom interfere, upon the application of a defendant, where the indictment is for forgery, perjury, sedition, or for a nuisance to a highway ;(a)

(a) 2 Hawk. c. 25, s. 146.

consent of the defendant, though it is for a crime, in which they never show the same indulgence upon the application of a prisoner. 2 Sess. Cass. 19; 2 East, 226-7. And if an indictment removed by certiorari is at issue, and the prosecutor procures another indictment to be found, alleging the first to be defective, the court will by consent of all parties, order the first to be quashed, and the second to be substituted in its place, and to stand in the same condition. 3 Burr. 1468; 1 Bla. Rep. 460; Com. Dig. Indictment, H; Bac. Abr. Indictment, K. And in a late case, on an indictment for perjury against the defendant, who had been prosecutrix of an indictment for a conspiracy where there was another indictment for perjury against one of the witnesses, in the prosecution for the conspiracy, the court refused to quash the indictment against the defendant, unless the prosecutor was named, and the second indictment should stand in the same situation as the first would have done. 3 B. & A. 373. But otherwise in case of removal by certiorari, the court will not quash the indictment after the forfeiture of the recognizance, by neglecting to carry down the record for trial. 1 Salk. 380; Com. Dig. Indictment, H.

When an information is filed by the *attorney-general* ex-officio, the court will quash it upon motion, if they see cause; but if it be exhibited by a private individual, they will not thus dispose of it, because the defendant is entitled to costs. 1 Sid. 152; Com. Dig. Information, D; 4 Vin. Abr. Information, E; Dougl. 240, 241; Hawk. b. 2, c. 25, § 149.

When the motion is made on the part of the *defendant*, the rules by which the court are guided are more strict, and their objections are more numerous; because, if the indictment be quashed, the recognizances will become ineffectual, (2 Sess. Cas. 1;) and the courts usually refuse to quash on the application of the defendant when the indictment is for a serious offence, unless upon the clearest and plainest ground, but will drive the party to a demurrer, or motion in arrest of judgment, or writ of error. Cald. 432, 554; Nolan, P. L. 261.

See *Lambert v. People*, 7 Cowen, 166; *People v. Eckfuit*, ib. 535; *State v. Hickey*, 4 Halst. 293; *State v. Matthews*, 3 Pike, 84; *State v. Baldwin*, 1 Dev. & Bat. 198.

It is, therefore, a general rule, that no indictments which change the higher offences, as treason or felony, (1 Salk. 372; Com. Dig. Indictment, H.; but see 4 Harg. St. Tr. 697, 698;) or those crimes which immediately affect the public at large, as perjury, forgery, extortion, conspiracies, (an indictment for a conspiracy may be quashed. *State v. Rickey*, 4 Halst. 293,) subornation, keeping disorderly houses, or offences affecting the highways, not executing legal process, will be thus summarily set aside. 1 Salk. 372; 5 Mod. 13; 2 Sess. Cas. 1, 2, 4, 8; 1 Sess. Cas. 337, 338, 339; 2 Stra. 1210; Com. Dig. Indictment, H.; Bac. Abr. Indictment, K.; Hawk. b. 2, c. 25, s. 146; Burn. J. Perjury, III.; Williams, J. Perjury, II.; 5 Mod. 13, as to extortion.

So, the court refused to quash an indictment against a number of persons for breaking and entering a lead mine, though it was defective, because there were large numbers of persons met together, and the judges was trying others in the same county for similar offences. 1 Wils. 325; Com. Dig. Indictment, H.; Bac. Abr. Indictment, K. Upon the same ground, the court will refuse to quash an indictment for a nuisance, without a certificate that it is removed, (2 Ld. Raym. 1164; Andr. 139, 220; 4 Burr. 2116; 1 Salk. 372; 1 Vent. 370; Cro. Car. 584; 1 Barnard, K. B. 45; Com. Dig. Indictment, H.; Bac. Abr. Indictment, K. ;) and the court have refused to quash an indictment against a parish for not repairing a highway, on an affidavit that the way was in repair, but the defendants were directed to plead guilty, and pay a nominal fine, (2 Chit. Rep. 216;) and the court will refuse to quash an indictment against overseers for not paying money over to their successors, for that is a growing evil, and affecting the interests of the community. 2 Stra. 1268; Com. Dig. Indictment, H.; Bac. Abr. Indictment, K.

Neither will the court, as it has been held in general, quash indictments for forcible or

nor upon the application of a prosecutor, until after a good bill for the same offence, against the same party, shall have been preferred and found.(a)

(a) See *R. v. Dunn*, 1 Car. & K. 730; *R. v. Wynn*, 2 East, 226.

fraudulent injuries, as for a forcible entry, (6 Mod. 96; Com. Dig. Indictment, H.) for a disturbance in church, (Cro. Car. 584; 1 Sid. 54; Com. Dig. Indictment, H.) or against a bankrupt for his embezzling his effects, (1 Leach, 10; 3 J. B. Moore, 656,) or for enticing away a servant, (1 Salk. 372; Com. Dig. Indictment, H.) for though some of these are private in their name, they are public in their consequences. 6 Mod. 42; 3 Burr. 1841; Com. Dig. Indictment, H.

And in an indictment for using false weights and measures, the court will not thus interfere, even where it appears the scale for goods is the lightest, and though it is not stated where the supposed offence was committed. 3 Burr. 1841; Com. Dig. Indictment, H.; Bac. Abr. Indictment, K. And as informations are rarely allowed, except for offences endangering the public welfare, it is said that the court will never quash them at the instance of the defendant. 1 Vin. Abr. Information, E.

And it is no ground to quash an indictment, that there be another pending against defendant for the same offence, unless, indeed, there be some vexation, which the court will judge of and determine; and in a case where there was a joint indictment against two for perjury, which, on the trial, the court inclined to think bad, and the trial was postponed, pending which a separate indictment against one of the parties was preferred, the court refused to quash the latter indictment, no vexation appearing. Per Abbott, J. Nov. 1816, Adolphus moved to quash the indictment.

There are some cases, however, in which the court will thus interfere on the behalf of the defendant upon a proper application, made upon affidavit of the objection, and pointing it out so that it may be cured in another indictment. Thus, where the court, in which the indictment was found, have no jurisdiction, it will be quashed; as if an indictment for perjury at common law, be presented at the quarter sessions which they have no power to determine. 1 Burr. 389; 2 Stra. 1088; Hawk. b. 2, c. 25, s. 146, n. 25; Com. Dig. Indictment, H.

PENNSYLVANIA.—In the case of the *Commonwealth v. Kosloff*, consul-general of Russia, for rape, the indictment, which had been found in the court of oyer and terminer, held by the judges of the supreme court of the state of Pennsylvania, was quashed on the ground that under the constitution and laws of the United States, the state courts have no jurisdiction "in cases affecting ministers and consuls," but that the same is in the tribunals erected under the national constitution and laws.

In this case the motion to quash the indictment was urged upon two grounds.

1. That consuls of foreign powers, are not amenable to the criminal jurisdiction of the country in which they are resident, but are under the protection of the power by whom they are appointed; and must, if an offence be committed by them, be sent home for punishment.

2. That the jurisdiction over consuls, is exclusively in the courts of the United States.

Mr. Chief Justice Tilghman, in deciding on the motion, denied the exemption claimed in favor of consuls, from punishment for crimes; this privilege being by the laws of nations, given only to public ministers; the motion prevailed on the second ground.

Mr. Peters, who was in this case of counsel for the defendant, owes it as a duty to state, that in his knowledge the charge was malicious and unfounded.

And it seems the court will quash an indictment for perjury for want of an addition to defendant's name, if the objection be properly taken by affidavit. 3 D. & R. 621.

An indictment for an assault and battery was quashed, because it did not set forth the estate, degree or mystery of the traverser. *State v. Hughes*, 2 Har. & M'Hen. 479. The proper mode in which an indictment may be quashed in such cases is by plea in abatement. *Commonwealth v. Cherry*, 2 Virginia Cas. 20; *Same v. Lewis*, 1 Motcalf, 151; *Swift v. Bowker*, 1 Mass. 76; *State v. Bishop*, 15 Maine, 122. For cases in which indictments have

An indictment may be thus quashed, as well by a court of quarter sessions,<sup>(a)</sup> as by courts of oyer and terminer and jail delivery, or by the court of Queen's Bench.

(a) *R. v. Wilson et al.*, 14 Law J. 3 m.

been quashed, see *State v. Roach*, 3 Hayw. 352, where no day was laid, on which the offence was committed. *State v. of P.*, 1 Tyler, 283, where offence appeared to be barred by limitation. *State v. Leyton*, 3 Hawks, 284, where offence was laid on day to come. In the State of New York, such addition is not essential in any case. 2 N. Y. Rev. Stat. 728.

And if from the facts stated, it appear, that no indictable offence has been committed, the indictment will be thus set aside in the first instance. Dougl. 253.

Where a presentment by a grand jury is general, without specifying any particular offence, or the names of the witnesses on whose information it is founded, the court will quash it, on motion in behalf of the defendant. *State v. Mitchell*, 1 Bay, 269.

So an indictment for exercising a trade, contrary to the custom of the city will be quashed, as it manifestly cannot be supported. And an indictment when not for any of the public offences we have already mentioned, may also be quashed for the omission of a material averment; as where an indictment for not receiving a parish apprentice did not aver the binding to be within the 43 Eliz. c. 2, (2 Stra. 1268; Com. Dig. Indictment, H.; Bac. Abr. Indictment, K.,) or before the repeal of the statute, the proceeding for maintaining a cottage without four acres of land, neglected to state that it was inhabited: (Andr. 230; Com. Dig. Indictment, H.,) or where the defendant was charged with speaking words of a magistrate, not in themselves actionable, and they were not stated to be said of him in the execution of his office. Andr. 230; Com. Dig. Indictment, H.; Bac. Abr. Indictment, K. And the same rule applies to evident misjoinder, and gross deficiency in the formal requisites. Thus where six persons were jointly and severally charged with exercising a trade without having served an apprenticeship, the indictment was quashed as altogether vicious. 1 Stra. 623; Com. Dig. Indictment, H. So where the indictment alleged it was presented, without adding "by the oath of twelve men;" (Andr. 230,) where in a caption, it was said, "that the several indictments to this schedule annexed are true bills," whereas they are only bills till they are found; (1 Salk. 376;) and where the charge is expressed merely by way of recital, (1 Sess. Cas. 3,) the proceedings may be thus disposed of.

But the court will not quash an indictment on a statute, merely because it does not conclude "against the form," &c. but leave the defendant to demur. 2 Stra. 702; Bac. Abr. Indictment, K. See *State v. Berry*, 4 Halstead, 374. And the defect, in general, must be very gross and apparent to induce the court to dismiss the indictment in this summary way, instead of leaving the party to the more usual remedies of demurring or moving in arrest of judgment; (1 Bla. Rep. 275; Dougl. 240, 241; Hawk. b. 2, c. 25, a. 146, in notis; Cro. Car. 147; Fost. 104,) where, however, a defect is shown which induces the court thus to interfere, they must quash the whole indictment, for they cannot strike out some counts, and leave others to be determined on the trial. 2 Stra. 1026; Rep. temp. Hardw. 203; Com. Dig. Indictment, H. Bac. Abr. Indictment K. If the defendant did not duly appear, or has forfeited his recognizance, his application to quash the indictment will be ineffectual; (1 Barnard, K. B. 44; 1 Salk. 380,) and although the court may, in their discretion quash the indictment at any time before the jury are charged to try the prisoner, they commonly, in order to avoid collusion, refuse to do so after he has pleaded, (1 Leach, 11, 420; 2 East, 226,) at least unless another good indictment has been found. 2 East, 226.

It is too late to sustain a motion to quash an indictment after the accused has been arraigned and pleaded not guilty. *State v. Burlingame*, 15 Maine, (3 Shepley,) 104. See *People v. Monroe*, O. T. 20 Wendell, 108.

If therefore, the prosecutor desire to quash, he must apply in an early stage of the proceeding. And by a particular provision of the legislature, (7 W. 3, c. 3,) in all cases of treason, except for counterfeiting the coin, seal, sign, or signet, no indictment shall be quashed

## SECTION II.

## APPEARANCE AND PLEA.

When the indictment has been found, if the defendant be not then in custody, or if out on bail and he have not surrendered, in pursuance of his recognizance, to take his trial, the first proceeding is to sue out process, &c., upon the indictment, in order to have him apprehended; when in custody, he is brought to the bar of the court and arraigned, and he pleads or demurs; the prosecutor then replies, if the plea be

for any formal defects, unless before evidence given which has been construed to mean before the defendant plead, (4 St. Tr. 673; And see 1 East P. C. 110; Hawk. b. 2, c. 25, s. 148,) nor can any such exception be taken in arrest of judgment. What therefore, in other cases is a rule which the discretion of the courts have adopted for their own guidance, and from which, of course, they may vary, is, in case of the higher treasons, made the subject of a positive enactment. The motion however to quash an indictment may be made on the last day of the term. 1 Burr. 651; Bac. Abr. Indictment, K.; Com. Dig. Indictment, H.

After the indictment against the defendant has been quashed, a new and more regular one may be preferred against him. He can gain, therefore, very little advantage, except delay, by such an application; and therefore usually reserves his objection until after the verdict, when, if the indictment be found to be sufficient, the court are bound *ex debito justitiæ*, to arrest the judgment. 2 Burr. 1127.

It is error to quash an indictment for matter which is not apparent in the body of it or in the caption; extrinsic matter being proper for defence only on trial by jury. An indictment will not be quashed upon the ground, that the endorsement on its back, stating that the witnesses were sworn and sent to the grand jury, is not signed by the clerk. *Bennett v. State*, 2 Yerger, 472. An unnecessary averment which renders an indictment ungrammatical, does not vitiate it, although it should be carefully avoided. *State v. Haney*, 2 Dev. & Bat. 390. Quashing an indictment as to one of several defendants, quashes it as to all. *Lambert v. People*, 7 Cowen, 666; *People v. Eckford*, 7 Cowen, 535.

In Massachusetts, it is provided by statute that no indictment shall be quashed, or otherwise affected, by reason of the omission or misstatement of the title, occupation, estate, or degree of the defendant, or of the name of the city, town, county, or place of residence; nor by reason of the omission of the words "force and arms," or the words "against the statute," &c. Rev. Stat. of Mass. ch. 138, sec. 14. There is a similar statute in New York.

If two indictments for the same offence be found in the same court, the course is to quash one before the party is put to plead on the other. If in different courts, the defendant may abate the latter, by plea that another court has cognizance of the case by a prior bill. *State v. Tisdale*, 2 Dev. & Bat. 159. It is said, however, that the finding of a bill does not confine the state to that single bill; another may be preferred, and the party put to trial on it, although the first remains undetermined. *Ibid.*

The New York revised statutes (p. 726, sec. 42, vol. 2,) provide that where two indictments are pending against a defendant for the same offence, the one first found shall be deemed to be superseded by the second, and shall be quashed. But the mere finding of a second indictment is not *per se* a supersedeas to the first. A motion to quash must be made. 20 Wend. Rep. 108. Neither has a district attorney any right to enter a *nolle prosequi* upon any indictment without leave of the court. 2 N. Y. Rev. Stat. 728, sec. 54. If he wishes to try the defendant on a second indictment, for the same offence embraced in the previous one, he must move to quash the first before he can do so. Barb. Cr. Law. p. 349.

On a prosecution for an offence which must be commenced within a given time after its commission, if the first indictment be quashed, and the second one, in order to prevent the bar of the statute of limitations, set out the proceedings under the first, they must be stated

special, or joins in demurrer, after which the case is ripe for trial or argument. I shall treat of these different proceedings under the following heads.[2]

1. *Process upon Indictment to outlawry*, p. 102.
2. *Arraignment and plea*, p. 107.
3. *Special pleas*, p. 110.
4. *Demurrer*, p. 114.

#### 1. *Process upon Indictment to outlawry.*

##### (a) *Process.*

The regular process upon an indictment, in cases of treason, felony, or mayhem, is by *capias*, *alias* and *pluries*.(a)

In cases of misdemeanor, the first process is the writ of *venire facias*; and if to that the sheriff return that the party has been summoned, then the prosecutor may have a *distringas*, *alias* and *pluries*, and so proceed by distress infinite; or if the sheriff return *nil* to the *venire*, [\*103] \*the prosecutor may have a *capias*, *alias* and *pluries*.(b)

But in practice these writs are never sued out, except for the purpose of proceeding to outlawry; but upon the indictment being found, the prosecutor, at the assizes or sessions, where the defendant is not in custody, procures a bench warrant, or the warrant of a justice of the peace, as shall presently be mentioned; or where the indictment has been found in the court of Queen's Bench, or removed into that court by *certiorari*, the prosecutor may procure a judge's warrant.(c)[1]

(a) 2 Hawk. c. 27, s. 15.

writs, Arch. Pr. Cr. Off. 43, 44.

(b) Id. s. 9, 10; see the forms of these

(c) See Arch. Pr. Cr. Off. 46, 47.

with the precision and certainty required in original criminal proceedings. *State v. English*, 2 Missouri Rep. 147.

[2] We have hitherto supposed the party accused to have found bail or to be in custody before the finding of the indictment; in which case he is, as soon as convenience admits, arraigned and put upon his trial. But if he be not taken or do not appear, process must issue, for the purpose of bringing him into court, in order to defend himself against the charge; for though a bill may be preferred and found against a person in his absence, yet this being a mere *ex parte* proceeding, to which, if present, he could make no opposition, yet in general no indictment can be tried unless he personally appear—a principle founded upon a principle of equity in all cases, that no man shall be condemned, without being brought to answer by due process of law.

[1] Process generally imports the writs which issue out of any court to bring the party to answer, or for doing execution. Comyn's Dig. tit. *Process*. It is so denominated because it *proceeds* or *issues forth* in order to bring the defendant into court to answer the charge preferred against him. The form of process in a particular case, may be prescribed by statute. In some of the states there are statutory provisions regulating the mode of process generally. The term is applicable to summonses, warrants, capiases, precepts, attachments, commitments, mittimus, executions, subpoenas and other writs, made out and issued by magistrates in criminal cases. Such a writ is regarded in law, as the process of the state, for the

(b) *Outlawry.*

Outlawry upon an indictment before judgment, lies in all cases of treason and felony, and in all cases of indictable misdemeanors in which a *capias* lies.(a) For this purpose, in misdemeanors there must be three writs of *capias*,—*capias*, *alias* and *pluries*,—before the exigent;(b) one is sufficient on an indictment for treason, murder, or manslaughter;(c) but it is doubtful whether two writs of *capias* be not necessary in other felonies;(d) and they are so, where the party is indicted at quarter sessions.(e) Besides this, in treason and felony, if the defendant reside in a different county from that in which he is indicted a writ of *capias cum proclamatione* must issue to the sheriff of the county in which he resides.(g) If *non est inventus* be returned to these writs of *capias*, then the writ of exigent and the writ of proclamations may issue; and afterwards a writ of *allocatur exigent*, if necessary.(h) And if he do not surrender, before the last of the proclamations, judgment of outlawry is signed;(i) and a writ of *capias ulagatum* may issue to apprehend the outlaw, or a special *capias ulagatum* to apprehend him and to seize all his property.(k)[2]

(a) See 2 Hawk. c. 27, s. 109.

(b) Id. s. 111.

(c) Id. s. 112.

(d) Id.

(e) 25 Ed. 3, st. 5, c. 14; *R. v. Yendall*, 4 T. R. 358.

(g) 6 H. 6, c. 1; and see Arch. Pr. Cr. Off. 48, 49.

(h) Arch. Pr. Cr. Off. 48, 50; and see the forms of these several writs, Id. 50, 51.

(i) Id. 51, 52.

(k) Id. 52; and see the forms, Id.

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purposes of justice; and it is provided in the constitutions of the states respectively, that all process shall be in the name and style of the particular state.

Wherever the state grants an authority of oyer and terminer the power to issue process is incidentally given; for as there can be no inquiry respecting offences without the presence of the party, wherever the power is entrusted of determining the former, there must also be authority to compel the latter. For the same reason, justices of the peace, whenever they are authorized to inquire, hear and determine, may thus compel the defendant to appeal; and the same observations apply of course to all magistrates.

From the very nature and object of process, it follows that there can be no necessity for it when the defendant is present in court, but only when he is absent. If therefore an indictment be found against a party already in custody, he may be brought up and charged with the indictment. But if the defendant, not being in actual custody, voluntarily appears in court, it is discretionary, and not obligatory in the court to detain him; but it may leave him to be taken by the ordinary legal process. 4 Burr. 2531.

[2] The process of outlawry, with few exceptions, is unknown in the United States. In the state of New York, the process of outlawry in civil actions is abolished; and also in criminal cases, except for treason. 2 N. Y. Rev. Stat. 553, 745; see 2 N. Y. Rev. Stat. 743, 744. In Pennsylvania, there is no outlawry in civil cases. *Dillman v. Shultz*, 5 Serg. & Rawle, 35; see 1 Smith's Laws of Penn. 116, 117; and 3 Smith's L. of Penn. 37, 38, 39, 40. This process has never been employed in North Carolina. *Sherrod v. Davis*, 1 Hayw. 284. And it is unknown to the laws of Kentucky. *Sneed v. Wiester*, 2 Marsh. Rep. 278.



(c) *Bench warrant.*

Upon an indictment being found at the assizes or quarter sessions, if the defendant be not in custody, or if out on bail, and it be doubtful whether he will surrender to take his trial, the court upon application, will grant a bench warrant;(a) upon which he may be apprehended as upon any other warrant, as mentioned;(b) and it may be backed, when necessary as stated.(c)[3]

In the central criminal court, the prosecutor applying for a bench warrant, must, before it issues, enter into a recognizance, such as the court shall direct, to prosecute the law with effect against the defendant.(d)

[\*104] \*The following may be the form of a

*Bench Warrant.*

County of } To all constables, headboroughs, and other officers and min-  
—, } isters of the peace of our Lady the Queen within the coun-  
ty of —, and to every of them, whom it may concern.

These are to will and require, and in her majesty's name strictly to charge and command, that you or some one of you, upon sight hereof, take and bring A. B. before [us, and others *Her Majesty's justices assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdemeanors committed in the same county,*] at this present sessions [*of the peace*] holden at —, in and for the said county, (if the court shall be here sitting,) to answer to an indictment found against him for [*state shortly the offence;*] and if the court shall not be sitting at the time of such taking, then that you or some of you forthwith afterward bring the same party before some one or more of Her Majesty's justices of the peace for the same county, to find sufficient sureties personally to appear at this present sessions, to answer the same indictment, and all such other matters as on Her Majesty's behalf shall be here objected against him; And if he cannot be taken during this present session, then that you bring him before some one or more of Her Majesty's justices of the peace for the same county,

(a) 1 Hale, 599.

(b) *Ante*, p. 33.

(c) *Ante*, pp. 33, 34.

(d) Reg. Gen. Jan. 1842; Car. & M. 254.

[3] The New York revised statutes provide that after an indictment has been found by the grand jury, and presented to the court, a warrant for the arrest of the defendant may be issued by the court, or by the district attorney, or by any justice of the Supreme Court or county judge of the county in which the indictment was found, either during the sitting of the court or in vacation. 2 N. Y. Rev. Sta. 728, sec. 55. This warrant is to be delivered to the sheriff and constables of any county in the state. If served in any county other than that in which the indictment was found, the same proceedings are to be had as on an indorsed warrant issued before the indictment.

as speedily after as may be, to find such sureties, personally to appear at the next session [*of the peace*] to be holden for the said county, to answer as aforesaid, and further to be dealt with according to law.

Hereof you are not to fail at your peril.

[*Given under our hands in open session*] this — day of —, in the year of our Lord —.

(d) *Warrant of justice out of sessions.*

By stat. 11 & 12 Vict. c. 42, s. 3, where any indictment shall be found by the grand jury in any court of oyer and terminer or general jail delivery, or in any court of general or quarter sessions of the peace, against any person who shall then be at large, and whether such person shall have been bound by any recognizance to appear to answer to the same or not, the person who shall act as clerk of the indictments at such court of oyer and terminer or jail delivery, or as clerk of the peace at such sessions, at which the said indictment shall be found, shall at any time afterwards, after the end of the sessions of oyer and terminer or jail delivery or sessions of the peace at which such indictment shall have been found, upon application of the prosecutor, or of \*any person on his behalf, and on payment of a fee of one [\*105] shilling, if such person shall not have already appeared and pleaded to such indictment, grant unto such prosecutor or person a certificate of such indictment having been found;—and upon production of such certificate to any justice or justices of the peace for any county, riding, division, liberty, city, borough, or place in which the offence shall in such indictment be alleged to have been committed, or in which the person indicted in and by such indictment shall reside or be, or be supposed or suspected to reside or be, it shall be lawful for such justice or justices, and he and they are hereby required, to issue his or their warrant to apprehend such person so indicted, and to cause him to be brought before such justice or justices, or any other justice or justices for the same county, riding, division, liberty, city, borough, or place, to be dealt with according to law; and afterwards, if such person be thereupon apprehended and brought before any such justice or justices, such justice or justices, upon its being proved upon oath or affirmation before him or them that the person so apprehended is the same person who is charged and named in such indictment, shall, without further inquiry or examination, commit him for trial, or admit him to bail, in manner before mentioned.

The following is the form of the

*Certificate of Indictment being found.*

I hereby certify, that at [*a court of oyer and terminer and general jail*

*delivery, or a court of general quarter sessions of the peace,]* holden in and for the [*county*] of —, at —, in the said [*county*], on —, a bill of indictment was found by the grand jury against A. B., therein described as A. B. [*late of —, labourer,*] for that he [*&c., stating shortly the offence,*] and that the said A. B. hath not appeared or pleaded to the said indictment.

Dated this — day of —, 185—.

J. D.

Clerk of the indictments on the — circuit,

or

Clerk of the peace of and for the said [*county*].

The reader will perceive that this certificate can only be obtained after the assizes or sessions; for during the assizes or sessions the prosecutor may obtain a bench warrant. But it is not only in cases where the prosecutor has omitted to apply for a bench warrant during the assizes or sessions, but also where he has applied and got it, that this mode of obtaining a justice's warrant to apprehend a party indicted may be useful; \*for it may often happen that whilst the bench warrant is in possession of a constable in another county, or in a distant part of the same county, there may be an opportunity of apprehending the defendant in another part of the county or in another county.[1]

[1] In general, where a constable has actually made an arrest on the warrant of a justice of the peace for a criminal offence, he ought not to deliver up the party arrested to another officer, as a sheriff, or marshal, on a warrant for a different offence from another magistrate, though of superior jurisdiction, as a judge of a state court, or a judge of a court of the United States. It is the duty of the constable to take the party arrested by him before the justice of the peace, who issued the warrant, or some other magistrate, in obedience to the requisitions of the warrant, or according to the course of the law. At the same time proper facilities should be afforded to the other officer, in the manner above mentioned, in order that the party might be ultimately arrested or detained in prison on the other warrant against him. When the party is brought before the justice, he is to proceed in the case, according to law, notwithstanding the existence of another warrant. If the party be bailed, or committed to prison by the justice of the peace, it will be thereafter decided, on *habeas corpus*, or otherwise, by a judge or competent court, for what offence the party shall be first tried, or whether he shall be removed to another county, or state, on the other charge. M'Kinney's Am. Mag. 229.

Where an officer, with or without a warrant, has lawfully arrested a party for a crime or offence, and has him in custody, he cannot be taken out of his custody by another officer, for the purpose of being apprehended by the latter on another criminal charge. Both officers may act jointly in making the arrests on the several charges, and in the custody of the prisoner; or the latter officer may accompany the former, with the party in view, to see that the party does not escape, or is not set at liberty, until he be brought before the magistrate, when each case will be disposed of in its order, and according to its nature or circumstances. Or in such cases, one of the officers may, when it can be legally done, depute the others to execute his warrant, or to make the arrest designed. In such instances, if one magistrate has not jurisdiction of, or cannot proceed to the examination in both cases; the prisoner is to be taken before the magistrate acting in the case in which the first arrest was made, and

The following is the form of the

*Warrant to apprehend the Person indicted.*

To the constable of —, and to all other peace officers in the said [county] of —

Whereas it hath been duly certified by J. D., clerk of the indictments on the — circuit [or clerk of the peace of and for the [county] of —,] that, [ &c., stating the certificate:] These are therefore to command you, in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before [me,] or some other justice or justices of the peace in and for the said [county,] to be dealt with according to law.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the county aforesaid.

J. S. [L. S.]

The following is the form of the

*Warrant of Commitment of the Person indicted.*

To the constable of —, and to the keeper of the [common jail, or house of correction,] at —, in the said [county] of —,

Whereas by [my] warrant under my hand and seal, dated the — day of —, after reciting that it had been certified by J. D. [ &c., as in the certificate,] [I] commanded the constable of —, and all other peace officers of the said county in Her Majesty's name, forthwith to apprehend the said A. B., and bring before [me,] the undersigned, [one] of Her Majesty's justices of the peace in and for the said [county,] or before some other justice or justices of the peace in and for the said [county,] to be dealt with according to law: And whereas the said A. B. hath been apprehended under and by virtue of the said warrant, and being now brought before [me,] it is hereupon duly proved to [me] upon oath that the said A. B. is the same person who is named and charged in and by the said indictment: These are therefore to command you the said constable, in Her Majesty's name, forthwith to take and safely convey the said A. B. to the said [house of correction] at —, in the said [county,] and there to deliver him to the keeper, thereof, together \*with this precept; and I hereby command you the [\*107]

If the party be discharged or bailed, he is to be delivered over or detained by the officer in the other case, on his warrant or authority; or if the party be committed to prison, he will be detained there on the other charge, as is stated below under this head.

Constables, and the like officers, having warrants against parties already arrested by another officer, and in his custody, ought to give due notice thereof to the officer. And it is the duty of peace officers to assist, or render the proper facilities to each other in all such cases, in executing the process or authority of the law, and enforcing the administration of justice. An officer by whose negligence, connivance, or omission, in this respect, an offender should effect his escape, would be considered highly criminal and severely punished. M'Kinney's Am. Mag. 228, 229.

said keeper to receive the said A. B. into your custody in the said house of correction, and him there safely to keep until he shall be thence delivered by course of law.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.

J. S. [L. S.]

Or if the party indicted be confined in prison for any other offence than that charged in the indictment, at the time of such application, the justice, upon the like proof of identity, shall issue his warrant directed to the keeper of the prison, to detain him, until he shall be removed by habeas, for the purpose of being tried.<sup>(a)</sup>[1]

The following is the form of a

*Warrant to detain a Person indicted who is already in Custody for another Offence.*

To the keeper of the [common jail or house of correction] at —, in the said [county] of —,

Whereas it hath been duly certified by J. D., clerk of the indictments on the — circuit [or clerk of the peace of and for the county of —,] that [ &c., stating the certificate :] And whereas [I am] informed that the said A. B. is in your custody in the said [common jail] at — aforesaid, charged with some offence or other matter; and it being now duly proved upon oath before [me,] that the said A. B. so indicted as aforesaid, and the said A. B. in your custody as aforesaid, are one and the same person: These are therefore to command you, in Her Majesty's name, to detain the said A. B. in your custody in the [common jail]

(a) 11 & 12 Vict. c. 42, s. 3.

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[1] When the party is already in prison, in a civil action, he may then be charged criminally by merely leaving with the jailer the warrant of the justice or other warrant; but such justice cannot take a prisoner out of the custody of the court, and send him to the county jail; for the prisoner in such case can only be removed by the authority of a *habeas corpus* issuing out of the court. When a party in custody in a civil action is then proceeded against criminally, the practice is for the magistrate before whom the complaint is laid, to take the information of the accuser and witnesses, and to issue his warrant, which is lodged with the keeper of the place of confinement where the defendant is kept in prison. This officer on the termination of the civil imprisonment, sends for a constable, who takes the party before a justice of the peace, by whom the accuser, witnesses and prisoner, are examined, and the latter is discharged, bailed or committed as on an original accusation.

When the party is already in jail on a criminal charge, and finally committed for trial, it is not usual to bring him from his first custody before a magistrate on a subsequent charge; but the examination of witnesses is taken as in ordinary cases, and a warrant of detainer is sent to the jailer, in whose custody he remains. By this means it will appear on the calendar that he is charged with two offences, and if acquitted on that for which he was first committed, his discharge will be prevented, and if the offence was committed in another county, he may be sent thither to take his trial. 1 Chitty's Crim. Law, p. 66.

aforesaid, until by Her Majesty's writ of habeas corpus he shall be removed therefrom for the purpose of being tried upon such indictment, or until he shall otherwise be removed or discharged out of your custody by due course of law.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.

J. S. [L. s.]

## 2. Arraignment and Plea.

### (a) Arraignment.

When a person, against whom the grand jury have found a true bill, is in custody, the clerk of arraigns at the assizes, or clerk of the peace at sessions, orders the jailer to bring him to the bar. When he appears, the clerk addresses him thus: "A. B., hold up your hand: You \*stand indicted by the name of A. B., [*late of, &c.*] [\*108] for that you, on the — [*&c., as in the indictment, to the end, except that it is addressed to the prisoner in the second person, and that the second and subsequent counts are stated shortly.*] How say you, A. B., are you guilty of this [*felony*] whereof you stand indicted, or not guilty?"[1]

[1] The term *arraignment* signifies the calling the defendant to the bar of the court, to answer the accusation contained in the indictment. 2 Hale, 216; 4 Blk. Com. 322. It consists of three parts. 1st, calling the prisoner to the bar by his name, and commanding him to hold up his hand; 2dly reading the indictment to him in English that he may understand the charge; and 3dly, demanding of him whether he is guilty or not guilty. 2 Hale, 219.

The first of these ceremonies is intended the more completely to identify the prisoner as the person named in the indictment, because by holding up his hand when his name is called, he acknowledges himself to be properly described under that appellation. 2 Hale, 219; Dalt. c. 185; Hawk. b. 2, c. 28, s. 2; 4 Bla. Com. 323; Burn, J. Arraignment; Williams, J. Arraignment; Dick. Sess. 158. But this ceremony is not absolutely necessary, for if the prisoner obstinately refuse to hold up his hand, the same purpose is answered by any admission that he is the person intended. Sir T. Raym. 408; 1 Bla. Rep. 3; 2 Hale, 219; Hawk. b. 2, c. 28, s. 2; 4 Bla. Com. 323; Burn, J. Arraignment; Williams, J. Arraignment; Dick. Sess. 159.

The intention of reading the indictment to the prisoner, is, that he may fully understand the charge to be produced against him. 2 Hale, 219; Dalt. c. 185; 4 Bla. Com. 323; Williams, J. Arraignment; Dick. Sess. 160. This is to be done in English by a very ancient statute, long before the proceedings in general were in our own language, and when all the written parts of the accusation were scrupulously framed in Latin. 37 Ed. 3, c. 15; Hawk. b. 2, c. 28, s. 3; 4 Bla. Com. 323. And it seems that the indictment is to be read, although the defendant has had a copy delivered to him. 1 Burr. 643.

The New York Revised Statutes provide that upon any defendants being arraigned upon an indictment, it is not necessary to ask him how he will be tried; and, instead of being required to say whether he pleads guilty or not guilty, he shall be required to say whether he demands a trial upon such indictment. He may answer that he does require such trial; and for the purpose of all further proceedings, such an answer shall be deemed equivalent to a plea of not guilty. If he refuses to plead or answer, and in all cases where he does not confess the indictment to be true, a plea of not guilty shall be entered by the court; and the

Upon an indictment for a subsequent offence after a previous conviction, the prisoner is to be arraigned upon the whole indictment, including the former conviction; and if he plead not guilty, then the jury in the first instance are charged with the subsequent offence, and only that part of the indictment read to them which relates to it; and if they find him guilty, then (without their being again sworn) that part of the indictment relating to the previous conviction is read to them, and they are charged with it; and if they find that he was previously convicted, then a verdict of guilty on the whole indictment is entered. This has been determined to be the proper course, by the whole body of the judges, upon full consideration.<sup>(a)</sup> In cases of murder or manslaughter where, besides the indictment, there is also a coroner's inquisition, it is usual to arraign the prisoner on the inquisition immediately after arraigning him on the indictment, and to try him on both at the same time.<sup>(b)</sup>

The holding up of the hand is a mere ceremony, and not of any importance. It is principally done where there are two or more arraigned upon the same indictment, for the purpose of ascertaining which of them is A. B., which C. D., &c.<sup>(c)</sup>

But the court will not dispense with the prisoner's standing at the bar, whatever his station in life may be, particularly in case of felony.<sup>(d)</sup> In this latter case, however, (which was the case of Captain Douglas, who surrendered to take his trial for being second to Lord Cardigan, in a duel with Captain Tuckett), Williams, J., allowed several of the prisoner's friends to stand beside him in the dock. In a subsequent case,

(a) Per Lord Campbell, C. J., in *R. v. Shuttleworth*, 21 Law J. 36, m.; see *post*, p. 624.

(b) 1 East, P. C. 371.

(c) 2 Hawk. c. 28, s. 2; *R. v. Ratcliffe*, 1 W. Bl. 3.

(d) *R. v. Douglas*, Car. & M. 193.

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same proceedings in all respects shall be had, as if he had pleaded not guilty to such indictment. 2 N. Y. Rev. Stats., p. 728, sec. 53.

At common law, the accessory could never be arraigned before the actual attainder of the principal; and, therefore, where the attainder of the former was prevented by his death, standing obstinately mute, challenging peremptorily above the number allowed by law, being pardoned, or admitted to the benefit of clergy, the latter altogether escaped from justice. 2 Inst. 183, 4; Cro. Eliz. 541; 2 Hale, 222; Fost. 362, 3; Hawk. b. 2, c. 29, s. 41; 4 Bla. Com. 323. And it was necessary that the attainder of the principal should be upon the very same charge, in which the accessory was included. 2 Inst. 184; Plowd. 98, 9; Hawk. b. 2, c. 29, s. 39. But it was no objection to the arraignment of the accessory, that the attainder of the principal was erroneous, as none can take advantage of that circumstance but the individual against whom it was pronounced; (9 Co. Rep. 119; 2 Inst. 184; Hawk. b. 2, c. 29, s. 40;) though, if both are attainted, the renewal of the attainder of the latter reverses also that of the former. 1 Rol. Abr. 777; 9 Co. Rep. 119; Hawk. b. 2, c. 29, s. 40. And it was considered, that if the principal were once attained, whether, after conviction by verdict or outlawry, his subsequent death or pardon would not in the least prevent the arraignment of the accessory. Cro. Eliz. 541; 2 Dyer, 120; Hawk. b. 2, c. 29, s. 42.

where a foreigner, who was a merchant in London, was indicted for fitting out a ship to be employed in the slave trade, his counsel applied that the prisoner might sit by him instead of going into the dock,—not on account of his station in life, but because he was a foreigner, and many of the documents in the case were in a foreign language, which would render it necessary for his counsel from time to time to communicate with him personally for the purposes of his defence,—the court (Maule & Wightman, JJ.,) however, held that the application was one which could not be granted.(a)[2]

Formerly, when there was more danger of rescue and escapes \*than there is at present, it was no uncommon thing for [\*109] prisoners to be brought to the bar of the court in irons. And the were obliged to stand at the bar in irons during the arraignment, and until they had pleaded, the judges saying that that they had no authority to order them to be struck off until the trial.(b) At the trial, however, the irons were always struck off.(c)[1]

(b) *Standing mute, &c.*

If any person being arraigned upon, or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information: in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of “not guilty” on behalf of such person; and the plea so entered shall have the same force and effect, as if such person actually pleaded the same(d) And to ascertain whether a person who stands mute, is mute of malice or by the visitation of God, the judge will immediately charge the jury to try this collateral issue; and the jailer, or such other person as can give evidence upon the subject, shall be sworn and examined(e)[2]

(a) *R. v. Pedro de Zuheta*, 1 Car. & K. 215.

(b) *R. v. Loyer*, 16 How. St. Trials, 94, 99, 129; *R. v. Waite*, 2 East P. C. 570; 1 Leach, 28, 36.

(c) *Id.*

(d) 7 & 8 G. 4, c. 28, s. 2.

(e) See *R. v. Mercier*, 1 Leach, 183; *R. v. Steele*, 1 Leach, 451.

[2] In Pennsylvania, by the act of Assembly, passed 28th March, 1808, (Purd. Ab. new ed. 274,) it is enacted, “that no person arraigned on any indictment, who shall be bound by recognizance to abide the judgment of the court, shall be put within the prisoner’s bar to plead to the same, or be confined therein during his or her trial, but shall have an opportunity of a full and free communication with his or her counsel.”

[1] In Pennsylvania, it is provided by statute, that no person who may hereafter be arraigned on an indictment, and who shall be bound by recognizance to abide the judgment of the court, shall be put within the prisoner’s bar to plead to the same, or be confined therein during his or her trial, but shall have an opportunity of a full and free communication with his or her counsel. Dunlop’s Laws of Penn. p. 267.

[2] When the prisoner, upon his arraignment, totally refuses to answer, insists upon mere



Where a prisoner, upon his arraignment stated that he was deaf, and upon the indictment being read over to him he appeared not to under-

frivolous pretences, or refuses to put himself upon the country, after pleading not guilty, he is said to *stand mute*. 2 Dyer, 241, b.; Keilw. 70; 2 Inst. 178; 2 Hale, 316, 317; 4 Bla. Com. 324; Hawk. b. 2, c. 38, s. 1; Burn, J. Mute; Williams, J. Mute.

But if he demurs, or challenges peremptorily more than the number of jurors allowed by law, he will not be regarded as having stood mute by reason of his obstinacy, in the one case, or his subsequent silence in the other. Hawk. b. 2, c. 30, s. 2, 3; 3 Inst. 327; Williams, J. Mute. If he is wholly silent, an inquest must be impannelled, to inquire whether he is obstinately mute, or dumb, *ex visitatione Dei*, which may be by the oath of any twelve persons who may happen to be present. 1 Ry. & Moo. C. N. P. 78; 1 Leach, 452; 2 Hale, 217; 2 Inst. 177, 178; Rast. Ent. 385; Hawk. b. 2, c. 30, s. 5; Williams, J. Mute; see form of swearing the jury, 4 Bla. Com. 328, 329; 1 Leach, 183, 451, 452, 453; Cro. C. C. 484; Williams, J. Mute; see form of oath, Cro. C. C. 542, 7th ed.

But after an issue has been joined, if the prisoner stand mute, while the jury are in court, the investigation may be taken before them, if circumstances render it requisite. Hawk. b. 2, c. 30, s. 5. If they return that he is dumb, *ex visitatione Dei*, (see form of finding, 1 Leach, 184, 452, 453,) the court will use every means to convey to him information of the nature of the arraignment; and if he be incapable, in any way, of expressing his desires, the clerk of arraigns will enter for him a plea of *not guilty*, and the trial will proceed as if he had pleaded. 1 Leach, 452. In this case, it is the duty of the court to examine all the proceedings with a critical eye, to take every fair advantage on behalf of the prisoner, and to render him every possible service consistent with the rules of the law. 1 Leach, 452; 2 Inst. 177, 178; Hawk. b. 2, c. 30, s. 7; 4 Bla. Com. 324; Williams, J. Mute.

In the case of the *U. S. v. Hare et al.*, (Circuit Court Maryland District, May Sessions, 1818,) the court decided that if a prisoner charged with a felony against the laws of the United States, stands mute, the trial will proceed by jury as if the prisoner had pleaded not guilty.

Where one indicted for larceny stood mute upon his arraignment, a jury was impanneled, who returned a verdict that he stood mute fraudulently, wilfully and obstinately; whereupon he was sentenced, as upon conviction. *Com. v. Moore*, 8 Mass. 402; Roscoe's Dig. Cr. Ev. 174; *Turner's case*, 5 Ohio, 542.

If the prisoner answer, but merely foreign to the purpose, and refuse regularly to plead, so as to warrant his trial, it is evident there can be no occasion for any inquest; for his obstinacy and ability to speak are sufficiently apparent. And where a man is found to have cut out his own tongue to prevent his answering, he will be regarded as obstinately silent. 2 Inst. 178; 4 Bla. Com. 325.

In England, the punishment of *peine forte et dure* was, until recently, denounced, as the consequence of an obstinate silence. The greatest caution and deliberation were indeed to be exercised before it was resorted to; and the prisoner was not only to have "*trina admonitio*," but a respite of a few hours, and the sentence was to be distinctly read to him, that he might be fully aware of the penalty he was incurring. 2 Hale, 320, 321; 4 Bla. Com. 325.

And if the felony were one for which the benefit of clergy might be allowed him on his prayer, the court would allow it though it were not prayed, and that after as well as before judgment. 2 Hale, 321. And it is even said, that the court ought to examine witnesses, to show a probability of his guilt, before they proceed to this extremity, (2 Inst. 177; 2 Hale, 321; Hawk. b. 2, c. 30, s. 14;) though this does not appear to be of absolute necessity, and no entry of the investigation need appear on the record. Hawk. b. 2, c. 30, s. 14. If, on such an inquiry, the evidence against him appeared very slight, it seems that he could only be fined and imprisoned for a contempt of the process of justice. Hawk. b. 2, c. 30, s. 15.

The sentence of penance which was pronounced against those who thus added contumacy to guilt, was indeed exceedingly dreadful. They were to be remanded to prison, and there placed in some low and dark room, laid on the back with scarcely any covering, and iron weights

stand it: Gifford, C. J., immediately directed a jury to be impanelled, to try whether he stood mute of malice, or by the visitation of God.(a)

Where a prisoner, who had already been tried and convicted, but whose trial was deemed a nullity on the ground of some informality in the swearing of the witnesses who gave evidence before the grand jury, was again arraigned upon an indictment for the same offence, and refused to plead, alleging that he had already been tried: Littledale J., and Vaughan, B., ordered a plea of not guilty to be entered for him, under the above statute.(b)

But if the jury, upon being so impanelled, find that the prisoner is insane, the court shall record such verdict, and order the party to be kept in strict custody, in such place and in such manner as to them shall seem fit, until Her Majesty's pleasure shall be known.(c)[3]

(a) *R. v. Hulton*, 1 Ry. & M. 78.

(c) 39 & 40 G. 3, c. 94, s. 2; see *ante*, p.

(b) *R. v. Bitton*, 6 Car. & P. 92.

4, 5.

more heavy than they could bear placed upon them. In this situation, they were to receive no sustenance the first day but three morsels of the worst bread, and on the second day, three draughts of standing water which should be nearest to the prison door, and thus remain till they died; or, as the ancient judgments ran, till they answered. 2 Inst. 178; Keilw. 70; Rast. Ent. 385; 2 Hale, 319; Hawk. b. 2, c. 30, s. 16; 4 Bla. Com. 327; Burn, J. Mute. There are slight variations in some of the precedents, but they agree in all the important particulars of this infliction, which was intended that the criminal should die by famine, cold, and pressure. 2 Inst. 178. It seems to be matter of dispute, in what manner and at what period it was first introduced, and whether it existed at common law, or was created by legislative provision. 2 Inst. 178, 179; 2 Hale, 321, 322; 4 Bla. Com. 327, 328. The statute of Westminster the first (3 Edw. 1, c. 12,) directs notorious felons, who will not put themselves upon the inquest, "shall have *strong and hard confinement*, as they which refuse to stand to the common law of the land;" but these words seem very imperfectly to express the sentence which is set forth with so horrible a minuteness. Lord Coke and Hale therefore contend, with great force, that the punishment must have existed before that act was passed, and that it merely directed the persons who were to become the objects of its severity. 2 Inst. 178, 179; 2 Hale, 321, 322. But Blackstone, on the contrary, regards it as altogether of statutable origin, and thinks that it was gradually introduced between the reign of Edward 3, and Henry 4, when the last instance occurs of its infliction. 4 Bla. Com. 327, 328. How a cruelty so elaborate could have been introduced, without any express statute to sanction it, seems exceedingly obscure, and will perhaps warrant us in differing from the learned commentator, and assigning it to the earlier and darker periods of our history. The only cause which delayed its abolition until a recent date seems to be, that by the refusal to plead, the criminal escaped conviction, and consequently his blood was not corrupted, nor his lands forfeited by the attainder. 2 Hale, 319; Bro. Abr. Forfeiture, 64. This penalty was therefore preserved, in order to compel the defendant to plead, that the lord might not lose his forfeiture: and instances have occurred, in which the desire of preserving the estate to the family has overcome the fear of torture, and induced him to remain obdurate. At length, however, by the 12 Geo. 3, c. 20, this punishment was entirely abrogated, and the inconveniences arising from the refusal to answer avoided.

In the United States Circuit Court, Maryland District, May Sess., it was held, in the case of *U. S. v. Hare and others*, that the *peine forte et dure*, is unknown to the laws of the United States.

[2] No insane person can be tried, sentenced to any punishment, or punished for any crime or offence, while he continues in that state. 2 R. S. 697, sec. 2. When there is rea-

(c) *Plea.*

Upon being asked whether he was guilty or not guilty, the defendant may plead *ore tenus* "not guilty," of which the clerk of arraigns or clerk of the peace makes a minute on the indictment, and puts it into form, if it afterwards becomes necessary to make up the record. Formerly the clerk of the peace asked the defendant also, how [\*110] will you be tried? and \*he answered, "by God and my country." But now, by stat. 7 & 8 G. 4, c. 28, s. 1, if any person, not having the privilege of peerage, being arraigned for treason, felony, or piracy, shall plead thereto a plea of "not guilty," he shall by such plea, without any further form, be deemed to have put himself upon the country for trial; and the court shall, in the usual manner, order a jury for the trial of such person accordingly.[1]

If, instead of pleading "not guilty," the defendant say that he is "guilty," this is a confession of the offence, which subjects him precisely to the same punishment, as if he were tried and found guilty by verdict. But as defendants often imagine that, by pleading guilty, they

son to believe that the accused is a lunatic or idiot, the most discreet and proper method of determining the question, in an important case, is for the court to empanel a jury to decide whether he be *non compos mentis* or not; and if they find for the accused, the trial will be suspended. But other modes may be adopted, in the discretion of the court. 3 Robinson's Prac. 115; 2 Va. Cas. 266; 1 Mass. Rep. 102; Per Beardsley, J. 4 Denio, 9. On this preliminary trial, the jurors are sworn in this manner: "You shall diligently inquire, and a true verdict return, on behalf of the people of the state of New York, whether A. B., the prisoner at the bar, who now stands indicted for murder, be of sane memory or not, according to your evidence and knowledge." 13 Mass. Rep. 299. Where a jury empanelled to try whether a person indicted for murder was then insane, were instructed by the court that they were to decide "whether the prisoner knew right from wrong; and if he did, then he was to be considered sane," it was held that the charge was erroneous. And the jury having found that the prisoner was "sufficiently sane in mind and memory to distinguish between right and wrong," it was held that the verdict was defective. *Freeman v. The People*, 4 Denio, 9. The test of insanity, when it is set up to prevent a trial, is whether the prisoner is mentally competent to make a rational defence; and, when alleged as a defence to an indictment, it is whether at the time of committing the act, he was laboring under such mental disease as not to know the nature and quality of the act he was doing, or that it was wrong. Ibid. On such preliminary trial, the defendant is not entitled to peremptory challenges; but challenges for cause may be made. Ibid. In a case recently tried in England, the prisoner having been indicted for a misdemeanor in uttering seditious words, and upon his arraignment refusing to plead, and showing symptoms of insanity, and an inquest being forthwith taken under a statute passed for that purpose, (39 and 40 Geo. 3, ch. 94, sec. 2,) to try whether he was insane or not; it was held, first, that the jury might form their own judgment of the present state of the prisoner's mind from his demeanor while the inquest was being taken; and might thereupon find him to be insane, without any evidence being given as to his present state; secondly, that upon the prisoner showing strong symptoms of insanity in court during the taking of the inquest, it became unnecessary to ask him whether he would cross-examine the witness, or would offer any remark on the evidence. *Queen v. Goode*, 7 Add. & Ellis, 536.

[1] The revised statutes of Massachusetts provide that it shall not be necessary to ask the defendant how he will be tried. Rev. Stat. of Mass. ch. 136, sec. 28.

are likely to receive some favor from the court in the sentence that will be passed upon them, the judge very frequently undeceives them in that respect, and apprizes them that their pleading guilty will make no alteration whatever in their punishment. If, however, they still persist in their plea of guilty, it is then recorded by the clerk of arraigns or clerk of the peace; and in the record, when made up, the judgment immediately follows the plea.[2]

(d) *Traverse.*

Formerly, in all cases of misdemeanors, the defendant was not bound to submit to be tried at the same assizes or sessions at which the bill was found, but had a right to traverse it, that is to say, to put off his trial, until the next following assizes or sessions for the same county. This was afterwards somewhat modified by stat. 1 G. 4, c. 4.

But now, by stat. 14 & 15 Vict. c. 100, s. 26, that statute is repealed; and by sect. 27, no person, prosecuted, shall be entitled to traverse or postpone the trial of any indictment found against him at any session of the peace, session of oyer and terminer, or session of jail delivery: provided always, that if the court, upon the application of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session without entering into any fresh recognizance for that purpose.[3]

[2] This is the highest kind of conviction of which the case admits. 2 Hale, 225. It may be received after the plea of not guilty is recorded, whenever the defendant wishes to withdraw his plea of not guilty and confess the accusation. 2 Hawk. P. C. ch. 31, sec. 1; 3 Hill Rep. 395. But the courts are very reluctant to receive and record such confessions, especially where the punishment is capital, and will frequently, out of tenderness of the life of the prisoner, advise him to retract it and plead not guilty. 2 Hale, 225. And where he freely, in court, discloses the facts of his case, and demands the opinion of the judges whether they amount to felony, upon which they reply in the affirmative, they will refuse to record the disclosure, and admit him to the full advantage of a trial upon the evidence of the witnesses. Ibid. Sometimes, in case of mere personal and trifling injuries, the prosecutor and defendant agree in private; the latter comes into court and pleads guilty to the indictment; and upon proving a general release given by the former, submits to a small fine for the breach of the peace which his conduct has occasioned. In the higher description of offences, when the defendant pleads guilty, the clerk writes on the indictment the word "*confesses*." Upon this the confession is recorded, and the prisoner is set aside until the time of passing the sentence.

[3] It is said that the technical term *traverse* from *transverto*, to turn over, is applied to an issue taken from an indictment for a misdemeanor, and means nothing more than turning over, or putting off the trial to a following session; and that thus it is that the court asks the party whether he is ready to try then, or will *traverse* to the next session, though some

8. *Special Pleas.*(a) *Pleas in abatement.*

A defendant is not allowed in criminal cases, as in civil actions, to plead in abatement that another indictment is pending against him

have referred its meaning originally to the denying, or taking issue upon an indictment, without reference to the delay of trial, and which seems more correct. 4 Blk. Com. 351.

In Massachusetts, the statute provides that every person held in prison upon an indictment, shall, if he require it, be tried at the next term of the court, after the expiration of six months from the time when he was imprisoned, or shall be bailed upon his own recognizance, unless it shall appear to the satisfaction of the court that the witnesses on behalf of the government have been enticed or kept away, or are detained and prevented from attending the court, by sickness or some inevitable accident. Rev. Stat. of Mass. ch. 136, sec. 30.

See *Com. v. Prophet*, 1 Browne, 135; *Republica v. Arnold*, 3 Yeates, 268; *State v. Fraser*, 2 Bay, 96.

There are several cases in which, upon a proper application, the court will put off the trial. And it has been laid down that no crime is so great, and no proceedings so instantaneous, but that the trial may be put off, for sufficient reasons shown. 1 Chit. Cr. L. 491. And in general the trial may be postponed on the ground of the publication of a libel tending to influence the minds of the jurors in forming their decision. 4 T. R. 285; 1 Burr. 510; 3 Brod. & Bing. 272. So the illness of the defendant's attorney has been allowed as a sufficient reason. Say. Rep. 63; Bac. Abr. Trial, (H.)

But the most usual ground for the delay is the absence of a material witness, which, if properly verified, will be sufficient, on an indictment for treason, felony or misdemeanor, at the instance of a defendant. Bac. Abr. Trial, (H.) If, however, the witness was not absent at the time notice of trial was given, it seems the court will not grant the application on account of any subsequent absence. Ibid.; Barnes, 442. And where the witnesses are in a foreign country and not likely soon to come hither, the court have refused to allow it, (3 Burr. 1514; 8 East, 37; 1 Mass. Rep. 6;) though as the witnesses may be examined on interrogatories sent out abroad, it should seem that when the evidence is very material, the trial may be delayed till such examination has been obtained. 1 Chit. Cr. L. 492. But when the defendant has been guilty of laches or delay, the court will refuse to put off the trial, or at least will impose terms upon him, as that he shall consent to examine upon interrogatories a material witness for the people. Ibid.; 1 Black. Rep. 514; 2 M. & S. 602.

To obtain an order for putting off the trial, an affidavit must be made, stating the names and places of abode of the absent witnesses, and that they are material to the prosecution or defence. 8 East, 35; Fost. 2. This affidavit should state at what time the witnesses return may be expected; but this may be in some case dispensed with. 1 Black. Rep. 514; 1 Barnard, 39. It is also necessary the affidavit should be positive that the absent witness is material, and not merely that the deponent believes him to be so. Ibid.; Bac. Abr. Trial, (H.)

When there is no cause for suspicion of mere desire to delay, it will be sufficient generally to swear that the absent party is a material witness, without whose evidence the party cannot safely proceed to trial; that he has endeavored, without effect, to serve him with a subpoena, and that there is a reasonable ground to expect his future attendance. 1 Chit. Cr. L. 493.

This affidavit must, in general, be made by the party applying, (Ibid.; Barnes, 437; 9 Pick. 515;) though in some cases his attorney, or a third person, has been allowed to do it in his stead, as if he be abroad or unable to appear. Peake's N. P. 97; Barnes, 448.

Notice of an application to put off the trial is not usually given, in this state.

for the same offence; (a) \*and if he go on to show that he [\*111] was acquitted or convicted on the former indictment, the plea is then a plea in bar, not in abatement. But the only pleas in abatement in criminal cases are, that the indictment gives the defendant no christian or first name or a wrong one, no surname or a wrong one, no addition of degree or mystery or a wrong one. But this is now of no use; for by stat. 7 G. 4, c. 64, s. 19, no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition or wrong addition of the party offering the plea, but in such a case the court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon the party to plead thereto, and shall proceed as if no dilatory plea had been pleaded. And by stat. 14 & 15 Vict. c. 100, s. 24, no indictment shall be holden insufficient, for want of, or imperfection in, the addition of any defendant. (b) [1]

(a) 2 Hawk. c. 34, s. 1.

(b) See *ante*, p. 78.

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When the motion is granted, it is seldom for more than the next term or session of the court. But upon the particular circumstance of the case, the court will sometimes put off the trial to a more distant time. 1 Chit. Cr. L. 494.

The above observations apply to the putting off a trial by express order of the court, on the application of either party. The trial of a cause may also be put off or postponed by the mere laches or neglect of the prosecutor to bring it on. In cases of this kind, the revised statutes give a remedy to the prisoner, by providing for his discharge, if he shall not be brought to trial before the end of the next term of the court after the indictment is found; unless good cause shall be shown for detaining him. 2 R. S. 737, secs. 28, 29, 30.

[1] As we have no corresponding statute, the plea in abatement in criminal cases is still in use here.

Any misnomer, in general, is matter for abatement: (*State v. Lorey*, 2 Brevard, 395,) thus, where the indictment charged the defendant as George Lyons, it was held, he could well abate it by showing his true name was George Lymes. *Lymes v. State*, 5 Porter, 236. Want of addition is generally ground for abatement. *State v. Hughes*, 2 Har. & M'Hen. 479; 1 Ch. C. L. 204; see per contra, *State v. Newman*, 2 Car. Law. Rep. 74. And a wrong addition can be taken advantage of in the same manner. Thus, in an indictment on the statute of Maine, prohibiting the sale of lottery tickets giving the accused the name of lottery vendor, when his proper addition was broker, furnishes good cause for abating the indictment. *State v. Bishop*, 15 Maine Rep. 122.

When a plea in abatement is found in favor of the defendant, the judgment in case of misdemeanor, is, that he be not compelled to answer the indictment, but depart the court without day. 2 Hale, 238; 10 East, 88, where see form. But, on an accusation for a capital crime, after the indictment has been abated for misnomer, the court will not dismiss the prisoner, but cause him to be indicted de novo, by the name disclosed in his plea, to which we have seen he can, make no second objection. Cro. Car. 371; 2 Hale, 176, 238; Hawk. b. 2, c. 34, s. 2. Williams, J. Misnomer and Addition, II. And if the grand jury be not discharged, another bill may be immediately preferred, whatever may be the description of the offence. 2 Hale, 176, 238; Cro. C. C. 21; Hawk. b. 2, c. 34, s. 2; Dick. Sess. 167. If it be pleaded by one of several defendants, and allowed, it will only quash the indictment as to him, without affecting it as to those who are correctly indicted. Rep. temp. Hardw. 303; 2 Hale, 177; Bac. Abr. Indictment, G. 2; Williams, J. Misnomer and addition, II.

(b) *Auterfois acquit*.

That the defendant was formerly indicted and acquitted, is a good plea in bar to a subsequent indictment for the same offence; (a) for the law will not suffer a man to be twice put in jeopardy for the same offence. (b) [2]

(a) 2 Hale, 241, 242; 2 Hawk. c. 35, s. 1.

(b) *Id.*

[2] This principle is sanctioned and enforced in different forms of words in most of the constitutions of the several states, and in the constitution of the United States. See Const. of the United States, 5th Article of the amendments. *Commonwealth v. Roby*, 12 Pick. 502; *People v. Goodwin*, 18 Johns. 201; *State v. McKee*, 1 Bailey, 651; *State v. Norvell*, 2 Yerger, 24; Rev. Stat. of Mass. p. 715; *State v. Benham*, 7 Conn. 418, 419. The maxim, that a man ought not to be brought twice into danger for one and the same offence, Mr. Justice Story remarks, "is embodied in the very elements of the common law, and has been uniformly construed to present an insurmountable barrier to a second prosecution, where there has once been a verdict of acquittal or conviction regularly had upon a sufficient indictment." *U. States v. Gibert*, 2 Sumner, 42.

For the decisions in reference to putting one on trial a second time after a jury has been discharged, being unable to agree, or for other cause, see *Commonwealth v. Cook*, 6 Serg. & R. 577; *Commonwealth v. Clue*, 3 Rawle, 498; *State v. Ganniques*, 1 Hayw. 241; *Spier's case*, 1 Devereaux, 491; *State v. Ephraim*, 2 Dev. & Bat. 162; *Mahaler v. State*, 10 Yerger, 532; *State v. Ned*, 7 Porter, 188.

In the above cases it was held that a person put on trial before a jury, who were discharged, because they were unable to agree or for any cause but one of necessity, could not be put on trial again before another jury. The contrary, however, has been held in many other cases. See *U. States v. Perch*, 9 Wheat. 579; *Commonwealth v. Bowden*, 9 Mass. 194; *Commonwealth v. Purchase*, 2 Pick. 521; *Moore v. State*, 1 Walker, 134; *U. States v. Shoemaker*, 2 M'Lean, 114.

The first view has been taken by the courts of Pennsylvania, North Carolina, Tennessee, and to a certain extent, of Alabama. *State v. Ned*, 7 Porter, 188.

In Alabama, in a late case, after a careful review of the subject, the following points were made: 1st. That courts have not, in capital cases, a discretionary authority to discharge a jury after evidence given. 2d. That a jury is, *ipso facto*, discharged by the termination of the authority of the court to which it is attached. 3d. That a court does possess the power to discharge, in any case of pressing necessity, and should exercise it whenever such a case is made to appear. 4th. That sudden illness of a prisoner, or a juror, so that the trial cannot proceed, are ascertained cases of necessity, and that many others exist, which can only be defined when particular cases arise. 5th. That a court does not possess the power, in a capital case, to discharge a jury because it cannot, or will not agree.

That, on the contrary, no man is in jeopardy until verdict rendered has been held by the Supreme Court of the United States, by Washington, J., Story, J., and M'Lean, J., sitting in their several circuits, and by the courts of Massachusetts, New York, and Mississippi.

*New York*.—*Auterfois acquit* is not a good plea, if the former indictment was so far defective, that no good judgment could have been given upon it. *The People v. Barrett*, 1 Johns. 65.

Nor will a prisoner be deemed to have been put on his trial, where he challenged all the jurors except eight, who were sworn; and upon opening the box to draw out talesmen, it was found, from some neglect, to contain no names of talesmen, in consequence of which the prisoner was remanded: And it was held that such prisoner might be afterwards tried. *State v. Burket*, 2 Con. Ct. 155. And where judgment is arrested, after conviction, on an indictment for a felony, this is not a bar to a second indictment for the same offence; although the second indictment be in every respect similar to the first. *People v. Casborous*, 13 Johns.

So, if a man be acquitted on an indictment for murder, he cannot afterwards be indicted for manslaughter of the same person, for he

351. So, a former conviction procured by the fraud of the defendant, is no bar to a subsequent prosecution. *State v. Little*, Adams, 257; *State v. Browne*, 16 Conn. 54. A conviction of a breach of the peace before a magistrate on the confession or information of the offender himself, is no bar to an indictment by the grand jury for the same offence. *Commonwealth v. Alderman*, 4 Mass. 477. But, if after a prisoner has pleaded to an indictment, and after the jury has been sworn, and evidence offered, the public prosecutor, without the consent of the prisoner, withdraw a juror, merely because he is unprepared with his evidence the prisoner cannot afterwards be tried on the same indictment; and if he be tried and convicted, judgment will be arrested, *People v. Barrett*, 2 Caines, 304.

Where an assault and battery has been made upon two, and both were wounded by the same stroke, and the offender has been legally convicted before a court of competent jurisdiction for the breach of the peace in the assault and battery upon the one, an indictment cannot afterwards be maintained against him for the assault and battery upon the other. *State v. Damon*, 2 Tyler, 387. See *State v. Benham*, 7 Conn. 414; *Commonwealth v. Andrews*, 2 Mass. 409. See *Burgess v. Sugg*, 2 Stew. & Port. 341; *Commonwealth v. Chester*, 1 Virg. Cas. 312.

If a prisoner be acquitted of burning the barn of Josiah Thompson, on the ground of a misdirection of the owner, he cannot plead this acquittal in bar of an indictment for burning the barn of Josias Thompson, the real owner. *Commonwealth v. Mortimer*, 2 Virg. Cas. 325. See also *Commonwealth v. Wade*, 17 Pick. 400.

An acquittal upon an invalid and insufficient indictment is no bar to another indictment for the same offence. *State v. Ray*, 1 Rice, 1; as, if the offence is alleged to have been committed in another district than the one in which the bill was found. So if an impossible date is assigned to the commission of the offence, as a day posterior to the finding of the indictment, (Id.) *Commonwealth v. Cunningham*, 13 Mass. 245; *Hite v. State*, 9 Yerger, 357, *Commonwealth v. Curtis*, Thatch. C. C. 202; *Gerard v. People*, 3 Scammon, 363; *State v. Risler*, 1 Rich. 219; *Commonwealth v. Cook*, 6 Serg. & R. 577; *Same v. Clue*, 3 Rawle, 498; *Same v. Purchase*, 2 Pick. 521; *State v. Woodruff*, 2 Day, 504.

In Massachusetts, it is provided by statute that no man shall be held to answer on a second indictment for any offence, of which he has been acquitted by the jury, upon the facts and merits, on a former trial; and the former acquittal, unless produced by a variance between the indictment and proof, or by a technical exception, may be pleaded in bar. In Vermont, the same provision forms part of the revised statutes. Rev. Stats. of Mass. ch. 123, secs. 4 and 5; Rev. Stats. of Verm. ch. 93.

If a man be committed for a crime, and no bill be preferred against him, or if it be thrown out by the grand jury so that he is discharged by proclamation, he is still liable to be indicted. 2 Hale, 243. So the entry of a *nolle prosequi*, by the competent authority, does not put an end to the case, and is no bar to a subsequent indictment for the same offence. *U. S. v. Shoemaker*, 2 M'Lean, Rep. 114; *Com. v. Wheeler*, 2 Mass. 172; *Com. v. Lindsey*, 2 Virg. Cas. 345; *State v. Haskett*, 3 Hill, S. C. R. 95.

"If in civil cases the law abhors a multiplicity of suits, it is yet more watchful in criminal cases that the crown shall not oppress the subject, or the government the citizen by unreasonable prosecutions." Per Drake, J. in *State v. Cooper*, 1 Green's Rep. 375. In *State v. Inglis*, 2 Hayw. Rep. 4, A. had been indicted and convicted of an assault and battery upon B. and afterwards, he was prosecuted along with others for a riot, and for beating and imprisoning B.; both offences grew out of the same transaction, and the former suit being relied on by A., it was held a bar. "The state," say the court, "cannot divide an offence consisting of several trespasses into as many indictments as there are acts of trespass that would separately support an indictment, and afterwards indict for the offence compounded of them all; as for instance, just indict for the assault, then for a battery, then for imprisonment, then for a riot, then for mayhem, &c.; but upon an indictment for any of these offen-



might have been convicted of manslaughter on the former indictment.<sup>(a)</sup> So, if a man be indicted for burglary and larceny, and acquitted, he

(a) 2 Hale, 246.

ces, the court will inquire into the concomitant facts and receive information thereof, by way of aggravating the fine or punishment, and will proportion the same to the nature of the offence as enhanced by all these circumstances, and no indictment will afterwards lie for any of these separate facts done at the same time." Id. p. 5. So as to a former conviction under like circumstances. *Commonwealth v. Kinney*, 2 Virg. Cas. 139. The reporter (id. p. 140,) adds, by way of note, as follows: "In this case the court was of opinion, that as the inferior offence of an assault and battery was included in the higher offence of a riot, and constituted a part of it, and the commonwealth had already elected to indict, and had actually convicted the defendant of that inferior offence, it was barred from prosecuting the defendant for the higher offence; for if this proceeding were allowed, then the defendant having been already fined and imprisoned for the battery, might be again placed in peril of another fine and imprisonment for a riot of which the battery of which he had before been convicted was a part and perhaps the chief part.

"An acquittal of manslaughter will bar a future prosecution for murder. 1 Chitty, 455, 6; 2 Hale, 246. And an acquittal of murder is a bar to an indictment for petty treason; Foster, 329. And I presume by parity of reasoning, a conviction of manslaughter will bar a prosecution for murder, and a conviction of murder a prosecution for petit treason; for the plea of *autrefois convict*, depends on the same principle with the plea of *autrefois acquit*. 1 Chitty, 461.

"In cases of this kind, where two grades of offence are the result of the same act, it would seem that the attorney for the commonwealth should either begin with the higher, and, on failure, prosecute for the lower, or unite both offences in the same indictment under separate counts. Thus the three defendants might have been indicted for a riot and beating a man. If convicted, their punishment covers the whole ground, and they or either of them cannot be indicted for the battery alone. If acquitted, however, they could not plead *autrefois acquit* to a second indictment charging them with the battery, because, although they might not be guilty of a riot, yet they or some of them, might be guilty of the inferior offence. See 2 Leach, 716, *Vandercomb's case*, and 2 East's C. L. 519. But the better way is to charge the battery in the same indictment with the riot, under separate counts; there is no doubt that several misdemeanors may be joined in the same indictment. 1 Chitty, 254; 2 Chitty, 489, note:" (id.)

The above distinction of the learned reporter between a conviction and acquittal, must depend on the question whether the indictment for the higher offence necessarily involve the lower. If it do, then no matter whether the result were a conviction or acquittal; the whole ground was covered and shall not be gone over again in whole or in part. To warrant the trial for the battery, after acquittal of the riot, we must first learn that there cannot be a conviction of the former under a simple indictment for the latter; for then, in respect to the verdict of acquittal, we cannot see that the whole ground was covered, though it would be by a verdict of conviction.

The severance of the subject matter in any form, and prosecuting for part, followed by a trial on the merits, equally bars the whole. A criminal has in his possession forged bank bills on different banks, with intent to pass them. He is indicted and tried for the intent in respect to one of the bills; the whole being an entire offence, this will bar other indictments in respect to any other of the bills, though on a bank different from the first. *State of Connecticut v. Benham*, 7 Conn. Rep. 414. The decision is ably maintained in argument, and illustrated by several authorities from the English books, by Williams, J. who delivered the opinion of the court, (id. 417, 18;) thus: "It has been decided that a person indicted for stealing nine one pound notes, may be convicted upon proof of stealing only one. *Rex v. John*, 3 Mau. & Selw. 539, 548; *Rex v. Clark*, 1 Brod. & Bing. 473. There, the substance

cannot afterwards be indicted for the larceny. After being indicted and acquitted on an indictment for felony, he cannot afterwards be in-

of the offence is stealing notes. Here, the substance of the offence is having in possession counterfeit bills or notes. The number may add to the evidence of guilt, but not to the number of the offences. In an action for the penalty for insuring tickets in a lottery, where ten tickets were insured at one and the same time, Lord Kenyon held that but one penalty could be recovered. *Holland, q. t. v. Duffin*, Peake's Cas. 58," &c. A plea of a former acquittal of the defendant, for an assault and battery, by a justice of the peace, was held a sufficient bar to an indictment alleging the same offence with the additional aggravating circumstance of the complainant's life having been thereby endangered. *Commonwealth v. Cunningham*, 13 Mass. Rep. 245. Where there was an assault and battery upon A. & B. by the same stroke, and the offender was legally convicted of the offence upon one, held that this barred a prosecution for the offence upon the other. *State v. Damon*, 2 Tyl. Rep. 390. The prisoner had been indicted and tried for the murder of Mary Anne Condon, and convicted of manslaughter. He had before been tried for the murder of Mary Cormack, and convicted of manslaughter, and received the benefit of clergy. The deaths of both proceeded from the same act; but Mary Anne Condon was not dead at the time of the first trial. Yet held, that the first allowance of clergy protected the prisoner against the second trial. *Rex v. Jennings*, Russ. & Ry. 388. In *Rex v. Smith*, (3 Carr. & Payne, 412.) two indictments for the same offence having been found, one charging it capitally and the other as a misdemeanor, the prosecution was put to elect which it would go upon; and an acquittal was directed as to the other. "Under the numerous British statutes, imposing severe penalties, and even taking away the benefit of clergy from larcenies perpetrated under certain specified circumstances, it is the practice to indict the crime, with all its aggravations under the statute; and if the aggravating circumstances are not proved, to convict of the simple larceny only. I have met with no instance of an attempt on the part of the crown, after indicting for a simple larceny, and establishing that, to proceed by another indictment to establish the higher offence." Per Drake, J. in *State v. Cooper*, 1 Greenl. Rep. 375. A man was convicted of arson, in burning S.'s dwelling house. In doing so, he caused the death of H. who was burned in the house; for which murder he was indicted; but being arraigned, he pleaded *autre fois acquit*, or rather the whole matter specially, which was allowed as a good plea in bar of the indictment for the higher crime. Drake, J. said, the proper course would have been to have indicted him for the murder, laying the means to have been by the arson, in which case he might have been acquitted of the former and convicted of the latter, and so the whole offence have been expressly covered. But he should not be deprived of his plea, because the state chose to indict and convict him for the inferior offence, the evidence as to both being identical. He likens the case to burglary and stealing, and a conviction of the latter, which he says shall bar an indictment for the former. *State v. Cooper*, 1 Greenl. Rep. 361, 372, 374.

In New York there are some statute provisions allowing conviction of an inferior degree of the offence indicted; but forbidding the conviction of an assault with intent to commit the crime, or of an attempt, when it shall appear that the crime was actually perpetrated. 2 R. S. 702, §§ 26, 27. The 28th section (p. 702,) declares the conviction nor acquittal on a charge of one degree of crime, a bar to prosecutions for any other degree, and for any attempt to commit the same or any other degree.

There are certain decisions which it is difficult to reconcile with the above doctrine. Such seems to be the case of *Bailey v. Taylor*, (2 Bail. Rep. 49,) where it was held that if one act comprise the requisite ingredients of two offences, the defendant may be prosecuted successively for each. And see the *State v. Yancey*, 1 N. Car. Law Reps. 519. So also with respect to the case of the *Commonwealth v. Roby*, 12 Pick. 496, where it was held that a conviction for an assault with intent to murder, could in no case be pleaded in bar to an indictment for the murder itself.

Other cases come in as exceptions to the rule. Thus, if A. steal the goods of B., and on the next day steal the goods of C.; and D. becomes the receiver of all, at the same time an-

dicted for an attempt to commit it, for he might have been convicted for the attempt on the previous indictment for the felony.(a) For the same reason, a man indicted and acquitted on an indictment for robbery, cannot afterwards be indicted for an assault with intent to commit it;(b) a man indicted and acquitted for a misdemeanor, which upon the trial, appears to be a felony, cannot afterwards be indicted for the felony;(c) so, a person indicted and acquitted for embezzlement, cannot afterwards be indicted as for a larceny; or if tried and acquitted for a larceny, cannot afterwards be indicted as for embezzlement, upon evidence of the same facts;(d) or if a man be indicted and acquitted of having, with others received stolen goods, he cannot afterwards be indicted for separately receiving them.(e) If a man be indicted and acquitted of obtaining goods by false pretences, he cannot afterwards be indicted upon the same facts as for a larceny;(g) but if he be indicted and acquitted of a larceny, he may afterwards be indicted upon the

(a) See 14 & 15 Vict. c. 100, s. 9.

(b) Id. s. 11.

(c) Id. s. 12.

(d) 14 & 15 Vict. c. 100, s. 13.

(e) Id. s. 14.

(g) See 7 & 8 G. 4, c. 29, s. 53.

by one act; a conviction for receiving the goods stolen from A. is no bar to another indictment for receiving the goods stolen from C. For the guilt of the accessory, has relation to the crime of the principal, and as the latter has committed two offences, so has the former. *Commonwealth v. Andrews*, 2 Mass. Rep. 409.

An acquittal on an indictment for forging and uttering an order, is no bar to a subsequent indictment for a misdemeanor in obtaining goods on the same order, by using it as a false token. *Commonwealth v. Quann*, 2 Virg. Cas. 89. In Virginia, a plea of *autrefois acquit* or *convict* by an examining court, must show the crime charged there to have been the same offence as that charged in the indictment to which the former trial is interposed as a bar. *Commonwealth v. Somerville*, 1 Virg. Cas. 164. Where a single act combines the requisite ingredients of two distinct offences, it has been held, in South Carolina, that the defendant may be separately indicted and punished for each; e. g. unlawfully trading with a slave, and by the same act knowingly receiving stolen goods from him; for the necessity of proving the stealing and scienter, in the last case, shows the point to be different from that in the former, which is sustained by showing a mere dealing with the slave. *State v. Taylor*, 2 Bail. 49. See *Conant v. Raymond*, *infra*. Proof of receiving stolen goods, knowing them to be stolen, will not support an indictment for larceny of the same goods. The latter is the principal offence: the former the mere accessory; and an acquittal or conviction of the one, will not bar a prosecution for the other. *Ross v. The State*, 1 Blackf. 390, 1. That the counterfeit bill for the passing of which the prisoner is now indicted, was given in evidence against him on a former trial for passing another bill, will not render such former suit a bar. *United States v. Randenbush*, 8 Pet. 288. In Kentucky, a trial of bastardy, on a warrant charging the birth to have been one day, will not bar a second trial, on a warrant stating a different day; for the day is material. *Burnett v. Commonwealth*, 4 Monroe, 106, 7, 8. See also, *Rex v. Smith*, 3 Barn. & Cress. 502. An indictment was against three persons jointly, for obstructing a highway. The evidence was that each separately obstructed it on his own farm. The variance was held fatal, because a trial on this joint indictment would not bar separate indictments for each offence. The indictment should have charged the offences to have been several, and then the defendants might have been severally convicted or acquitted. *The Commonwealth v. M'Chord*, 2 Dana, 242.

same facts for obtaining the goods or money under false pretences.(a) \*If on a former indictment against an accessory before the fact, which specially charged him with inciting, &c., he was acquitted, he may afterwards be indicted as principal;(b) but if he were indicted as principal on the former occasion, it would be otherwise.[1]

(a) *R. v. Henderson et al*, Car. & M. 328.

(b) 2 Hawk. c. 35, s. 12.

[1] An acquittal upon an indictment for manslaughter, is, it seems, a bar to an indictment for murder, for if the defendant were innocent of the modified offence he could not be guilty of the same fact with the addition of malice. *Fost.* 329; 4 *Coke Rep.* 45, 6; 2 *Hale* 246; 12 *Pickering*, 504. But in Pennsylvania, it is said that an acquittal for murder, is no bar to an indictment for an involuntary manslaughter, which is there a misdemeanor. *Com. v. Gable*, 7 *Serg. & Rawle*, 423. A conviction for an assault with intent to kill would be no bar to an indictment for murder. *Com. v. Roby*, 12 *Pick.* 496. So an acquittal for larceny would not prevent a prosecution for burglary with intent to steal. It has been said, in Connecticut, that a conviction for an assault and battery with an intent to commit a rape was a bar to a subsequent indictment for rape. The subject arose on the question whether proof of a rape would sustain an indictment for an assault with intent to commit a rape, and the court held that it would and that the doctrine of merger did not apply. *Whart. Cr. Law*, p. 142.

In Massachusetts, where, to an indictment for receiving stolen goods which were the property of A., the defendant pleads in bar, a former indictment, conviction and judgment for receiving stolen goods, the property of B., and then alleges that the two parcels were received by him of the same person, at the same time, and in the same package, and that the act of receiving them was one and the same, the plea was held insufficient. *Com. v. Thomas Andrews*, 2 *Mass. Rep.* 409. But in cases of felony, where one of the offences is a necessary ingredient of the other, and where the state has selected and prosecuted it to conviction, it is said there can be no farther prosecution on the other. *State v. Cooper*, 1 *Green. Rep.* 361; *State v. Shepard*, 7 *Conn. Rep.* 54.

It was held in Alabama, in the case of *State v. Standifer et al*, 5 *Porter Rep.* 523, that to an indictment for assault on J. L. with intent to murder, it cannot be pleaded in bar that the defendant had previously been acquitted on an indictment for the murder of L. L., the transactions being averred to have been identical. But in Virginia, (*Com. v. Kinney*, 2 *Virg. Cas.* 159,) where the defendant with two others was indicted for riotously and routously assembling to disturb the peace, and being so assembled, did riotously and routously beat, wound and ill-treat one K. M., and pleaded that he had been heretofore indicted for an assault and battery on the said H. W., being the same offence with which he is now charged, and in Vermont it has been laid down that where a man by the same blow wounds A. and B., and he is convicted for the assault and battery on A., he cannot afterwards be tried for the assault and battery on B. *State v. Damon*, 2 *Tyler*, 390. But this decision seems to be opposed to the weight of authority. In Virginia, in the case of *Vaughan v. Com.*, 2 *Virg. Cas.* 273, it was held that if a person be indicted for shooting S. W., and acquitted thereof, and then indicted for shooting J. W., the plea of *auterfois acquit* will not be supported, although the same act of shooting is charged in each indictment; for the jury who tried the first indictment might have acquitted the prisoner on several grounds which would not affect the second trial, as that the shot did not wound and strike S. W., or that he did not shoot S. W. with intent to maim, disfigure, disable or kill the said S. W., &c.

A person may be indicted for an assault committed in view of the court, though previously fined for the contempt. The plea of *auterfois convict* will not avail him, because the same act constitutes two offences; one violates the law which protects courts of justice, and stamps an efficient character on their proceedings; the other is levelled against the general law which maintains the public order and tranquillity. *State v. Yancy*, 1 *Car. Law Rep.* 519.

The former indictment, however, must appear to have been a good and valid indictment for the offence, and which might be supported by the same evidence as would support the present one.(a)[2]

(a) 2 Hawk. c. 35, s. 8; *R. v. Vandercombe*, a.; *Wigg's case*, 4 Co. 46 b. 2 Leach, 708; and see *Vaux's case*, 3 Co. 45

And where General Houston had been punished by the House of Representatives for a contempt and breach of privilege, it was held that the action of the House was no bar to an indictment for an assault and battery growing out of the same transaction. Opinions of Atty., Genl. 2, 958.

[2] A legal acquittal in any court, of competent jurisdiction, if the indictment be good, will be sufficient to preclude any subsequent proceedings before every other court. *Com. v. Cunningham*, 13 Mass. Rep. 245; *Com. v. Goddard*, 13 Mass. 457; *Wortham v. Com.*, 5 Rand. 669; *Bailey's cases*, 1 Virg. Cas. 258; 1 Virg. Cas. 188, 248. The court, however, must have been competent and the proceedings regular. Thus a conviction of a breach of the peace before a magistrate, on the confession or information of the offender himself, is no bar to an indictment by the grand jury for the same offence. *Com. v. Alderman*, 4 Mass. Rep. 477.

The true test to ascertain whether a plea of autrefois be a good bar, is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. *People v. Barrett*, 1 Johnson, 66; *Com. v. Cunningham*, 13 Mass. 245; *Hite v. Skute*, 9 Yerger, 357; *Com. v. Halstat*, 2 Boston Law R. 177; Archbold's C. P. by Jervis, 82; *Com. v. Curtis*, Thacher's C. C. 202; *Com. v. Goodenough*, Thacher's C. C. 132; *Gerard v. People*, 3 Scammon, 363; *State v. Ray*, Rice, 1; *State v. Risler*, 1 Richardson, 219.

The rule undoubtedly is, that if the prisoner *could* have been legally convicted on the first indictment, upon any evidence that *might* have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment; and it is immaterial whether the proper evidence were adduced at the trial of the first indictment or not. *R. v. Sheen*, 2 C. & P. 634; *R. v. Clarke*, 1 Brod. & B. 473; *R. v. Embden*, 9 East, 437.

If the charge be in truth the same, though the indictments differ in immaterial circumstances, the defendant may plead his previous acquittal, with proper averments, for it would be absurd to suppose that by varying the day, place, or any other allegation, the precise accuracy of which is not material, the prosecutor could change the right of the defendant, and subject him to a second trial. *Hite v. State*, 9 Yerger, 357; Keeler, 58; 1 Leach, 448; *R. v. Embden*, 9 East, 437. But if the crimes charged in the two cases are so distinct that evidence of the one will not support the other, it is inconsistent with reason and law, to say that they are so far the same that an acquittal of the one will be a bar to the prosecution of the other. *Hite v. State*, 9 Yerger, 357.

In the case of *Com. v. Jackson*, 2 Virg. Cas. 501, where a person charged with an assault and battery was recognized to appear at the then next Superior Court, to answer an indictment to be then and there preferred against him for the said offence, but in the meantime, fraudulently procured himself to be indicted for the same offence in the county court, and there confessed his guilt, and a small amercement was thereupon assessed against him, such fraudulent prosecution and conviction was held to present no bar to the indictment preferred against him in the Superior Court.

If after a prisoner has pleaded to an indictment, and after the jury has been sworn and evidence offered, the public prosecutor, without the consent of the prisoner, withdraw a juror merely because he is unprepared with his evidence, the prisoner cannot afterwards be tried on the same indictment, and if he be tried and convicted, judgment will be arrested. *People v. Barret and Ward*, 2 Caines' Rep. 304.

Where the defendant, at a previous term, had pleaded to another indictment for the same offence, it was held that the fact of the former indictment being still pending, was no bar to

And the acquittal must appear to have been before a court which had jurisdiction of the offence. Therefore, where a man was tried at

a trial on the second. *Com. v. Dunham*, per Thacher, J., 1 Boston Law Reporter, 145 Thacher's C. C. 513. And an acquittal of nuisance, nine years back, is not a conclusive bar, to an indictment for a nuisance at the present time, though the offences on the record are identically the same, each day's continuation of the nuisance being a repetition of the offence. *People v. Townsend*, 3 Hill's Rep. 479.

Where judgment has been arrested for any defect in the indictment, a new one may be preferred, correcting the error, and the former cannot be pleaded in bar, as where there has been a final judgment of acquittal or conviction. *People v. Casborus*, 13 Johns. Rep. 351; *Com. v. Durham*, 1 Boston Law Rep. 145.

A defendant who has been acquitted upon one of several counts in an indictment, is entirely discharged therefrom, nor can he a second time be put upon his trial upon that count. *Campbell v. State*, 9 Yerger, 333. Even an erroneous acquittal is conclusive until the judgment is reversed, so that if a judge direct a jury to acquit the prisoner on any ground, however fallacious, he is entitled to the benefit of the verdict. *State v. Norvell*, 2 Yerger, 24.

In the case of *Com. v. Mortimer*, (2 Virg. Cas. 325,) where the prisoner was on his trial for burning the barn of Josiah Thompson, the prosecutor was asked his name, who replied Josias Thompson, on which the prisoner was acquitted, without leaving their box; on being indicted for burning the barn of Josias T——, he cannot plead *auterfois acquit*.

A trial and acquittal, on an indictment for stealing a negro man, is no bar to a subsequent prosecution for stealing a negro man slave. *State v. McGraw*, 1 Walker, 208. An acquittal on an indictment, charging the defendant with setting fire to the premises of A. & B. is no bar to an indictment charging him with setting fire to the premises of A. & C. *Com. v. Wade*, 17 Pick. 395.

Where the defendant had been indicted for stealing the cow of J. G., and acquitted, and was again indicted for stealing the same cow, at the same time and place, and of the same owner, but by the name of J. G. A., which was the proper name, it was held that the acquittal was no bar to the second indictment. *State v. Risher*, 1 Richardson, 214.

In *Hile v. State*, (9 Yerger, 357,) the first indictment charged the prisoner with having stolen, taken, and carried away one bank note, of the Planter's Bank of Tennessee, payable on demand at the Merchant's and Trader's Bank of New Orleans. Upon this he was acquitted. The second indictment charged him with having stolen, taken and carried away one bank note of the Planter's Bank of Tennessee, payable on demand at the Mechanic's and Trader's Bank of New Orleans. The former acquittal was pleaded in bar, but it was held to be no bar to the prosecution of the second indictment. A prisoner having been acquitted of the forgery of an order, and also of falsely uttering, as true, a forged order, cannot plead that acquittal to a subsequent indictment, charging him with having falsely and fraudulently obtained sundry goods by means of a false privy token and counterfeit letter, which privy token was the same order, of the forgery and uttering of which he had been acquitted. *Com. v. Quann*, 2 Virg. Cas. 89.

In order, however, to entitle the defendant to this plea, it is necessary that the crime charged be precisely the same, and that the former indictment, as well as the acquittal, was sufficient. 2 Leach, 717; 1 East P. C. 522; 9 East, 437. As to the first of these requisites, the identity of the offence, if the crimes charged in the former and present prosecution are so distinct, that evidence of the one will not support the other, it is inconsistent with reason, as it is repugnant to the rules of law to say, that the offences are so far the same, that an acquittal of the one will be a bar to the prosecution for the other. 2 Leach, 717; 12 Pick. 505. But, on the other hand, it is clear, that if the charge be in truth the same, though the indictments differ in immaterial circumstances, the defendant may plead his previous acquittal, with proper averments; for it would be absurd to suppose, that by varying the day, parish, or any other allegation, the precise accuracy of which is not material, the prosecutor could change the rights of the defendant, and subject him to a second trial.

the sessions in Southwark, and it appearing that the offence was committed a few yards within the city of London, the defendant was ac-

Keilw. 58; 1 Leach, 448; 9 East, 437; 2 Hale, 224, 225, 226, 247; 2 Inst. 318; Hawk. b. 2, c. 35, s. 3; Burn, J. Indictment, XI.; [12 Pick. 504; 13 Mass. R. 245.] Thus, as to the point of time, if he be indicted for a murder, as committed on a certain day, and acquitted, and afterwards be charged with killing the same person, on a different day, he may plead the former acquittal in bar, notwithstanding this difference, for the day is not material; and this is a fact which could not be twice committed. 2 Hale, 179, 244; Hawk. b. 2, c. 35, s. 3. And the same rule applies to accusations of other felonies; for, though it is possible for several acts of the same kind to be committed at different times by the same person, it lies in averment, and the party indicted may show that the same charge is intended. 2 Hale, 179, 244; Burn, J. Indictment, XI.

Where a defendant pleaded an acquittal on an indictment for murdering a child, by *administering a certain deadly poison, to wit, oil of vitriol*, and by forcing the child to *take, drink, and swallow down*, a large quantity of the said oil of vitriol, knowing it to be a deadly poison, whereby the child became sick and distempered in his body, and by that sickness languished and died, it was held a good bar to an indictment (first count) for murdering the same child, by *administering a large quantity of oil of vitriol*, and forcing the child to *take into his mouth and throat* a large quantity of the said oil of vitriol, knowing that the said oil of vitriol would occasion the death of the child, whereby he became *disordered in his mouth and throat*, and by the *disorder, choking, suffocating, and strangling* occasioned thereby, languished and died; (2d count) for murdering the child, by *administering a certain acid*, called oil of vitriol, and forcing the child to take a large quantity of the said acid into his mouth and throat, by means whereof he became *disordered in his mouth and throat*, and incapable of swallowing his food, and died of the *inflammation, injury, and disorder* occasioned thereby. 1 Brod. & Bing. 473. If a party be indicted for the murder or assault of a certain person unknown, and afterwards charged in an indictment for the same offence, he may rely upon the previous acquittal. Dyer, 285, a; Keilw. 25; Hawk. b. 2, ch. 35, sec. 3. So, if the person killed be differently, though sufficiently described in the two distinct indictments, the defendant may show that the same individual is intended. 2 Hale, 244. But then it is necessary to aver, that the party slain was known by both names, so as to maintain the sufficiency of the first proceedings, for if they were merely nugatory, they will form no ground of defence to any subsequent prosecution. 2 Hale, 244, 245; Hawk. b. 2, c. 35, sec. 3. And hence, we may observe, that the great general rule upon this part of the subject is, that the previous indictment must have been one upon which the defendant could legally have been convicted, upon which his life or liberty was not merely in imaginary, but in actual danger, and consequently, in which there was no material error. 4 Co. Rep. 39, 40; 1 Leach, 448; 2 Hale, 248; Hawk. b. 2, ch. 35, sec. 8; 2 Russell, 40, 41. So that all variations not inconsistent with the validity of both proceedings, such as differences in the day, the ville, or the quantity, may be shown to be merely technical. But if the variances are in those things which are material, *auterfois* acquit must not be pleaded; for either the first indictment was ineffectual, and therefore, the acquittal is of no avail, or the second will prove not applicable to the evidence, and therefore, the objection is needless. Thus, if a person be indicted for a crime laid to be done at a certain parish in a particular county, and found not guilty, and afterwards accused of the same fact at another place within the same county, he may plead his former acquittal, for the ville is altogether immaterial, and either indictment might be supported, (2 Hale, 245;) but if the difference be in the county, he cannot do this, because one indictment must be bad, since the offence will be proved to be beyond the jurisdiction of the grand jury. 2 Hale, 245; Com. Dig. Indictment, L. And where the reason fails, the rule fails with it; for an indictment removed from the proper county, though tried in another, is thus pleadable, because the same offence may still be intended. 2 Hale, 245. Upon the same principle, where the defendant was acquitted merely on some error of the indictment, or variances in the recitals, he may be indicted

quitted; being afterwards indicted in London for the same offence, he pleaded *auterfois acquit*: but the judges held the plea to be bad, as the sessions had no jurisdiction to try the offence.(a)

(a) *R. v. Welsh*, Ry. & M. 175.

again upon the same charge, for the first proceedings were merely nugatory. 2 Leach, 708; 2 East P. C. 519. Thus, if an indictment for larceny lay the property in the goods in the wrong person, the party may be acquitted, and afterwards tried on another, stating it to be the property of the legal owner. 1 Leach, 464. But where, in the first indictment, the prosecutor mis-stated a mere superfluous averment, he cannot afterwards rectify that error in a second, to place the life and liberty of the defendant again in jeopardy. 9 East, 437. And, in such cases, the point in discussion always is, whether, in fact, the defendant could have taken a fatal exception to the former indictment; for, if he could, no acquittal will avail him, but if he could not, it is always competent for him to show the offences to be really the same, though they are variously stated in the proceedings.

It is not, in all cases, necessary that the two charges should be precisely the same in point of degree, for it is sufficient if an acquittal of the one will show that the defendant could not have been guilty of the other. Thus, a general acquittal of murder is a discharge upon an indictment of manslaughter upon the same person, because the latter charge was included in the former, and, if it had so appeared on the trial, the defendant might have been convicted of the inferior offence; and, on the other hand, an acquittal of manslaughter will preclude a future prosecution for murder, for if he were innocent of the modified crime, he could not be guilty of the same fact, with the addition of malice and design. 4 Co. Rep. 45, 46; 2 Hale, 246; Fost. 329; 12 Pick. 504. So, an acquittal of petit treason will bar an indictment for the murder of the same person, and an acquittal of murder an indictment for petit treason. Fost. 325, 328, 329; Hawk. b. 2, ch. 35, sec. 5. But if the former charge were such an one as the defendant could not have been convicted of the latter upon it, the acquittal cannot be pleaded. Thus, if the first charge were for a felony or stealing, and the second for a mere misdemeanor, the previous acquittal will be no bar, for a felony or larceny cannot be modified on the trial into a trespass or misdemeanor. Hawk. b. 2, c. 35, sec. 5; Bro. App. 121; 1 Leach, 12; 12 East, 415. And it often happens, that after an acquittal of the felony, the defendant is indicted and tried for the misdemeanor upon the same evidence, and it would be no objection, though the judge might still think that there was evidence of the felony to have gone to the jury. 12 East, 415. Thus, also, if the defendant be indicted for a burglarious entry and a stealing, and acquitted, he may still be tried for a burglarious entry with intent to steal; for although the burglary be the same, it is evident the prisoner could not have been found guilty on the first, upon proof of a mere intention, and therefore may well be indicted for that offence in the second. 2 Leach, 716; Hawk. b. 2, ch. 35, sec. 5; 2 Leach, 816; 12 Pick. 503. It is, indeed, generally laid down, that an acquittal of burglary will not prejudice an indictment for larceny, or vice versa, (2 Hale, 245, 246; Hawk. b. 2, ch. 35, sec. 5;) but this must be understood of those cases, in which, like that we have just stated, the former charge did not necessarily include the latter. On the same ground, if a robbery be committed in one county, and the goods be carried into another, so as to make it larceny there, an acquittal of the larceny in the last county will not prejudice an indictment for robbery in the first, because the verdict of not guilty can proceed on the ground only, that the goods were not brought within the jurisdiction of the grand jury, and will not affect the original taking, into which they had no authority to inquire. 2 Hale, 245, acc.; but see Hawk. b. 2, ch. 35, sec. 4, cont. And thus also, it is clear, that if a man be indicted as accessory after the fact, and acquitted, he may afterwards be tried as a principal, for proof of one will not at all support the other. 1 Hale, 625, 626; 2 Hale, 625, 626; 2 Hale, 244; Kel. 25, 26; Hawk. b. ch. 35, sec. 11; Staundf. 105. But it was formerly holden, that the offences of principal and accessory before the fact, were in substance the same; and therefore, that after an acquittal as to the former, no one could be



As to the form of the plea: by stat 14 & 15 Vict. c. 100, s. 28, it is enacted that "in any plea of *autrefois convict* or *autrefois acquit*, it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted (as the case may be) of the offence charged in the indictment."

The following therefore may be the form of a

*Plea of Autrefois Acquit.*

And the said A. B., in his own proper person, cometh into court here, and having heard the said indictment read, saith that our Lady the Queen ought not further to prosecute the said indictment against him; because he saith that heretofore, to wit, at a sessions of oyer and terminer and general jail delivery [*or at the general quarter sessions of the peace*] holden at —, in and for the county of —, he the said A. B. was lawfully acquitted of the said offence charged in the said indictment: And this he the said A. B. is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the present indictment specified.

*Replication thereto.*

And hereupon E. F., [*the clerk of arraigns or clerk of the peace*] who prosecutes for our Lady the Queen in this behalf, saith that by reason of any thing in the said plea of the said A. B. above pleaded in bar alleged, our said Lady the Queen ought not to be precluded [\*118] from further prosecuting the said \*indictment against the said A. B.; because he saith that the said A. B. was not lawfully

indicted as to the latter, though it was admitted that an acquittal as procurer would not hinder him from being indicted as a principal. 1 Hale, 625; 2 Hale, 244; Hawk. b. 2, ch. 35, s. 11. But as it seems now to be the better opinion, that the charges, however nearly allied in moral guilt, are specifically different in their legal aspect, and that evidence of procuring will not suffice to show an actual commission, it follows that a previous verdict in his favor, when charged with being principal, cannot be pleaded on a subsequent prosecution, for inciting others to the felony. Fost. 361, 362; 2 St. Tr. 798; Hawk. b. 2, ch. 35, sec. 11; 2 Hale, 244. And if two offences are supposed to have been committed at the same time, as if a horse and a saddle are stolen together, an acquittal of one will be no bar to an indictment for the other, for the crimes are essentially different. 2 Hale, 246. So, if a road be out of repair, the parties bound to amend it may be indicted, though they have, at a former period, been acquitted on a similar proceeding. 6 East, 316.

As to the sufficiency of the discharge, which may be thus pleaded, it must be a legal acquittal by judgment upon trial, by a verdict of a petit jury. 2 Hale, 243, 246; Hawk. b. 2, ch. 35, sec. 6; Burn, J. Indictment, XI. And, therefore, if a man be committed for a crime, and no bill be preferred against him, or, if it be thrown out by the grand jury, so that he is discharged by proclamation, he is still liable to be indicted. So, if the facts be found specially by the coroner's inquest or grand jury, and he be thereupon discharged, he cannot plead it in bar to any subsequent prosecution; but if the special verdict be found by the petit jury, and judgment be given by the court "that he go thereof without day," this will amount to a sufficient acquittal. 2 Hale, 246; Burn, J. Indictment, XI.

acquitted of the said offence charged in the said indictment, in manner and form as the said A. B. hath in his said plea above alleged; and this he the said E. F. prays may be inquired of by the country, &c. And the said A. B. doth the like. Therefore let a jury come, &c.

The usual replication formerly, when the record of the former acquittal was set out in the plea, was *nul tiel record*. But as in this modern form of plea the record is not set out, and there is of course no *prout patet per recordum*, and as there is no such thing as a trial by the record in criminal cases, but the trial in all cases must be by the country,—it seems to me that a mere general traverse of the plea is the proper replication in this case.[1]

In proof of the plea, the record of the former acquittal must be made up; and if the former trial were at the quarter sessions, the court of Queen's Bench, will, if necessary, grant a madamus requiring the justices to make up the record.(a) And formerly the record or an examined copy it must have been given in evidence by the defendant. But now, by stat. 14 & 15 Vict. c. 99, s. 13, (after reciting that it is expedient, as far as possible, to reduce the expense attendant upon the proof of criminal proceedings,) it is enacted, that whenever in any proceeding, whatever it may be, it shall be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof; but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk

(a) *R. v. JJ. of Middlesex*, 5 B. & Ad. 1113.

[1] The plea of *auterfois acquit* is of a mixed nature, and consists partly of matter of record, and partly of matter of fact. The matter of record is the former indictment and acquittal; the matter of fact is the averment of the identity of the offence and of the person as having been formerly indicted. To support the first matter, it is necessary to show that the defendant was found not guilty on an indictment free from error in a court having jurisdiction. 4 Blk. Com. 335. On a plea of *auterfois acquit*, a jury are sworn instantly to try the cause. 2 Leach, 541. The proof of the issue lies upon the defendant. Arch. 90. To prove it, he has first merely to prove the record, and secondly to prove the averment of identity contained in his plea. 2 Russ. 721, n. Where the second indictment is preferred at the same term, the original indictment and minutes of the verdict, are receivable in evidence in support of the plea of *auterfois acquit* without a record being drawn up. *Rez v. Parry*, 7 C. & P. 836. But where the previous acquittal was at a previous term in the same jurisdiction, or in a different jurisdiction, it can only be proved by the record. *R. v. Bowman*, 7 C. & P. 101, 337.

Wherever the offences charged in the two indictments are capable of being legally identified as the same offence by averments, it is a question of fact for a jury to determine whether the averments be supported, and the offences be the same. In such cases the replication ought to conclude to the country. But when the plea of *auterfois acquit* upon its face shows that the offences are legally distinct and incapable of identification by averments, as they must be in all material points, the replication of *nul tiel record* may conclude with a verification. In the latter case, the court, without the intervention of a jury, may decide the issue. *Hite v. State*, 9 Yerger, 357.

of the court or other officer, having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.

If there be a variance between the former record and the present indictment, in the description of the offence, it may be made good by evidence, showing in substance that the proofs necessary to support the present indictment, would have been sufficient to convict him upon the former one.[2]

If the verdict be in favor of the defendant, the judgment is that he be dismissed and discharged from the said premises in the present indictment specified, and that he go thereof without day. But if the verdict be against the defendant, then in felonies the judgment is of *respondeas ouster*; but in misdemeanors the judgment is final.(a)[3]

(a) *R. v. Taylor*, 3 B. & C. 502.

[2] Where the only issue is the identity of the offences, a technical difference between the description of the property in the first indictment and the second will be disregarded. *The People v. M'Gowan*, 17 Wendell, 386.

In England, in the case of *R. v. Perry*, 7 Car. & P. 836; where four persons were tried for rape, upon an indictment containing counts charging each as principal and the others as aiders and abettors, they were acquitted; and it being proposed, on the following day, to try three of them for another rape upon the same person, the second indictment being exactly the same as the first with the omission of the fourth prisoner, they pleaded *autrefois acquit* to the second indictment, averring the identity of the offences, and to this plea there was a replication that the offences were different. The prisoners' counsel put in the commitment and the former indictment, and also the minutes of the former acquittal written on the indictment. On this evidence the jury found that the offences were the same; and it being referred for the opinion of the judges whether there was any evidence to justify and support the verdict, and if not, whether such verdict was final, and operated as a bar to any further proceedings by the crown upon the second indictment, the court held, that the verdict of the jury was final, and the prisoners were discharged.

To an indictment for larceny in a dwelling-house, the defendant pleaded a former conviction of pilfering, on a complaint before a police court, averring that the articles and the stealing mentioned in the indictment were the same mentioned in said complaint, and that the police court had jurisdiction of the offence. The replication averred that the stealing charged in the said complaint was a larceny in the dwelling-house, which was a high and aggravated crime, and that the police court had not jurisdiction thereof. The rejoinder traversed the several averments in the replication. It was held, on special demurrer, that the rejoinder was good, being neither a departure, nor double, and that though the plea was defective in form, for not directly traversing the charge of larceny in a dwelling-house, yet that the defect was cured by the pleading over. The proper plea would have been former conviction of the larceny, and not guilty of the residue of the charge. *Com. v. Curtis*, 11 Pick. Rep. 134; Whart. Cr. Law, 146.

Where the former conviction was effected by fraud, the plea of *autrefois convict*, in such case, being replied to specially, the replication which sets forth such fraudulent prosecution and conviction being well drawn, is a sufficient answer to the defendant's plea, and should be adjudged good on demurrer. *Com. v. Jackson*, 2 Virg. Cas. 501; *State v. Brown*, 16 Conn. Rep. 54.

[3] The judgment against the defendant, in felonies, is *respondeat ouster*; or rather, as the

\*(c) *Auterfois convict or attain.*

[\*114]

If the defendant were formerly attain or convicted of the same offence, he may plead it in bar to the present indictment.(o) The observations already made respecting the plea of *auterfois acquit*, are equally applicable to this plea. The form of the plea is also the same, merely substituting the word "convicted" for "acquitted." Formerly *auterfois attain* of another felony, was a bar to any subsequent indictment for felony, whilst the former attainder continued in force. But now, by stat. 7 & 8 G. 4, c. 28, s. 4, "no plea setting forth any attainder, shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment." [1]

(a) 2 Hale, 253; 2 Hawk. c. 36; and see Car. & P. 337.

*R. v. Scott*, 1 Leach, 401; *R. v. Broman*, 6

defendant generally pleads over to the felony at the same time with the issue in the plea of *auterfois acquit*, the jury are charged again to inquire of the second issue, and the trial proceeds as if no plea in bar had been pleaded. *R. v. Vandercomb*, 2 Leach, 708; *R. v. Cogan*, 1 Leach, 448; *Rex v. Shean*, 2 C. & P. 635. In England, in cases of misdemeanor, the judgment is final. *R. v. Goddard*, 2 Ld. Raymond, 922; 2 Hale, 256. In this country, however, the judgment in each case appears to be *respondet ouster*. *Com. v. Goddard*, 13 Mass. 455; *Barge v. Com.*, 3 Penn. 262; *Com. v. Foster*, 8 Watts & Serg. 77. When the plea is allowed, the judgment is that the defendant go without day. 2 Hale, 391; 1 Deacon, 90; Archbold, by Jervis, 88. Whart. Cr. Law, 146.

[1] The plea of *auterfois convict* depends like that we have just considered, on the principle that no man shall be more than once in peril for the same offence. In order to plead this plea with effect, the crime must be the same for which the defendant was before convicted, and the conviction must have been lawful on a sufficient indictment, (9 East, 441;) for a conviction of one felony, is no bar to a trial of another.

This plea must always be pleaded after conviction, and it cannot be taken advantage of as a plea in abatement, that there is another indictment for the same cause depending. 2 Ld. Raym. 920; Dougl. 240; Cro. Car. 147; 7 Conn. R. 418. Its form, requisites, and consequences, are very nearly the same as in a plea of former acquittal. Thus, like that plea, it will be of no avail when the first indictment was invalid, and when, on that account, no judgment could be given, because the life of the defendant was never before in jeopardy. 4 Co. Rep. 45; Hawk. b. 2, c. 36, s. 15; 12 Pick. 504, 505. So also, like that plea, it must set forth the former record, and plead over to the felony. 2 Hale, 255; 2 Hale, 392; Burn, J. Indictment, XI. See form, Cro. C. C. 388. As in that the identity must be shown by averments, both of the offence and the person, so the same forms are here requisite. 2 Hale, 255; Burn, J. Indictment, XI. The replication is also in the same way, taking issue upon the material averments; (2 Hale, 255, 391, 2. See form of replication and judgment, 2 Hale, 392,) and the judgment, if in favor of the prisoner, is, "that he go thereof without day."

A defendant cannot be convicted and punished for two distinct felonies growing out of the same identical act, and when one is a necessary ingredient of the other, and the state has selected and prosecuted one to conviction. *State v. Cooper*, 1 Green. 361; *State v. Shepard*, 7 Conn. 54.

See, as to misdemeanors, *State v. Damon*, 2 Tyler, 387.

Crimes are indivisible, and a former conviction or acquittal on a trial for a part of the same offence, is a good bar for the residue. *State v. Benham*, 7 Conn. 414.

But a conviction upon an indictment for an assault with intent to murder cannot be pleaded in a bar to an indictment for murder. *Commonwealth v. Roby*, 12 Pick. 496. See *Commonwealth v. Wade*, 17 Pick. 400; *Same v. Curtis*, 11 Pick. 134.

(d) *Pardon.*

If a pardon have been granted to the defendant for the offence of which he is indicted, he may plead it in bar of the indictment. Formerly the pardon must have been under the great seal. But now, by stat. 7 & 8 G. 4, c. 28, s. 13, where the King, by warrant under his sign manual countersigned by one of his principal secretaries of state, shall grant to any felon a free or conditional pardon, the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon under the great seal, as to the felony for which such pardon shall be granted; but no pardon shall affect or mitigate the punishment of the offender for any felony committed by him after the granting of such pardon. The pardon however is only a bar to an indictment for the offence specified in it, and not for any other, committed before or after.(a)[2]

(a) *R. v. Harrod*, 2 Car. & K. 294.

In Tennessee, a conviction, judgment and execution for a felony not capital, is a bar to all other felonies not capital committed before such conviction, &c. *Orenshaw v. State*, Martin & Yerger, 122. See *Hawkins v. State*, 1 Porter, 475; *State v. M'Carthy*, 1 Bay. 334.

Where a party indicted for an affray, pleads that he has been convicted for the same offence upon an indictment for an assault and battery, parol proof is admissible to show, what the records cannot show with sufficient precision, that the two offences were or were not identical. *Duncan v. Commonwealth*, 6 Dana, 295.

Where *auterfois v. convict* is pleaded, the only proper replication traverses the identity of the offence. *Id.*

A judgment rendered by J. P. under the act of Kentucky, 1802, upon a warrant for a breach of the peace, committed by an assault and battery, is a bar to an indictment for the same assault and battery. *Commonwealth v. Miller*, 5 Dana, 320.

The legislature may declare that when a man has been punished by one mode of proceeding, he shall not be again punished for the same offence; and though the mode referred to may be under an act not consistent with the constitution, the protection will nevertheless be effectual. *Id.*

The New York statute against duelling and sending challenges to fight, contains a provision that persons indicted here for those offences may plead a former conviction or acquittal for the same, in another state or country; and that if such plea be admitted or established, it shall be a bar to any further or other proceedings against him for the same offence. 2 N. Y. Rev. Stat. 687, sec. 7.

The forms of pleading, replication and judgment, are so similar in case of the plea of *auterfois attainé*, to those which belong to the pleas of a former conviction and acquittal that it will not be necessary here to discuss them. 2 Hale, 255, 392. It will therefore be only proper here to observe that besides these pleas of a former trial of the individual *himself* when his guilt, depends upon the proof of that of another, he may plead and give in evidence that party's acquittal. Thus, if a jailer suffers a prisoner to escape and he is afterwards retaken tried and acquitted, he may plead the acquittal of the party committed to his charge, because, if that party be innocent, he cannot be guilty. 3 Hale, 254. And the party escaping might give the first discharge in evidence to bar an indictment for the subsequent felony. 2 Hale, 254.

[2] By the Constitution of the United States, the President has power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. Const.

*(e) Pleas to indictments for not repairing highways, &c.*

Pleas to indictments for not repairing highways or bridges, showing that the inhabitants of some other district, or that some persons *ratione*

U. S., art. 3, sec. 2. In general a similar power is vested in the governors of the States by their respective constitutions. In some of the States it is confined to cases after conviction.

In *U. S. v. Wilson*, 7 Peter's Rep. 150, the Supreme Court of the United States said: "The power of pardon in criminal cases has been exercised from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance. We adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.

"It is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted upon. The looseness which would be introduced into judicial proceedings would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and would overturn those rules which have been settled by the wisdom of ages. There is nothing in pardon which ought to distinguish it from other facts; no legal principle known to the court will sustain such a distinction. A pardon is a deed to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him. It may be supposed that no being condemned to death would reject a pardon; but the rule must be the same in capital cases and in misdemeanors. A pardon may be conditional, and the condition may be more objectionable than the punishment inflicted by the judgment.

The governor may annex to a pardon any condition, whether precedent or subsequent, not forbidden by law, and it lies upon the grantee to perform the condition. If he does not, in case of a condition precedent, the pardon does not take effect; in case of a condition subsequent, the pardon becomes null; and if the condition is not performed, the original sentence remains in full vigor, and may be carried into effect. 8 Watts & Sergt. Rep. 197; 2 Bailey S. C. Rep. 516.

When the prisoner has either personally obtained a pardon for himself, or is included in a general act of grace, he must plead that privilege specially, as otherwise the court will not be bound to allow it, and indeed has no discretionary power to notice it. Cro. Car. 32, 449. But there seems to be an exception to this rule where a general act pardons all persons, without any kind of proviso of the particular offence for which the defendant is indicted; for then the court are required to attend to it *ex officio*, as they are to every other public statute. *U. S. v. Wilson*, 7 Peters, 150; 1 Baldwin, 91. A pardon may always be pleaded when the offender is evidently included within its intention; as where all felonies and lower offences committed before a certain day, are remitted. A murderer is pardoned who has given the fatal stroke before the time specified, though the death which completes the crime, does not happen till a subsequent period. 1 Hall, 426; Plowd. 401; see *Com. v. Roby*, 12 Pick. 508, 509. But if murders be expressly excepted, or the act extends only to misdemeanors, he will not be entitled to the benefit of the act, because, though at the time it was passed, his crime was only a misdemeanor, it subsequently became a higher crime than those included in the pardon. Post. 64; Bac. Abz. tit. Pardon.

In pleading a general act of pardon, if the act contain exceptions of particular persons, by name, or of a general description of individuals, it is in general necessary for the defendant

*tenuræ* are bound to repair it,—are the only other special pleas, which occur in practice in criminal cases. As we shall have to notice this subject particularly, however, in the second part of the work, when we come to consider indictments in particular cases and the evidence necessary to support them, we shall defer treating of these pleadings until we treat of the subject altogether.

#### 4. *Demurrer.*

A demurrer is a pleading, by which the legality of the last preceding pleading is denied and put in issue, and the issue is then [\*115] \*determined by the court. A demurrer is pleaded either to the indictment, or to a special plea.[1]

##### (a) *Demurrer to indictment.*

Formerly a demurrer to an indictment was unusual, because the defendant might have the same advantage of objecting, by motion in arrest of judgment, or writ of error.

Afterwards certain defects in indictments were cured by verdict by stat. 7 G. 4, c. 64, s. 20, which therefore could only be taken advantage by demurrer.(a)

(a) *R. v. Fenwick*, 2 Car. & K. 915.

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to show specially that he is not one of the parties named in the statute, as without its benefit in the first case, or included in the prescribed description in the second. Cro. Eliz. 125. But where the pardon is in its body, general as to all, and some are afterwards excepted in a distinct proviso, it seems that such averments are not absolutely requisite, and that if the defendant be thus excepted, it must be shown by the prosecution in reply. 1 Lev. 26; Bac. Abr. tit. Pardon. And where a particular offence only is excepted, he will be compelled to negative its commission; for the court will judicially take notice of the color of the charge against him, and compare it with that excepted in the pardon. Cro. Car. 449. So, where a single individual is excluded from the operation of the executive clemency, it has been held not necessary to aver that the defendant is not the person referred to; for that is a circumstance of which the judges are bound to take cognizance. Cro. Eliz. 125.

If there be any variance between the denomination of the party in the indictment and in the pardon, or in his addition, he may show, by proper averments of identity, that the same person is intended. 1 Dyer, 34, a.; Keilw. 58; Hawk. b. ch. 37, sec. 66; Bac. Abr. Pardon, G. 2. And, therefore, if a man be indicted as "yeoman," and pardoned as "gentleman," or the addition of place is different, he may show his identity by averment. Keilw. 58; 1 Rol. Rep. 368; Hawk. b. 2, ch. 37, sec. 66; Bac. Abr. Pardon, G. 2. So also, if in an indictment for homicide, the time of the death is stated differently, the variance may be thus explained, and rendered harmless. Bro. Abr. Charter de Pardonne, 15; Hawk. b. 2, ch. 37, sec. 66; Bac. Abr. Pardon, G. 2. And if these explanatory averments be omitted, the court will, in their discretion, defer the proceedings, in order to give time for the defendant to perfect his plea, or to obtain a more effectual pardon. 3 Inst. 240; 1 Sid. 41; Sir Tho. Raym. 13; Hawk. b. 2, ch. 37, sec. 66; Abr. Pardon, G. 2.

[1] The term "*demurrer*" is derived from *demorare* or *demeurer*, and signifies that the party will go no further, because the indictment or proceedings is defective in substance or informal in statement. 4 Blk. Com. 333. See WATERMAN'S CRIMINAL LAW, tit. DEMURRER.

And now, by stat. 14 & 15 Vict. c. 100, s. 25, every objection to any indictment, for any formal defect apparent on the face thereof, shall be taken by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared. This however has only reference to formal defects; defects in substance may still be taken advantage of, where not cured or amended, by motion in arrest of judgment or writ of error, as before.

A demurrer in criminal cases, has the effect of opening the whole record to the court; and therefore upon arguing it, the defendant may take objections, as well to the jurisdiction of the court where the indictment was found, as to the subject matter of the indictment itself.(a)

In misdemeanors, the judgment upon demurrer is final, and not merely that the defendant shall answer over.(b) But in capital cases the defendant is not concluded by the judgment on demurrer, but if the judgment be against him, he may still plead not guilty; and where a defendant in such a case demurs, it is usual for him at the same time to plead over to the felony.(c) But in felonies not capital, it seems to be doubtful whether the judgment is final or merely a judgment of *respondeas ouster*. In *R. v. Bowen*,(d) which was the case of a felony not capital, upon the defendant's counsel being about to demur, Tindal, C. J., cautioned him saying that he might be bound by his demurrer and not allowed to plead over; he did not actually deliver an opinion upon the point, but expressed great doubt upon it, and the prisoner's counsel thereupon declined to demur, and the prisoner pleaded not guilty. And Hawkins merely says, generally, that in criminal cases not capital, if the defendant demur to the indictment, the court will not give judgment against him to answer over, but final judgment.(e)[2]

(a) *R. v. Fearnley*, 1 T. R. 316.

*v. Adams et al.*, Id. 299.

(b) Per Lawrence, J., in *R. v. Gibson*, 8 East, 112.

(d) 1 Car. & K. 501.

(e) 2 Hawk. c. 31, s. 7.

(c) *R. v. Phelps et al.*, Car. & M. 180; *R.*

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[2] Mr. Chitty (1 Chitty's Cr. Law, pages 441, 442,) states the English practice as follows: "It seems to have been formerly doubted, whether, if the defendant demur generally in case of felony, and the indictment be held to be valid, final judgment shall not be immediately given, and execution awarded against him. 2 Hale, 315, 357; 2 Inst. 178, acc.; Hawk. b. 2, ch. 31, sec. 5; 2 Hale, 225, 257; 4 Bla. Com. 334, cont.; and see Stark. 315; 2 Leach, 603. But this doubt existed only in the case of a general demurrer concluding in bar; for it is clear, that if the demurrer prayed judgment of the indictment, and that it might be quashed, the prisoner could never be concluded from pleading over to the felony, either at the same time, or after the determination of the legal exceptions. 1 Salk. 59; Cro. Eliz. 196; Dyer, 38, 39; Hawk. b. 2, ch. 31, sec. 6. And, at the present day, it seems that



The following is the form of a

[\*116]

*\*Demurrer to an Indictment.*

And the said A. B., in his own proper person, cometh into court here, and having heard the said indictment read, saith, that the said indictment, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he is not bound by the law of the land to answer the same; and this he is ready to verify: Wherefore, for want of a sufficient indictment in this behalf, the said A. B. prays judgment, and that by this court here he may be dismissed and discharged from the said premises in the said indictment specified.

*Joinder thereto.*

And hereupon E. F., [*the clerk of arraigns or clerk of the peace*] who prosecutes for our Lady the Queen in this behalf, saith, that the said indictment and the matters therein contained, are sufficient in law to compel the said A. B. to answer the same; and he, the said E. F. is ready to verify and prove the same, as the court here shall direct and award: Wherefore, inasmuch as the said A. B. hath not answered to the said indictment, nor hitherto in any manner denied the same, the

the defendant shall have judgment of respondeas ouster, in every case of felony where his demurrer is adjudged against him; for we have already seen, that where he unwarily discloses to the court the facts of his case, and demands their advice whether they amount to felony, they will not record or notice the confession, (2 Hale, 225, 257; 4 Bla. Com. 334;) and a demurrer seems to rest upon the same analogy. Fost. 21; 4 Bla. Com. 334; 8 East, 112; 2 Leach, 603; 2 Hale, 225, 257; 1 M. & S. 184; Burn, J. Demurrer; Williams, J. Demurrer; but see Stark. 315.

"So, if the attorney-general demur to the defendant's plea, and it be adjudged against him, he shall not be concluded from a trial, but be ordered to plead over to the felony. 2 Hale, 257; Burn, J. Indictment, XI. But in mere misdemeanors, if the defendant demur to the indictment, whether in abatement or otherwise, and fail on the argument, he shall not have judgment to answer over, but the decision will operate as a conviction. 8 East, 112; Hawk. b. 2, ch. 31, sec. 7; Williams, J. Demurrer; Burn, J. Demurrer, acc.; 4 T. R. 459, *semb. contra*. The reason of this distinction seems to be, that there can be no demurrer in abatement in cases not capital, except to a plea in abatement of the same description; and, therefore, every objection to the indictment itself is in bar of the accusation. 1 Salk. 218, 220; Hawk. b. 2, ch. 31, sec. 7. In case, however, of judgment against the defendant on a demurrer to a plea in abatement, or to a replication to such plea, the judgment is respondeas ouster." Trem. P. C. 189, 190; 6 East, 602.

In this country, the general practice has been, in such cases, where there is, on the face of the pleading, no admission of criminality on part of the defendant, to give judgment *quod respondeat ouster*, and the English distinction does not seem to be recognized. *Com. v. Goddard*, 13 Mass. Rep. 456; *Foster v. Com.* 8 Watts & Serg. 77; *Com. v. Barge*, 3 Pa. Rep. 262.

But in Tennessee, it has been held, that when a demurrer to an indictment for a misdemeanor has been overruled, the defendant will not be permitted to plead to the indictment, as a matter of right; he must lay a sufficient ground before the permission will be granted. *Bennett v. State*, 2 Yerg. 472.

said E. F. for our said Lady the Queen, prays judgment, and that the said A. B. be convicted of the premises charged upon him in and by the said indictment.

*Demurrer to plea.*

If the defendant plead specially, the clerk of arraigns or clerk of the peace may, in like manner, demur to the plea. And if judgment be given for the crown, it is final in cases of misdemeanor, (a) a judgment of *respondeas ouster* in capital felonies, and doubtful in felonies not capital, in the same manner as in the case of a demurrer to an indictment, which I have just now noticed.

The following is the form of a

*Demurrer to a plea in bar.*

And E. F., [*the clerk of arraigns or clerk of the peace*] who prosecutes for our Lady the Queen in this behalf, as to the said plea of the said A. B., by him above pleaded and set forth, saith, that the said plea and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude our said Lady the Queen from prosecuting the said indictment against him the said A. B., and that he the said E. F., for our said Lady the Queen is not bound by the law of the land to answer the same; and this he the said E. F., who \*prosecutes as aforesaid, is ready [\*117] to verify: Wherefore for want of a sufficient plea in this behalf, the said E. F., for our said Lady the Queen prays judgment, and that the said A. B., may be convicted of the premises above charged upon him in and by the said indictment.

Where in the case of a misdemeanor, the prayer of judgment was, that the defendant should answer over, instead of that he might be convicted, the court notwithstanding gave a final judgment. (b)

*Joinder thereto.*

And the said A. B. saith, that his said plea by him above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude our said Lady the Queen from prosecuting the said indictment against him; and the said A. B. is ready to verify and prove the same, as the court here shall direct and award: Wherefore, inasmuch as the said E. F., for our said Lady the Queen, hath not answered the said plea, nor hitherto in any manner denied the same, he, the said A. B. prays judgment, and that by this court here he may be dismissed and discharged from the said premises in the said indictment specified.

(a) *R. v. Taylor*, 3 B. & C. 502.

(b) *R. v. Taylor*, 3 B. & C. 502.

## CHAPTER IV.

### EVIDENCE.[1]

HAVING treated of the pleadings, up to the joining of issue, I shall in this chapter treat of the evidence by which that issue is to be proved; and I propose doing so under the following heads:—(a)

#### SECTION I. WHAT MUST BE PROVED, AND THE MANNER OF PROVING IT, p. 117.

1. *What must be proved, and by whom*, p. 117.
  - (a) *By the prosecutor*, p. 117.
  - (b) *By the defendant*, p. 123.
  - (c) *Variance*, p. 123.
2. *The manner of proving the matter in issue*, p. 125.
  - (a) *By confessions*, p. 125.
  - (b) *Without inducement*, p. 126.
  - (c) *Before a magistrate*, p. 131.
  - (d) *By presumptions*, p. 134.
  - (e) *Best evidence*, p. 136.
  - (f) *Secondary evidence*, p. 137.
  - (g) *Notice to produce*, p. 138.
  - (h) *By dying declarations*, p. 140.

#### SECTION II. WRITTEN EVIDENCE, p. 141.

- (a) *Acts of Parliament*, p. 141.

(a) I have adopted here the same arrangement I used in treating of evidence in one of the earliest of my legal works, "*A Digest of the Law relative to Pleading and Evidence in Civil Actions*," first published in 1816,—an arrangement I have followed ever since, when I have had occasion to treat of evidence in cases civil or criminal.

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[1] The doctrine of *evidence* upon criminal prosecutions, is, in most respects, the same as that in civil actions. 4 Esp. Rep. 136, 139, 144; 2 East P. C. 993; 4 Bla. Com. 356; 1 Leach, 300, 392, n. a.; 2 T. R. 201, n. a.; 3 Camp. 401; 2 Stark. R. 155. The rules of credibility are evidently, in common reason, the same in both cases; and the chief distinction arises from that caution which always prevails when life is in question, and the anxiety of judges to look on every circumstance with the most favorable eye for the defendant. 4 Esp. Rep. 136, 139, 144; 2 East P. C. 993. In one respect, indeed, the superior interest which the public have in the punishment of offenders produces a more striking difference; for the party aggrieved is allowed to give evidence against the prisoner, though he is frequently permitted, by restoration of stolen goods, by rewards, by reimbursement of costs, or other means, to derive a benefit from his conviction. 2 East P. C. 993; 1 Leach, 131, 2, 3. No injustice need, however, arise from this exception which has been found essentially necessary for the purposes of public justice; because the credibility of the witness is still left to the jury, and they are able to estimate the probable influence of interest, or of revenge, on the testimony which he delivers. See Waterman's Cr. Law, tit. *Evidence*.

- (b) *Other records*, p. 141.
- (c) *Matters quasi of record*, p. 143.
- (d) *Other public documents*, p. 145.
- (e) *Depositions of witnesses deceased or unable to travel*, p. 147.
- (f) *Deeds and other private written instruments*, p. 148.

## SECTION III. PAROL EVIDENCE.

1. *Who may be witnesses*, p. 149.
  - (a) *Quakers, &c.*, p. 149.
  - (b) *Jews, Turks, &c.*, p. 150.
  - (c) *Infants*, p. 150.
  - (d) *Deaf and dumb persons*, p. 150.
  - (e) *Lunatics*, p. 150.
  - (f) *Judge or Juror*, p. 151.
  - (g) *Prosecutor*, p. 151.
  - (h) *Persons interested in the event*, p. 151.
  - (i) *Inhabitants*, p. 152.
  - (j) *Husband and wife*, p. 152.
  - (k) *Attorney*, p. 153.
  - (l) *One of two defendants*, p. 153.
  - (m) *Accomplice*, p. 154.
  - (n) *Persons convicted*, p. 155.
  - (o) *Examination on the voire dire*, p. 155.
2. *Number of witnesses required*, p. 155.
3. *Witnesses, how compelled to attend*, p. 156.
4. *Witnesses' expenses*, p. 156.

## SECTION I.

## WHAT MUST BE PROVED, AND THE MANNER OF PROVING IT.

1. *What must be proved, and by whom.*

(a) *By the prosecutor.*

Where the defendant pleads not guilty, the prosecutor in all cases begins to give evidence, and must \*prove the defendant to be guilty of the offence charged against him, before the latter can be called upon for his defence. Even where an offence consists wholly or partly of an omission or negative, the prosecutor must prove the negative.[1] And therefore where, upon an indictment for

[1] Every one is presumed to be innocent until the contrary is proved; and if there is reasonable doubt of his guilt he is to have the benefit of such doubt. The rule in civil and

coursing deer in inclosed ground, without the consent of the owner, the question was, whether the onus lay upon the prisoner to prove that

criminal cases is somewhat different. In the former the jury after weighing the testimony strike a fair balance and decide accordingly. But in criminal cases, in order to convict, the testimony must be such as to satisfy the jury beyond a rational doubt that the prisoner is guilty. Such doubt however, should be well grounded; not mere possibility or speculation. Everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. But no one is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction.

In general, therefore, as the law presumes that every person acts legally, and performs all the matters which he is by law required to perform, the party who charges another with the omission to do an act enjoined by law, must prove such omission, although it involves the proof of a negative. Thus in an information against Lord Halifax for refusing to deliver up the rolls of the auditor of the Exchequer, it was held that the plaintiff was bound to prove the negative, viz. that Lord Halifax did not deliver them, for a person shall be presumed duly to have executed his office till the contrary appear. *B. N. P.* 298. So in an action for the recovery of penalties under the hawkers' and pedlers' act, (29 Geo. 3, c. 26, s. 4; repealed and re-enacted by 50 Geo. 3, s. 7,) against a person charged with having sold goods by auction in a place in which he was not a householder, some proof of this negative, viz. of the defendant not being a householder in the place, would be necessary on the part of the plaintiff. *Phill. Ev.* 828, 8th ed.; 1st vol. p. 494, 9th ed. So in ejectment for not insuring according to covenant, it lies upon the plaintiff to prove that no insurance has been effected. *Doe v. Whitehead*, 3 N. & P. 557; 8 A. & E. 571.

Where a person in whom stolen property is found gives a reasonable account of how he came by it, the prosecutor ought to show on the trial that the account is untrue. *Aliter*, if that account be unreasonable or improbable on the face of it. Where a piece of wood, which had been stolen, had been found by a constable in the possession of the prisoner five days after it was lost, who said that he had bought it of N., who lived about two miles off, Mr. Baron Alderson held that it was incumbent on the prosecutor to negative this statement. N. was not called by either party. The prisoner was acquitted. *Croughurst's case*, 1 Carr. & K. 370.

But where a fact is peculiarly within the knowledge of one of the parties, so that he can have no difficulty in showing it, the presumption of innocence or of acting according to law, will not render it incumbent upon the other side to prove the negative; but the party who must know the fact is put to the proof of it. Thus, in the case of a conviction under the 5 Ann. c. 14, s. 2, (repealed,) against a carrier having game in his possession, it was held sufficient that the qualifications required in the 22 & 23 Car. 2, c. 25, (repealed,) were negatived in the information and adjudication, without negating them in evidence. *Turner's case*, 5 M. & S. 205. So, where on a conviction for selling ale without a license, the only evidence given was that the party sold ale, and no proof was offered of his selling it without a license, the party being convicted, it was held that the conviction was right, for that the informer was not bound to sustain in evidence the negative averment. It was said by Abbott, C. J., that the party was called on to answer for an offence against the excise laws, sustains not the slightest inconvenience from the general rule, for he can immediately produce his license; whereas, if the case is taken the other way, the informer is put to a considerable inconvenience. *Harrison's case*, Paley on Convictions, 45, 2nd ed. So also, *Smith's case*, 3 Burr. 1476. The same rule has been frequently acted upon in civil cases. Thus, on an action against a person for practising as an apothecary, without having obtained a certificate according to the 55 Geo. 3, c. 194, the proof of the certificate lies upon the defendant, and the plaintiff need not give any evidence of his practising without it. *Apoth. Comp. v. Bentley*, R. & M. N. P. C. 159.

If the charge consist in a criminal neglect of duty, as the law presumes the affirmative,

he had the consent of the owner: Lawrence, J., held, that it did not, but that it was incumbent on the owner to prove the negative; and the owner not being in attendance, the prisoner was acquitted.<sup>(a)</sup> So, where, upon an indictment for lopping and topping trees in the night time, without the consent of the owner, it was proved that the prisoners had committed the offence in the night time, and when detected, had run away; that the owner, after the offence was committed, had given orders for the apprehension of the prisoners, but died before the trial; and the land-steward proved that he himself never gave consent, and he believed his master never did: Bayley, J., told the jury that they must be satisfied that the prisoners did not obtain the consent of the owner, but left it to them to say whether the facts proved did not furnish reasonable evidence of want of consent; and the jury found the prisoners guilty.<sup>(b)</sup>

But where an offence is created by statute, and an exception is made, either by another statute, or by another and substantive clause of the same statute, it is not necessary for the prosecutor, either in the indictment or by evidence, to show that the defendant does not come within the exception; but it is for the defendant to prove the affirmative, and which he may do under the plea of not guilty.<sup>(c)</sup>

(a) *R. v. Rogers*, 2 Camp. 654.

(c) See *R. v. Pemberton*, 1 W. Bl. 230. See

(b) *R. v. Hazy and Collins*, 2 Car. & P. 458. *ante*, p. 86.

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the burthen of proof of the contrary is thrown on the other side. But in other cases, as where the negative does not admit of direct proof, or the facts lie more immediately within the knowledge of the defendant, he is put to his proof of the affirmative. Story J. in *U. States v. Hayward*, 2 Gall. 284.

On an indictment for selling liquor without a license, it lies on the defendant to prove his license. *Gening v. The State*, 1 M'Cord, 573.

*United States v. Hayward*, 2 Gallis, 485, 498. In all cases where a party stands charged with an offence, his innocence is presumed, and the onus is upon the prosecutor, unless a different rule has been expressly provided by statute. *United States v. Gooding*, 12 Wheat. 460, 471. *Commonwealth v. Stow*, 1 Mass. Rep. 54, S. P. In the case last cited, the defendant was indicted for having given a false and fraudulent certificate of membership, under the Massachusetts law of June 12th, 1800; and on the trial it became a question whether it was for the defendant to prove the certificate true; the court thought not, and so held, though it was contended that this was in effect, requiring from the prosecutor proof of a negative. Upon an indictment under the statute law of the same state, relating to hawkers and pedlars, which has a proviso, that nothing therein contained "shall prohibit any person carrying and selling, &c. goods &c., of the produce or manufacture of the United States," &c.; it was held incumbent on the prosecutor to prove that the articles were of foreign manufacture. *Commonwealth v. Samuel*, 2 Pick. 103. Where the charge, however, does not consist in a criminal omission, or breach of duty, the rule is otherwise. Yet, in a case in which the plaintiff claimed a slave as forfeited by the defendant, upon the ground that the defendant, a widow, to whom the slave had been assigned as dower, removed such slave from Virginia, without the consent of the reversioner, contrary to the law of that state it was held incumbent on the plaintiff to show that the reversioner did not consent. *Hicks et ux. v. Martin*, 9 Mart. Lou. Rep. 47.

As to the facts, &c., to be proved: it is a general rule, that all the facts and circumstances stated in the indictment, which cannot be rejected as surplusage, must be proved; as to what facts must be stated, I have already treated of that subject.(a)[2]

But where a felony is made additionally penal by statute, if committed at a particular time or place, or under particular circumstances, then, if the time or place or circumstances be not proved, the offender

(a) *Ante*, p. 86.

[2] It is now settled that the prosecution must prove every statement which enters into the substance of the charge; but it will not be compelled to maintain any averments; which, without being repugnant, are merely formal or superfluous. 2 Leach, 594. The distinction between material and immaterial averments is perfectly well settled in criminal, as well as in civil cases; and if the averments be material, that is, if it be connected with the charge, it must be proved; but if it be wholly superfluous, it may be thrown out of the question. See *People v. Townsend*, 3 Hill, 479; *Com. v. Hope*, 22 Pick. 1; *State v. Noble*, 15 Maine, 476; *Com. v. Tuck*, 20 Pick. 356, 364; *U. S. v. Vickery*, 1 Harr. & Johns. 427; *Com. v. Pray*, 13 Pick. 359; *U. S. v. Howard*, 3 Sumner, 12; *State v. Cassidy*, 1 Richardson, 91; *State v. Morrison*, 2 Iredell, 9; *Com. v. Arnold*, 4 Pick. 251; *Com. v. Bolkom*, 3 Pick. 281; *Com. v. Hunt*, 4 Pick. 252; *Com. v. Gable*, 7 Serg. & Rawle, 423; *Com. v. Bell*, Addison, 171, 173; *Com. v. Atwood*, 11 Mass. Rep. 93.

But, it is a general rule which runs through the whole criminal law, that it is sufficient to prove so much of the indictment as proves the defendant to have been guilty of a substantive crime therein stated, though not to the full extent charged against him. 2 Campb. 583. And therefore, if an indictment charges that the defendant did, and caused to be done, a particular act, it is enough to prove either; (2 Campb. 584,) and the defendant may be found guilty upon a count in an information, with charges him with having composed, printed, and published a libel, if he is proved to have published, without any evidence that he was implicated in the composition. 2 Campb. 583. And if negative averments be introduced, to show that the case is not within any of the exceptions recognized by a legislative provision which it would be his duty to produce, as matters of defence, if he could avail himself of their benefit, there will be no necessity to support those allegations in evidence. 2 East, P. C. 782. But when the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring it in pleading; and, when any act is required to be done by one, the omission of which would make him guilty of a criminal neglect of duty, the law presumes the affirmative, and throws the burthen of proving the negative on the party who insists on it. 3 East, 192; 3 Campb. 10, 12.

There are also some cases, in which it is not necessary that the proof should precisely correspond with the allegations in the indictment. Thus, an indictment for murder, by poisoning with one kind of poison, may be supported by proof of another kind of poison; and an indictment for killing with a sword, will be supported by proof of killing with a staff or gun; though an indictment for killing with poison, will not be supported by proof of killing by stabbing. 2 Hale, 291. So, if A. B. and C. be indicted for the murder of D., and it is laid in the indictment that A. gave the stroke, and that B. and C. were present, aiding and abetting, though upon the evidence it appears that B. alone gave the stroke, and that A. and C. were present, this will maintain the indictment, for they are all principals. 2 Hale, 292. It is also a general rule, that whatever is merely superfluous, need not be proved, although it be stated on the face of the proceedings. 2 Leach, 594.

It is necessary to adduce evidence to identify the defendant. The question of identity is for the consideration of the jury. In order to identify a person in court with one whom the witness has described, the attention of the witness may be directed to the person in court, and he may be asked whether that is the person of whom he had spoken.

may still be convicted of the simple felony: as, for instance, if upon an indictment for stealing from a dwelling house to the value of five pounds, if the prosecutor prove the larceny, but fail in proving the value, or that the stealing was from the dwelling house, the defendant may be found guilty of the simple larceny. If upon an indictment for breaking and entering a house, &c., and stealing therein, you prove the larceny, but fail to prove the breaking and entering, the prisoner may still be convicted of stealing in the dwelling house, or of the simple larceny.[3] So, in all cases of offences which, either at common

[3] In an indictment for larceny, the evidence must correspond strictly with the indictment as to the species of goods stolen; as, for instance, an indictment for stealing a pair of shoes cannot be supported by evidence of a larceny of pair of boots. Where an indictment (on the repealed stat. 16 G. 2, c. 34, and 14 G. 2, c. 6, which made it felony without benefit of clergy to steal any cow, ox, heifer, &c.) charged the defendant with stealing a cow, and in evidence it was proved to be a heifer, this was holden to be a fatal variance; for the statute having mentioned both cow and heifer, proved that the words were not considered by the legislature as synonymous. *R. v. Cooke*, 2 East, P. C. 617; 1 Leach, 123. See also *R. v. Douglas*, 1 Camp. 212. In like manner it was decided, that, as the statute specified lambs and sheep, an indictment for stealing lambs was not proved by evidence of stealing sheep; (*R. v. Loom*, 1 Mood. C. C. 160;) and, for the same reason, it has been holden, upon the stat. 7 & 8 G. 4, c. 29, s. 25, that an indictment for stealing a sheep is not supported by proof of stealing a ewe. *R. v. Puddifoot*, 1 Mood. C. C. 247; *R. v. Birket*, 4 O. & P. 216; but see *Reg. v. M' Culley*, 2 Mood. C. C. 34, *contra*. Where an indictment upon the repealed stat. 43 G. 3, c. 58, charged the defendant with cutting J. S., and the evidence proved a stabbing, the variance was holden fatal, for the statute used the alternative, stab or cut. *R. v. M'Dermot*, R. & R. 356. Upon an indictment for perjury, the oath was alleged to have been taken at the assizes before justices assigned to take the assizes, and it was holden a fatal variance that the oath was administered when the judge was sitting under the commission of oyer and terminer and jail delivery. *R. v. Lincoln*, R. & R. 421. See *R. v. Alford*, 14 East, 218, and *R. v. Cooke*, 7 C. & P. 559. And where an indictment for being at large after an order for transportation stated that his Majesty had extended his mercy to the prisoner, upon conditions of transportation for life beyond the seas, and the condition upon which he received the royal mercy was not general, but specific, that he should be transported to New South Wales, or some of the islands adjacent, it was holden a fatal variance. *R. v. Fitzpatrick*, R. & R. 512. So, an indictment for killing by striking will not be supported by proof that the defendant knocked the deceased down, and that, by falling to the ground, he received the injury which caused his death. *R. v. Kelly*, 1 Mood. C. C. 113; *R. v. Thompson*, Id. 139.

The names of the persons against whom the offence was committed, and of any party whose existence is legally essential to the charge, must be strictly proved as laid. Thus, in an indictment for larceny, the property in the goods must be strictly proved as laid; that is, the person whose goods they are alleged to be must be proved to be either the actual owner or the bailee of them. Even where an indictment for burglary charged the defendant with breaking and entering the house of J. D. with intent to steal the goods of J. W., and it appeared in evidence that no goods of any person of the names of J. W. were in the house, but that the name of J. W. had been inserted in the indictment by mistake, the judges held that the variance was fatal, and the defendant was accordingly acquitted. *R. v. Jenks*, 2 East, P. C. 514. So, if it appear in evidence, that the alleged owner of the goods is a *feme covert*, the defendant must be acquitted; (1 Hale 513;) for they are in law the goods of her husband. So, if a burglary be alleged to have been committed in the house of J. G., and it turn out in evidence to be the dwelling-house of J. S., the defendant must be acquitted for



[\*119] law or by \*statute include others of a less degree of enormity, if you fail to prove the greater offence, but prove the less, the defendant may be convicted of the latter: as, for instance, upon an indictment for murder, if you fail to prove the malice pre-pense, express or implied, the defendant may be found guilty of manslaughter; if upon an indictment for burglary and larceny, you prove the larceny, but fail in proving the breaking or entering, or that it was in the night time, &c., the defendant may be found guilty of stealing in the dwelling-house, or of the simple larceny; if upon an indictment for a felony or misdemeanor, you fail in proving the offence completed, but prove an attempt to commit it, the defendant may be found guilty of the attempt;(a) if upon an indictment for robbery, you fail in proving the offence, but prove an assault with intent to commit it, the defendant may be convicted of the assault with intent to rob.(b) And on the other hand, if the indictment contain a statement of any facts or circumstances not included in the definition of the offence, and which need not to have been stated, they may be rejected as surplusage, and need not be proved; and this, as well in an indictment on a statute, as in an indictment for an offence at common law.(c)[1]

(a) 14 and 15 Vict. c. 100, s. 9.

(c) *R. v. Jones*, 2 B. & Ad. 611.

(b) *Id.* s. 11.

the variance. *R. v. White*, 1 Leach 252. So, if a larceny be alleged to have been committed in the house of J. G., and it turn out in evidence to be the dwelling-house of J. S., the defendant must be acquitted of the stealing in the dwelling-house, and can be found guilty of the simple larceny merely. So, in all other cases, a material variance between the indictment and evidence, in the name of the party injured, will be fatal, and the defendant must be acquitted. But the party injured may be described either by his real name, or by that by which he is usually known. *Rez v. Norton*, R. & R. 150; *Rez v. J. Williams*, 7 C. & P. 298. And if the name proved be *idem sonans* with that in the indictment, and different in spelling only, the variance will be immaterial. Thus, "Segrave" for "Seagrave," *Williams v. Ogle*, 2 Str. 889; "Benedetto" for "Binidetto," *Abitol v. Benedetto*, 2 Taunt. 401; and "Whyneard" for "Winyard," pronounced "Winnyard," *R. v. Foster*, R. & R. 412, is no variance; but it has been decided that "M'Cann" and "M'Caru," *R. v. Tunnett*, R. & R. 351; "Shakespeare" and "Shakepear," *R. v. Shakespear*, 10 East, 83; "Tabart" and "Tarhart," *Bingham v. Dickie*, 5 Taunt. 814; and "Shutliff" and "Shirtliff," 1 Chit. 216, are not the same in sound. If the prosecutor be described with an addition, though unnecessary, it must be proved. *R. v. Deeley*, 1 Mood. C. C. 303. So, if he be described as a person to the jurors unknown, and it appear in evidence that his name is known, the defendant will be acquitted. See *R. v. Walker*, 3 Campb. 264; *R. v. Robinson*, 1 Holt, 595. And where, in an indictment for receiving stolen goods, the principal felon was described as a person to the jurors unknown, but it appeared in evidence that he was known, the receiver was acquitted for the variance. *R. v. Walker*, 3 Campb. 264. But a bill found by the same grand jury, imputing the principal felony to J. S., does not, sufficiently for this purpose, prove that J. S. committed the felony. *R. v. Bush*, R. & R. 372.

Sums of money stated in an indictment need not be proved as laid, (see *R. v. Gilham*, 6 T. R. 265,) unless they form part of the description of a written instrument, or the exact sum be of the essence of the offence.

[1] On an indictment for murder there cannot be a conviction of an assault with intent to

The time need not be proved as laid, unless where it is of the essence of the offence.(a)[2]

(a) *Ante*, p. 85.

murder, nor vice versa. *Com. v. Roby*, 10 Pick. 496. Nor of petit larceny on an indictment for horse stealing. *State v. Spurgin*, 1 M'Cord, 252. Nor upon an indictment for stealing can there be a conviction for receiving, &c. *Russ v. The State*, 1 Blackf. 791. See *State v. Taylor*, 2 Bailey, 49; *State v. Shepard*, 7 Conn. 54. But in *Stewart v. State*, 5 Ohio Rep. 242, it was held that on an indictment for an assault with intent to murder, there may be a conviction of an assault simply; the court remarking that "there is no foundation in this country, for the distinction made in England, on this point, between felonies and misdemeanors—for here, an indictment for the higher offence rather adds to, than subtracts from his privileges." In the case of *Com. v. Drum*, (19 Pick. Rep. 479,) it was held that on an indictment for rape, the prisoner may be convicted of incest or assault and battery. The court directed the jury, that if there was no sufficient endeavor to convict the defendant, either of the rape charged, or of an assault with an intent to commit a rape, still, under the provisions of the revised statutes, (ch. 137, sec. 11,) he might be convicted of an assault and battery. This provision is, that whenever any person indicted for a felony, shall be acquitted by verdict, of part of the offence charged, and convicted of the residue, such verdict may be recorded, and the prisoner shall be adjudged guilty of the offence, if any, which shall be substantially charged by the residue of such indictment and shall be sentenced and punished accordingly. The court were of opinion that the indictment for rape necessarily charged substantially and formally an assault and battery upon the person of the female alleged to have been ravished, and that this case was within the statute. And the prisoner was convicted and sentenced accordingly.

In New York, in the case of *Lohman v. People*, (1 Comstock Rep. 379,) it was held that when an indictment alleges facts which constitute a misdemeanor, it will be good for that offence; although it state other facts which go to constitute a felony, provided all the facts alleged, fall short of the charge of felony in consequence of some other facts essential to that charge, e. g. the intent of the party accused not being averred. Thus, by statute of 1845, ch. 260, sec. 2, it is a misdemeanor to administer drugs &c. to a pregnant female with intent to produce miscarriage; and by statute of 1846, ch. 22, sec. 1, it is manslaughter to use the same means with intent to destroy the child in case the death of such child be thereby produced. The indictment charged all the facts necessary to constitute the crime of manslaughter except the intent with which the acts were done, and in conclusion it characterised the crime as manslaughter; but the only intent charged was an intent to produce a miscarriage. It was held that the indictment was fatally defective for the felony, but good for the misdemeanor, and that the accused was properly convicted of the latter offence. And it seems that a conviction for a misdemeanor under such an indictment would be a bar to a subsequent indictment for the felony.

[2] The day and year on which facts are stated in the indictment or other pleading to have occurred, are not in general material; and the facts may be proved to have occurred upon any other day previous to the preferring of the indictment. *R. v. Charnock*, Holt, 301; 1 Salk. 288; 9 St. Tr. 587–605, 542–552; Fost. 7, 8; 9 East, 157; 1 Phil. Ev. 203; *R. v. Levy*, 2 Stark. N. P. 458. To this rule, however, there are these exceptions: namely, first, that in all cases where bills of exchange, promissory notes, or other written instruments, not under seal, are pleaded, the date, if stated, must correspond with the date of the instrument when produced in evidence at the trial. *Coxon v. Lyon*, 2 Camp. 307, n.; see *Freeman v. Jacob*, 4 Camp. 249. Secondly, as deeds may be pleaded either according to the date which they bear, or to the day on which they were delivered, if a deed produced in evidence bear date on a day different from that stated in the pleading, the party producing it must prove that it was in fact delivered on the day alleged in the pleading. Thirdly, if any time stated in a pleading is to be proved by matter of record, it must be correctly stated. See *Grey v.*

Place is immaterial, unless where it is matter of local description, such as the parish, &c., where the house or building is described to be in an indictment for burglary, or for breaking and entering a house, shop, warehouse, or a building within the curtilage, &c., in which cases the local description must be proved as laid.<sup>(a)</sup> Upon an indictment for treason or conspiracy, if you prove one good overt act in the county where the venue is laid, you may prove the others to have taken place in any other part of England.<sup>(b)</sup> And upon an indictment against an accessory before or after the fact, he may be indicted in any place and before any court where his principal may be tried, no matter where the offence of accessory was committed.<sup>(c)</sup>[3]

(a) *Ante*, p. 86.

(c) *Ante*, p. 15, 18.

(b) 2 Hawk. c. 46, s. 184—189.

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*Bennett*, 1 T. R. 656; *Pope v. Foster*, 4 T. R. 590; *Woodford v. Ashley*, 11 East, 508; *Rastall v. Stratton*, 1 H. B. L. 49; 2 Saund. 291, b. In these several respects, any—the slightest—variance between the time so stated, and that appearing from the instrument or record when produced, will, in felonies, be fatal; but, in misdemeanors, the variance may, in certain cases, be amended at trial. 9 G. 4, ch. 15. Fourthly, when the precise date of any fact is necessary to ascertain and determine, with precision, the offence charged, or the matter alleged in excuse or justification, any—the slightest—variance between the pleading and evidence in that respect, will be fatal. And lastly, where time is of the essence of the offence, as in burglary or the like, the offence must be proved to have been committed in the night time; although the day on which the offence is charged to have been committed, is immaterial, and it may be proved to have been committed on any other day previous to the preferring of the indictment. In murder, also, the death must be proved to have taken place within a year and a day from the time at which the stroke is proved to have been given. 2 Hawk. ch. 23, sec. 90.

[3] It is not, in general, necessary to prove that the facts stated in the indictment or subsequent pleading, occurred in the parish or place therein alleged; it is sufficient to prove that they occurred within the county, or other extent of the court's jurisdiction. 2 Hawk. ch. 25, sec. 84. But they must be proved to have been committed within the county, or other extent of the court's jurisdiction, otherwise the defendant must be acquitted. And where a forged bill of exchange was found upon J. S., who resided in Wiltshire, and had resided there about a year under a false name, but which bill bore date more than two years previously to its being found upon him, and at a time when he lived in Somersetshire; on an indictment against him for a forgery of the bill in Wiltshire, this was holden not to be sufficient evidence of the offence having been committed in that county. *R. v. Crocker*, 2 New Rep. 87; see *R. & R.* 99, n. But although the offence must be proved to have been committed in the county where the prisoner is tried, after such proof, the acts of the prisoner in any other county, tending to establish the charge against him, are properly admissible in evidence. 1 Ph. Ev. 206. If there be no such place as that stated in the indictment, it is immaterial. *R. v. Woodward*, 1 Mood. C. C. 323. The statute 9 H. 5, st. 1, ch. 1, sec. 3, (see 7 H. 5, ch. 18; and 18 H. 6, ch. 12,) which declared the indictment to be void in such a case, is now repealed; and a further ground for the objection is removed by the jury in criminal cases being now returned *de corpore comitatus*. 6 G. 4, ch. 50, sec. 20. An indictment alleged a highway robbery to have been committed in the parish of St. Thomas Pensford, but the witness called in the parish of Pensford, upon which it was objected that there was no proof that there was in the county any such parish as that laid in the indictment. Littledale, J., before whom the indictment was tried, said that the objection was not valid, and that he had once reserved a case for the opinion of the judges upon the very point, and

Where the intent with which an act is done forms a material ingredient in an offence, we have seen<sup>(a)</sup> that it must be laid in the indict-

(a) *Ante*, p. 88.

a great majority of the judges held that it was not incumbent upon the prosecutor to prove affirmatively the existence within the county of the parish laid in the indictment, and expressed a doubt how they should hold, even where it was proved negatively for the prisoner that no such parish existed. *R. v. Dowling*, Ry. & M. N. P. 433.

To the above rule, as to the parish and place being immaterial, there are, however, these exceptions: namely, first, that if the statute upon which the indictment is framed, give the penalty to the poor of the parish in which the offence was committed, the offence must be proved to have been committed in the parish stated in the indictment; secondly, upon an indictment against a parish for not repairing a road, the part of the road out of repair must be proved to be within the parish: and the same in all other cases in which the place where the fact occurred is a necessary ingredient in the offence; thirdly, if a place mentioned in pleading be stated as part of the description of a written instrument, or is to be proved by matter of record, any—the slightest—variance between the place as stated, and that appearing from the written instrument or record when produced, will, in felonies, be fatal, (see *Pitt v. Green*, 1 East, 188; *Pool v. Court*, 4 Taunt. 700; *Goodtitle v. Walker*, id. 761; *Morgan v. Edwards*, 6 Taunt. 394; *Goodtitle v. Lamniman*, 2 Camp. 274;) but, in misdemeanors, the variance may be amended at the trial. 9 G. 4, ch. 15. And lastly, where the place is stated as matter of local description, and not as venue merely, the slightest variance between the description of it in the indictment, and the evidence will be fatal; even though the injury be partly local and partly transitory; for, the whole being one entire fact, the local description becomes descriptive of the transitory injury. *R. v. Cranage*, 1 Salk. 385; 2 Stark. Ev. 1571. Thus, for instance, on an indictment for stealing in the dwelling house, &c. for burglary, for forcible entry, or the like, if there be the slightest variance between the indictment and evidence in the name of the parish or place where the house is situate, or in any other description given of it, the defendant must be acquitted. The rule is the same, in this respect, in criminal cases as in civil actions; and, where in an action for non-residence, the parish was styled in the declaration St. Ethelburg, and the real name appeared in evidence to be St. Ethelburga, it was holden a fatal variance. *Wilson v. Gilbert*, 2 B. & P. 281.

So, in an action for a nuisance in erecting a weir, if it be described in the declaration to be at H., and be proved to be at a lower part of the same water, called T., the variance is fatal. *Shaw v. Wrigley*, 2 East, 500. With reference to the description of the parish, there are several apparently conflicting authorities, which can only be reconciled upon the principle that it is sufficient to describe the parish either by its strict legal or popular name, provided the description be such as cannot mislead. That where, in ejectment, the premises were alleged to be in Farnham, and proved to be in Farnham Royal, it was holden not to be a fatal variance, unless it were shown that there were two Farnhams. *Doe v. Salter*, 13 East, 9. Where the premises were laid to be in Westbury, and it was proved that there were two parishes of that name in the county, Westbury-upon-Trim and Westbury-upon-Severn, the objection of variance was overruled, because in common parlance the addition was not used, and the description could not mislead. *Doe v. Harris*, 5 M. & Sel. 328.

So, where premises were described as situate in the parish of Lambeth, the real name of the parish being St. Mary, Lambeth, though usually called Lambeth, the variance was holden to be immaterial. *Kirkland v. Poundel*, 1 Taunt. 570; *R. v. Glossip*, 4 B. & Ald. 619. In *Taylor v. Williams*, (11 B. Moore, 448; 3 Bingh. 449,) the parish was described as the parish of St. James, in the county of Middlesex, and it appeared, from acts of Parliament, that there were two parishes of St. James, the one St. James, Clerkenwell, and the other, that laid in the declaration, sometimes called St. James, and sometimes St. James in the liberties of Westminster; upon which ground the description was holden sufficient.

ment; and it must be proved as laid. There is some difficulty naturally in proving this; for no man can tell what passes in the mind of another; he can only judge of it from the other's admission or overt acts. Where there is an admission of the intent, and the party proving it is believed, it is of course conclusive evidence of it. But where there is no admission, the prosecutor is then allowed to give in evidence any acts of the defendant, indicating his intention, or from which it can be presumed.

[\*120] Another mode of judging of \*the intent, is by presuming that the party intended that which he effected, or that which is the natural consequence of the act with which he is charged: if the natural consequence of his act would be the death of another, a jury may fairly infer from the act that it was done with intent to kill such other person; if the natural consequence of the act would be to defraud another, a jury may fairly infer from it an intent to defraud. In forgery formerly, the act was laid to be done with intent to defraud the party who was actually defrauded, or who would have been defrauded by it if the forgery had succeeded. In obtaining or attempting to obtain money or goods by false pretences, the act was laid to have been done with intent to defraud the party actually defrauded or attempted to be defrauded by it. But now, we have seen<sup>(a)</sup> that it is sufficient, in indictments for forgery, and for obtaining goods or money by false pretences, to allege the act to be done "with intent to defraud," without stating it to be to defraud any particular persons;<sup>(b)</sup> and no doubt the jury would be satisfied, from the nature of the act itself, that it was done for the purpose of defrauding some person.[1]

(a) *Ante*, p. 88.

(b) 14 & 15 Vict. c. 100, s. 8.

And where, in ejectment, the premises were alleged to be in the parish of St. Luke, in the county of Middlesex, and there appeared to be two parishes of St. Luke, the one St. Luke, Chelsea, and the other, that in which the premises were, sometimes called St. Luke, Old Street, but more commonly St. Luke, Middlesex; the description was holden sufficient, as it could not mislead. *Doe v. Carter*, 2 Y. & J. 492.

A prisoner was indicted at the central criminal court for burglary in a house stated in the indictment to be situate at the parish of Woolwich. The prosecutor stated that the correct name of the parish was St. Mary, Woolwich; but it being called in the central criminal court act, 4 & 5 W. 4, ch. 36, sec. 2, the parish of Woolwich, the indictment was therefore held sufficient. *Reg. v. St. John*, 9 C. & P. 40. But where, in an action of trespass, for breaking a house in the parish of Clerkenwell, there appeared to be two parishes in Clerkenwell, St. James and St. John, and the house was situate in the former, Gibbs, C. J., nonsuited the plaintiff. *Taylor v. Hooman*, 1 B. Moore, 161; 1 Holt, 523. And where the premises were laid in the parish of St. George the Martyr, Bloomsbury, and were proved to be in that of St. George Bloomsbury, there being two parishes of St. George in Bloomsbury, the one called St. George the Martyr, and the other St. George Bloomsbury, the plaintiff was nonsuited. *Harris v. Cooke*, 2 B. Moore, 587; 8 Taunt. 539.

[1] On an indictment for murder, former attempts of the defendant to assassinate the

It may also often be material to prove that the act charged in the indictment was done wilfully, and did not occur merely by accident; and in such a case, other acts of the defendant may be given in evidence, from which the jury may fairly infer that it was done wilfully. Where a man was indicted for setting fire to a stack of straw, and it appeared

deceased are admissible in evidence; so are former menaces of the defendant or expressions of vindictive feeling towards the deceased, or in fact, the existence of any motive likely to instigate him to the commission of the offence in question. Arch. C. P. 73.

On the trial of an indictment for assault and battery, in order to show some motive of resentment on the part of the defendant, it was held competent for the state to prove that the prosecutor had said in the defendant's hearing, a short time before, "that no honest man would avail himself of the bankrupt law," and then to prove further, that that defendant's father had previously been talking about taking the benefit of that act. *State v. Griffis*, 3 Iredell, 504.

On a charge of sending a threatening letter, prior and subsequent letters from the prisoner to the party threatened may be given in evidence, as explanatory of the meaning and intent of the particular letter upon which the indictment is framed, (*R. v. Robinson*, 2 Leach, 749,) if the intent cannot be inferred from the letter itself. 2 Leach, 479; 4 C. & B. 562.

Upon a trial of an indictment for passing counterfeit bank notes, proof that prisoner had, about the same time, passed another note of the same kind which was thought to be a counterfeit, and which he took back, though this note is not produced on the trial, is admissible evidence to prove the scienter. *Martin v. Com.* 11 Leigh, 745; *Spencer v. Com.* 11 Leigh, 751; *Hendrick v. Com.* 5 Leigh, 708; *U. S. v. Craig*, 4 Wash. C. C. R. 729; *State v. Antonio*, 2 Tr. Car. R. 776; *U. S. v. Doeble*, 1 Baldwin, 519. It may also be proved by the fact of similar forged orders found in the possession of the defendant, or of an accomplice in passing them. *Com. v. Percival*, Thacher's C. C. 293; *State v. Turtly*, 2 Hawks, 248; *U. S. v. Harman*, 1 Baldwin's C. C. R. 292. But in another case, where the second uttering had been made the subject of a distinct indictment, evidence of such uttering was, in the discretion of the judge refused. *Rex v. Smith*, 2 C. & P. 633; Talfourd's Dick. Sess. 359; but see *Rex v. Kirkwood*, Lewin's C. C. 103. The law appears to be, (*Rex v. Taverner*, Carr, C. L. 195, and *Rex v. Smith*, 4 C. & P. 411,) that in order to enable the prosecutor to give in evidence other utterings subsequent to that charged in the indictment, they must in some way be connected with the principal case, or the notes or bills must be of the same manufacture and precisely similar. Indeed, even with regard to previous utterings of forged notes, it seems doubtful whether they can be given in evidence to show a guilty knowledge, when not of the same description and denomination with the note in question. Such evidence, however, has sometimes been received. See *Rex v. Millard*, Russ. and Ry. 245; and *Rex v. Kirkwood*, Lewin's C. C. 103. Upon an indictment for procuring base coin, with intent to utter it, evidence of the defendant having a large quantity of such coin is admissible to prove the intent. *Rex v. Fuller*, R. and R. 308. See Wharton's Cr. Law, p. 69.

In *R. v. Hunt et al.*, (3 B. & Ald. 566,) upon an indictment for conspiring and unlawfully meeting for the purpose of exciting disaffection and discontent among his Majesty's subjects at Manchester, it was holden that the previous conduct of a portion of the assembly, in training, &c., and in assaulting persons whom they called spics, was competent evidence as to the general character and intention of the meeting, although the effect of it as to each particular defendant was a distinct matter for the consideration of the jury. It was held competent to show also, as against Hunt, (who, though a stranger, except by political connexion, had been invited to preside as chairman at the meeting,) that at a similar meeting in another place, holden for an object professedly similar, certain resolutions had been proposed by that person; it being in its nature a declaration of his sentiments and views on the particular subject of such meetings, and of the topics there discussed. So in an indictment for adultery, it is said, previous improper familiarities may be shown to show the *quo animo*.

that it had been set on fire by the prisoner's having fired a gun very near to it; the prosecutor having proved this, then proposed to prove that the stack had also been set fire to the day before, and that the prisoner was seen at the same time very near it with his gun: this was objected to, as being evidence of another felony; but Maule, J., held it to be admissible; he said that although it may be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable: if a person were charged with having wilfully poisoned another, and it were a question whether he knew a certain white powder to be poison, evidence would be admissible to show that he knew what the powder was, because he had administered it to another person some short time before, who had died.(a) So, where upon an indictment for maliciously shooting at the prosecutor, it became a question whether it happened by accident or was done wilfully; and the prosecutor, to show that it was done wilfully, was allowed to give in evidence that the prisoner had intentionally shot at him some time before; and the judges held that the evidence was rightly received.(a)[2]

Malice is often a material ingredient in an offence, and expressed particularly in the definition of it. When this is the case, the [\*121] indictment must state the act to have been maliciously \*done, and the malice as well as the act must be proved.[1]

(a) *R. v. Dossett*, 2 Car. & K. 306.

(b) *R. v. Voke*, R. & Ry. 531.

[2] On an indictment for murder, former attempts of the defendant to assassinate the deceased are admissible in evidence; so are former menaces of the defendant, or expressions of vindictive feeling towards the deceased, or, in fact, the existence of any motive likely to instigate him to the commission of the offence in question. Archb. C. P. 73.

On a trial of indictment for larceny of a watch, evidence of another larceny of a cloak, committed by prisoner, the two acts being wholly distinct and unconnected, are not admissible for any purpose. *Walker v. Com.*, 1 Leigh, 574. But, on a trial for murder, evidence that the prisoner, on the same day the deceased was killed, and shortly before the killing, shot a third person, was held admissible, under the circumstances of the case, notwithstanding the evidence tended to prove a distinct felony committed by the prisoner; such shooting, and the killing of the deceased, appearing to be connected as parts of one entire transaction. *Heath v. Com.*, 1 Robin. 735. And, where the *scienter* or *quo animo* is requisite to, and constitutes a necessary and essential part of the crime with which the person is charged; and proof of such guilty knowledge, or malicious intention, is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent, is competent; notwithstanding they may constitute in law a distinct crime. *Dunn v. State*, 2 Pike, 229. Thus, on an indictment against persons for a conspiracy to carry on the business of common cheats, evidence was admitted of the defendants having made false representations to other tradesmen besides those named in the indictment. *R. v. Roberts*, 1 Camp. 400.

[1] *Malitia*, in its proper or legal sense, is different from that sense which it bears in common speech. In common acceptation it signifies a desire of revenge, or a settled anger against a particular person: but this is not the legal sense; and Lord Holt, C. J., says upon this subject, "Some have been led into mistakes by not well considering what the passion of malice

Malice is proved in the same manner as intent,—from the admissions or the overt acts of the offender. It may generally be inferred from the nature of the act itself: if a man do an act, which cannot be of any benefit to himself, or to those with or for whom he is acting, and which must necessarily be of injury to another person,—as if he wilfully set fire to the house of another, or to his manufactory, or to his ships, or to his stacks or crops of corn,—or if he destroy or damage his trees, plants, fences, &c., not meaning to steal them,—or if he kill or wound his cattle, &c., not meaning to steal them,—in these and the like cases the jury will be warranted in inferring that the act was done from malice to the owner or party injured.

is; they have construed it to be a rancour of mind lodged in the person killing, for some considerable time before the commission of the fact; which is a mistake, arising from the not well distinguishing between *hatred* and *malice*. *Envy, hatred and malice*, are three distinct passions of the mind." Kel. 127. Amongst the Romans, and in the civil law, *malitia* appears to have imported a mixture of fraud, and of that which is opposite to simplicity and honesty. Cicero speaks of it (*De Nat. Deor. Lib. 3, s. 30.*) as "*versuta et fallax nocendi ratio*;" and in another work, (*De Offic. Lib. 3, s. 18.*) he says, "*nihil quidem etiam veras hereditates non honeste videntur si sint malitiosis* (i. e. according to Pearce, a malo animo profectis) *blanditiis officiorum; non veritate sed simulatione quassata.*" And see Dig. Lib. 2, Tit. 13, Lex. 8, where, in speaking of a banker or cashier giving his accounts, it is said, "*Ubi exigitur argentarius rationes edere, tunc punitur cum dolo malo non exhibet \* \* \* Dolo malo autem non edit, et qui malitiose edidit, et qui in totum non edit.*" Amongst us malice is a term of law importing directly wickedness, and excluding a just cause or excuse. Thus Lord Coke, in his comment on the words *per malitiam*, says, "If one be appealed of murder, and it is found by verdict that he killed the party *se defendendo*, this shall not be said to be *per malitiam*, because he had a just cause." 2 Inst. 384. And where the statute speak of a prisoner on his arraignment standing *mute of malice*, the word clearly cannot be understood in its common acceptance of anger or desire of revenge against another. Thus where the 25 Hen. 8, c. 3, says, that persons arraigned of petit treason, &c., standing "*mute of malice or froward mind*," or challenging, &c., shall be excluded from clergy, the word *malice*, explained by the accompanying words, seems to signify a wickedness or frowardness of mind in refusing to submit to the course of justice; in opposition to cases where some just cause may be assigned for the silence, as that it proceeds from madness, or some other disability or distemper. And in the statute 21 Edw. 1, *De malefactoribus in parcia*, trespassers are mentioned who shall not yield themselves to the foresters, &c., but "*immo malitiam suam proseguendo et continuando*," shall fly or stand upon their defence. And where the question of malice has arisen in cases of homicide, the matter for consideration has been (as will be seen in the course of the present and subsequent chapters,) whether the act were done with or without just cause or excuse; so that it has been suggested (Chapple, J., MS. Sum.,) that what is usually called malice implied by the law would perhaps be expressed more intelligibly and familiarly to the understanding if it were called *malice in a legal sense*. Malice, "in its legal sense, denotes a wrongful act done intentionally without just cause or excuse." Per Littledale, J. *M'Pherson v. Daniels*, 10 B. & C. 272. "We must settle what is meant by the term malice. The legal import of this term differs from its acceptance in common conversation. It is not, as in ordinary speech, only an expression of hatred and ill will to an individual, but means any wicked or mischievous intention of the mind. Thus in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is neither necessary in support of such indictment to show that the prisoner had any enmity to the deceased, nor would proof of absence of ill will furnish the accused with any defence, when it is proved that the act of killing was intentional, and done without any justifiable cause." Per Best, J. *Rex v. Harvey*, 2 B. & C. 268.



Such are the whole class of offences comprised in the stat. 7 & 8 G. 4, c. 30, (Peel's Act,) relating to malicious injuries; but as that act comprised the offences of killing or wounding cattle, &c., and from some previously decided cases it appeared that such offences were sometimes committed out of malice to the animal, it was thought necessary to provide that in all offences within that statute, it is immaterial whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise.(a)[2]

Malice may also be implied, where no malice against any particular person in fact existed. Even in murder, which is the highest offence of this class, in which malice forms a most material ingredient, and where the malice must be preconceived, malice may in this way be implied, although none actually existed as against any particular person. As if a man, being on a horse which he knows to be used to kick, ride him amongst a crowd of persons, and the horse kick a man and kill him, the rider is guilty of murder, although he had no malice against any particular person, nor any other intention than that of diverting himself by frightening the persons around him.(b) So, where a person fires a loaded pistol among an assembly of persons, or in the public streets where many persons are passing, and thereby kills a man or the like he is guilty of murder.(c) So, in all other cases, where a man wilfully does an act, which he knows must or probably will cause the death of another, whom he knows not, and a man is thereby killed, he is guilty of murder, in the same manner as if he had preconceived malice against the individual killed.[3]

(a) 7 & 8 G. 4, c. 30, s. 25.

(c) See *R. v. Bailey*, R. & Ry. 1.

(b) 1 Hawk. c. 31, s. 68.

[2] On an indictment for malicious mischief under the Tennessee act of 1803, ch. 9, it is not necessary to prove express malice. *State v. Concl*, 1 Tenn. Rep. 305. Malice, either express or implied, against the owner and not against the thing injured, is required. *State v. Wilcox*, 3 Yerger, 278.

An indictment for malicious mischief, may conclude at common law; and in such indictment, it is not necessary to charge malice against the owner of the property injured. *State v. Scott*, 2 Dev. & Bat. 35.

An indictment for malicious trespass alleged that the defendant did "maliciously and mischievously injure, and cause to be injured, a certain house, the property of one A. situate, &c," "of the value of \$50 to the damage of the said A. \$5, contrary to the form of the statute, &c. Held that the offence was insufficiently described, and that the indictment should have shown the specific injury done to the house. *State v. Aydelott*, 7 Blackf. 157.

In Massachusetts, it is said that, in order to a conviction of the offence of malicious mischief, the jury must be satisfied that the injury was done either out of a spirit of wanton cruelty, or of wicked revenge. *Com. v. Walden*, 3 Cush. Rep. 558.

[3] When a man commits an unlawful act, unaccompanied by any circumstances justifying its commission, it is a presumption of law that he has acted advisedly, and with an intent to produce the consequences which have ensued. Where a man was convicted of set-

Also, if a guilty knowledge from a material ingredient in the offence charged, it can only be proved from the admissions or the overt acts of the offender; and in the absence of admissions, the prosecutor may give in evidence any facts from which the jury may infer it. For instance, upon an indictment for knowingly uttering a forged bill of exchange, evidence \*that the prisoner gave a false ac- [\*122] count of the parties to it, and when he was apprehended, had other forged bills of exchange, all drawn upon the same parties, upon his person, this was holden to be properly received in proof of his guilty knowledge that the bill he was charged with uttering, was a forgery.<sup>(a)</sup> So, upon an indictment for forging and uttering a bank of England note, which appeared to have been done with a camel hair pencil, the prosecutors, for the purpose of proving guilty knowledge, tendered in evidence another note, forged in the same manner, with the same materials, uttered by the prisoner about three months before, and two 10*l.* notes, and thirteen 1*l.* notes of the same fabrication, from the files of the bank, (but when received by them did not appear,) all of which had the prisoner's handwriting on the back: the judge received

(a) *R. v. Hough*, R. & Ry. 120.

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ting fire to a mill, with intent to injure the occupiers thereof, a doubt occurred whether under the words 43 Geo. 3, ch. 58, an intent to injure or defraud some person was not necessary to be proved; or at least some fact from which such intention could be inferred, beyond the mere act of setting the mill on fire; but the judges were of opinion that a person who does an act wilfully, necessarily intends that which must be the consequence of the act, viz., injury to the owner of the mill burned. *Farrington's case*, Russ. & Ry. 207. See also *Philps' case*, 1 Moody C. C. 263. "In every charge of murder," says Foster, "the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him, for the law presumes the fact to be founded in malice, until the contrary appears." Foster, 255; 1 Hale P. C. 455; 1 East P. C. 340. Presumption of a malicious intent may arise from the weapon used in the perpetration of the deed. *Woodsides v. The State*, 2 Howard, 656. When on the trial of an indictment for murder, the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder, and proof of matter of excuse or extenuation lies on the defendant. *Com. v. York*, 9 Metcalf Rep. 93. The rule of law is, that a man shall be taken to intend that which he does; or which is the immediate or necessary consequence of his act. A mortal wound given with a deadly weapon in the previous possession of the slayer, without any, or upon very slight provocation, is *prima facie*, wilful, deliberate and premeditated killing; and throws upon the prisoner the necessity of proving extenuating circumstances. *Hill's case*, 2 Grattan, 594.

A man shooting at a tame fowl, with intention to steal it, kills a person; that in England is murder punished with death; but in Pennsylvania, it would be murder in the second degree. An officer of justice, or a private man, is killed in endeavoring to part two persons whom he sees fighting; a person throws a large stone, or piece of timber, from a house into a street where he knows many persons are passing and kills another; a man riding in a road a dangerous horse apt to strike happens to kill a person; all these cases are murder in England; but in Pennsylvania, they would be murder in the second degree. *Com. v. Dougherty*, 1 Browne, Appendix 18; see also, *Pennsylvania v. McFall*, Addis. Rep. 257.

the evidence, subject to the opinion of the judges as to its admissibility ; and the judges afterwards held that it was admissible for the purpose, subject however to observations as to the weight of the evidence, which would be more or less considerable, according to the number of the other notes, the distance of time at which they were put off, the situation in life of the prisoner, so as to make it more or less probable that so many notes should pass through his hands in the regular way of business.(a)[1]

Also, where several offences of the same nature form parts of one entire transaction, it is in the discretion of the judge to confine the prosecutor to the proof of one, or to allow him to give evidence of the others also : as for instance, where a shopman being suspected of stealing from his employer's till, marked money was put into the till, and being watched, he was observed going to the till, immediately after which some of the money was missed ; at this part of the evidence at the trial, it was objected for the prisoner that the prosecutor should be confined to this instance, but the judge overruled the objection ; it was then proved that shortly after, he was observed to go again to the till, that he took his hand out of it, clenched, and put it into his waistcoat pocket, and that the till being immediately examined, it was found that more of the money was gone from it ; the prisoner was then apprehended and searched, and six shillings of the marked money found upon him : upon motion to stay the judgment, on the ground that evidence of another offence had been received, the court held that it was in the discretion of the judge to allow it ; the two felonies were so connected, as to form parts of one entire transaction, and the one was evidence to show the character of the other.(a)[2]

(a) *R. v. Ball*, R. & Ry. 132.

(b) *R. v. Ellis*, 6 B. & C. 145.

[1] Evidence of a prisoner's endeavors to engage a person to procure for him counterfeit money ; of his declared intention to become acquainted with a counterfeiter, and to remove to a place near his residence, is admissible on a prosecution for passing a counterfeit note to prove the *scienter*. *Com. v. Finn*, 5 Rand. 701. *The State v. Houston*, 1 Bailey, 300 ; *Martin v. Com.* 5 Leigh, 707. But the notes must be produced, or proved to be destroyed, or in the prisoner's possession, and not produced on notice. *People v. Lagrille*, 1 Wheeler's Cr. Cas. 415 ; *Helm's case*, 1 Rogers' Rec. 46 ; *Case of Smith et al.*, 4 Id. 166 ; *Dougherty's case*, 3 Id. 148. But proof of the *scienter* is not admissible, before the principal charge is established, *Jones' case*, 6 Id. 86. On an indictment for passing a counterfeit silver dollar, knowingly, evidence that defendant had counterfeited other dollars, was held not admissible. *State v. Odel*, 2 Const. Rep. 758. But on an indictment for counterfeiting money, evidence of possession of instruments of coining is admissible. *State v. Antonio*, Ib. 776.

[2] Where the offence is a cumulative one, consisting, in itself, in the commission of a number of acts, evidence of those various acts so far from being inadmissible, is essential to the proof of the charge. In an indictment for obtaining goods by false pretences, it is allowable to prove that the same pretences were used to another. *Collin's case*, 4 Roger's Rec. 143. On an indictment against the defendants for a conspiracy to cause themselves to be believed persons of large property for the purpose of defrauding tradesmen ; after proof of a

So, in other cases, there can be no objection that the evidence of one offence, proves the defendant to be guilty of another offence also. (a) And now by stat 14 & 15 Vict. \*c. 100, s. 17, in the [\*1] case of larceny, although the indictment state only one act of stealing, and at one time, yet if it appear that the property was in fact stolen at different times, the prosecutor shall not, by reason thereof, be required to elect on which taking he will proceed, unless it shall appear that there were more than three takings, or that more than 1

(a) *R. v. Moore*, 2 Car. & P. 235.

representation to one tradesman, evidence was offered of a representation to another tradesman at a different time, and admitted by Lord Ellenborough, who said that cumulative instances were necessary to prove the offence, and that the same sort of evidence was allowed on an indictment for perjury. *Robert's case*, 1 Camp. 399. To prove fraud against the defendant, a transaction between him and a third person of a similar nature to the one in question, may be given in evidence. *Snell et al. v. Moses et al.* 1 Johns. 99. See also *Rankin v. Blackwell*, 2 John. Cas. 193. In an action for a conspiracy to defraud, A. by falsely representing B. to be a man of credit, evidence that such representations were made to others in consequence of which such other persons made the same representations to A. is admissible. *Gardner v. Preston*, 2 Day's Cases, 205.

In Connecticut it has been held, that on the trial of a man charged with the murder of his wife, the state could show, for the purpose, it was said, of rebutting the presumption of innocence arising from the marital relations between the defendant and the deceased, that he had lived in adultery with another woman. Evidence of previous malice undoubtedly would have been admissible to show the *quo animo*, or perhaps to lend to circumstantial evidence a motive, but it is hard to see how such evidence as that of adultery could have been admitted to rebut the presumption of innocence. In England it has been held, that on the trial of a person charged with an unnatural crime, it was not evidence to prove that the defendant had admitted that he had a tendency to such practices; and it would be strange if a man's having been guilty of other offences, or having a tendency to commit them, should be received as evidence to rebut the presumption of his innocence of a particular charge. If such reason be allowed to operate there is scarcely any evidence derogatory to a defendant's character which could be excluded. Wharton's Cr. Law, citing *State v. Watkins*, 9 Conn. Rep. 47; 1 Phil. Ev. 499; 1 Russ. on Cr. 700.

Although the evidence offered may be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable, either as part of the *res gestæ* or in order to show intent. In many cases it is an important question whether a thing was done accidentally or wilfully. Thus, as is said by Maule, J., in a recent case, if a person were charged with having wilfully poisoned another, and it were a question whether he knew a certain white powder to be poison, evidence would be admissible to show that he knew what the powder was, because he had administered it to another person who had died, although that might be proof of a distinct felony. *Regina v. Dassett*, Maule, J., 2 Car. & Kirb. 306. And so, it is competent for the prosecutor of an indictment for selling liquor without a license, to prove that the defendant kept a bar with bottles in it. *The People v. Hubert*, 1 Denio, 133. But, where a defendant was on trial for breaking and entering the City Hall at Charleston, and a mass of burglarious tools and implements found in his possession at the time of his arrest, were exhibited to the jury; some of which were adapted to the commission of the offence with which he was charged, it was held, that it was not competent for the government to prove, that the ward of a key found among such tools and implements was made and fitted by the defendant, for the purpose of opening the door of the building of the Lancaster Bank. *Com. v. Wilson*, 2 Cushing, 590. Wharton's Cr. Law, p. 240.

space of six calendar months elapsed between the first and the last of such takings; and in either of such last-mentioned cases, the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months from the first to the last of such takings.(a)[1]

(b) *By the defendant.*

If the defendant plead specially, as where he pleads *auterfois acquit*, &c.,—or, upon an indictment against a parish for non-repair of a highway, where the defendants plead that others, and not the parish, are bound to repair,—the rule as to the right to begin, is the same as in civil actions, namely, that the party who adds the *similiter*, begins. When the plea is put in issue therefore, the defendant must prove it,

(a) 14 & 15 Vict. c. 100, s. 17.

[1] In all cases of larceny, and like offences, several articles may be joined in a count, the proof of either of which will sustain the indictment. It has even been ruled, that the same count may join the larceny of several distinct articles, belonging to different owners, where the time and the place of the taking of each are the same. An indictment may, in a single count, charge the prisoner with stealing three negroes, and the offence is complete if he stole either of the negroes, and the conviction will be sustained. *Com. v. Williams*, Thacher C. C. 722; *State v. Johnson*, 3 Hill's S. C. Rep. 1.

In *R. v. Reid et al.*, (1 Eng. Rep. 599,) per Jervis, C. J., it was said that an order to convict a prisoner of a felony, not a felony primarily charged in the indictment, it is necessary that the minor felony should be substantially included in the indictment. Thus an indictment for burglary includes an indictment for housebreaking, and generally also for larceny, and the prisoner on this may be found guilty of one or other of these felonies. But in an indictment for burglary, and for breaking and entering a house and stealing, the prisoner cannot be found guilty of breaking and entering a house with intent to steal. In Pennsylvania, on an indictment for adultery, the defendant may be convicted of fornication. *Com. v. Roberts*, 1 Yeates, 6; and of the same offence on an indictment for seduction. *Denkey v. Com.*, Sup. Ct. Pa., Jan. 1852.

If a man be charged with an offence as principal in the first degree, evidence of his being principal in the second degree will support the indictment, and *e converso*; as, for instance, if A. and B. be indicted for murder, and the indictment charge that A. gave the mortal stroke, and that B. was present, aiding and abetting, evidence that B. gave the mortal stroke, and that A. was present, aiding and abetting, will support the indictment. *Fost.* 351; *R. v. Mackally*, 9 Co. 67 b; *Plowd.* 98; *Reg. v. Crisham*, C. & Mar. 187. Also, in conspiracies, and even in high treason, when it consists of a conspiracy, and in all other offences which involve a conspiracy, not only the acts of the defendant himself, but also all the acts of his accomplices, done in furtherance of the common object, no matter where committed, may be given in evidence against him. *R. v. Hardy*, 1 East P. C. 98, 99; *R. v. Tooke*, Id. 98. As a foundation for such evidence, however, the existence of the conspiracy must be first proved; 2ndly, evidence must be given to connect the defendant with the conspirators; and 3rdly, it must be proved that the person whose acts are about to be given in evidence was connected with the defendant in the same conspiracy. The prosecutor may, however, either prove the conspiracy, which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different parties, and so prove the conspiracy. *R. v. Lovat*, 9 St. Tr. 670, &c. See also *R. v. Stone*, 6 T. R. 528; *R. v. Standley*, R. & R. 305; *R. v. Gogerly*, Id. 343; *R. v. Bingley*, Id. 446; *Reg. v. Frost*, 9 C. & P. 149; *Reg. v. Sheppard*, Id. 277.

in the same manner that a prosecutor must prove an indictment. Where the plea is *autrefois acquit* or *convict*, the defendant must get the former record made up, and produce a certified copy of it in evidence, as directed.<sup>(a)</sup> He must also, if necessary, prove his identity with the party before acquitted or convicted, and the identity, in substance, of the offence in both cases.<sup>[2]</sup>

Under the general issue, not guilty, the defendant may make what defence he can, showing that he is not guilty. And if indicted as accessory before or after the fact to a person named, he may contest the case of the prosecutor against that party, and show that he is not guilty; or if indicted as accessory to a person unknown, he may show that no felony in fact was committed.<sup>[3]</sup>

Under the general issue also, he may set up an *alibi* as a defence, and call witnesses to prove it; he may call witnesses to prove any other defence he may set up; or he may call witnesses to character,—in larceny, as to his honesty,—in murder, &c., as to his humanity,—in treason, as to his loyalty,—in riot, as to his peaceable disposition,—and

(a) *Ante*, p. 113.

[2] As to the right of the defendant, he may begin upon a plea in justification of a libel, there being no general issue, although the plaintiff holds one affirmative there; viz. in making out his damages. *Cooper v. Wakley*, 3 Carr. & Payne, 470; 1 Mood. & Malk. 248, S. C. So, on a plea of a right of way to an action of trespass *quare clausum fregit*, though the plea began with denying the force and arms, &c. *Hodges v. Holder*, 3 Campb. 366; *Jackson v. Hesketh*, 2 Stark. Rep. 518, S. P. So under a justification of an assault to suppress a mutiny. *Bedell v. Russell*, Ry. & Mood. 293. So of a justification for taking goods under proceedings upon a commission of bankruptcy. *Cotton v. James*, 3 Carr. & Payne, 505; 1 Mood. & Malk. 273, S. C. So on a justification in trespass, though the declaration allege special damage. *Fish v. Travers*, 3 Carr. & Payne, 578. Per Lord Tenterden, C. J., in *Fowler v. Foster*, 1 Mood. & Malk., 242, 3.

[3] Upon all capital accusations, the plea of not guilty puts in issue the whole of the charge, not merely whether the defendant actually did the facts stated on the record, but the criminal intention with which it is alleged he was actuated, and the legal quality of the guilt to be deduced from the whole. 4 Bla. Com. 338; 1 Erskine's Speeches, 278. In this respect there is a very important distinction between civil and criminal proceedings; in the former, if the facts are admitted, and the defence is, that they were rendered legal by circumstances, a special justification must be pleaded; but, in the latter, no justification can be admitted, to limit the defendant's means of defence; nor is it at all necessary, for if it appear that the facts, though true, were legal, the defendant will, of course, be acquitted. 2 Hale, 258; 4 Bla. Com. 338, 9; 1 Erskine's Speeches, 278. Thus on an indictment for murder, a man cannot plead that he killed the deceased in the fury of passion, and therefore it is only manslaughter; nor that he slew him in self defence, and so is altogether guiltless; but he must plead generally "not guilty," and give the special matter in evidence. 2 Hale, 258, 304; Bro. Abr. Appeal, 122; 4 Bla. Com. 338; 6 Mod. 172; Trem. P. C. 270; Bac. Abr. Assault and Battery, C. So also in indictments for felony and treason, if the facts stated amount to neither of them, the prisoners will be discharged under the general issue; for the terms "feloniously," and "traitorously," by which those crimes are designated, are the gist of the charge; and unless they are shown to be properly applied, the indictment cannot be supported. 4 Bla. Com. 338, 9.

the like. Witnesses to character are always useful: in doubtful cases they may affect or influence the verdict; or if the defendant be found guilty, they may have the effect of mitigating the punishment.[4]

[4] In all criminal prosecutions the prisoner is always permitted to call witnesses to speak of his general character, who are usually examined in his behalf, as to how long they have known him, and what his general character for honesty, humanity, or peaceable conduct, (according to the nature of the offence charged) has been during that time. The inquiry ought manifestly to bear some analogy and reference to the nature of the charge against the prisoner. On a charge of stealing it would be irrelevant and absurd to inquire into his loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. The inquiry must also be made with reference to the general character of the prisoner; for it is general character alone which can afford any test of general conduct, or raise a presumption that the person who had maintained a fair reputation down to a certain period, would not then begin to act an unworthy part: and, therefore, proof of particular transactions, in which the prisoner may have been concerned, are not admissible.

Formerly evidence of the prisoner's good character was admitted in capital cases only, in *favorem vite*. *Reg. v. Harris*, 2 St. Tr. 1038. The evidence is now admitted in all prosecutions which subject a man to corporal punishment; but not in actions or informations for penalties, though founded on the fraudulent conduct of the parties. Peake's Ev. 7. The true line of distinction, C. B. Eyre observed, is this: in a direct prosecution for a crime such evidence is admissible; but where the prosecution is not directly for the crime, but for the penalty, it is not. *Attorney-General v. Bowman*, cited 2 Bos. & Pul. 582; 1 Phil. Ev. 469. See 2 Overton, 94; *Wallace v. Clark*.

It has been usual to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the party, character however excellent is no subject for their consideration; but that when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference that the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be, not, in any case, to withdraw it from consideration, but to leave the jury to form their conclusion, upon the whole of the evidence, whether an individual whose character was previously unblemished, has or has not committed the particular crime for which he is called upon to answer.

The prosecutor cannot enter into the defendant's character, unless the defendant enable him to do so, by calling witnesses in support of it: and even then the prosecutor cannot examine to particular facts, the general character of the defendant not being put into issue, but coming in collaterally.

In *Reg. v. Stannard*, 7 C. & P. 673, Patteson, J., said: "I cannot in principle make any distinction between evidence of facts and evidence of character; the latter is equally laid before the jury as the former, as being relevant to the question of guilty or not guilty; the object of laying it before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly evidence in the case." And per Williams, J., "It is evidence to be submitted to the jury to induce them to say whether they think it likely that a person with such a character would have committed the offence."

Bull. N. P. 296, citing *Martyn v. Hind*, Cowp. 437. The ordinary course, however, is to

(c) *Variance.*

I have already noticed this subject fully, in treating of the cases in which the court, at the trial, will amend the indictment.<sup>(a)</sup> I shall therefore notice it in this place very shortly.

If there be a variance between the indictment, and the evidence brought forward to sustain it, the court on application will amend \*the indictment in the following instances:—where the [\*124] variance is in the setting out of any matter in writing or in print,—or in the name of any county, city, town, parish, &c.,—or in the name of the owner of any property which is the subject of the indictment,—or in the name of any person injured, or intended so to be, by the offence charged,—or in the name of any person mentioned in the indictment,—or in the “name or description of any matter or thing whatsoever therein named or described,”—or in the ownership of property therein named or described.<sup>(b)</sup>[1]

(a) See *ante*, p. 99.

(b) See *ante*, pp. 113, 114.

ask the witness whether he has not heard that the prisoner has been tried for a particular offence.

In bastardy cases the general character of the prosecutrix for *chastity* may be inquired into. *Short v. The State*.

If on the trial of an indictment, the defendant introduces evidence of his good character prior to the alleged commission of the crime charged, it is competent to the government to prove that subsequently to that time his character has been bad. *Commonwealth v. Sachet*, 22 Pick. 394. Good character is available only in doubtful cases. *Bennett v. The State*, 8 Humphreys, 118.

In criminal charges, the prisoner's character cannot be put in issue by the state unless he open the door by giving testimony to it. But it is not a conclusion of law, that from his silence the jury are to believe he is a man of bad character. *State v. O'Neil*, 7 Iredell, R. C. 251.

Where no evidence of general character has been given, the subject of character is not one for the consideration of the jury. Therefore, when on the trial of an “indictment for murder, the evidence was circumstantial, and the judge instructed the jury that fair character was important to the prisoner, and that they were to inquire why it was that she had given no evidence of her general character.” *Held*, that such instruction suggested the inference that her character was bad, and was erroneous. *The People v. Bodine*, 1 Denio, 281.

On a trial for murder, evidence of the character of the deceased as a violent man is not admissible for the defendant. *State v. Hawley*, 4 Harrington, 562.

[1] At common law, an indictment can only be amended with the consent of the grand jury, before they are discharged; and there seems to be an absence of statutory provision on the subject in this country. The question, therefore, of variance, is one of paramount importance.

The name of any party whose existence is essential to the charge, must be proved in conformity to that laid in the indictment, for a misnomer of him is usually fatal. 1 Stark. Ev. 470. On an indictment for stealing in a dwelling house to the value of £5, the name of the owner of the house must be proved as laid. So, on an indictment for robbing a dwelling house in the day-time, some persons being therein, the name of some person who was in the house at the time must be correctly stated. *Rex v. Kelly*, Carr. Suppl. 42. The 7 Geo. 4, ch. 64, extends only to remedy the misnomer of the defendants, when pleaded in



But there are some cases of variance, where an amendment is not necessary. Upon an indictment for embezzlement, if the evidence

abatement. And if such person be described as a certain person to the jurors unknown, and it appear in evidence that his name clearly was known, the prisoner cannot be convicted. 1 East, P. C. 651; *Rex v. Robinson*, Holt, N. P. C. 695; *Rex v. Walker*, 3 Camp. 264; *Rex v. Deakin and Smith*, 2 Leach, 863. But if the charge against an accessory is that the principal felony was committed by *persons unknown*, it is no objection that the same grand jury have found a true bill imputing the principal felony to I. S. *Rex v. Bush*, Russ. & Ry. 372. Where a person is described by name simply, without addition, proof that there are two persons of that name is no variance, for the allegation is still true. Upon an indictment for an assault upon Elizabeth Edwards, it appeared that there were two of that name, mother and daughter, and that in fact the assault had been made on the daughter; but the conviction was held to be good. *Rex v. Peace*, 3 B. & A. 579. The court said: "The question here is, not whether the party has been rightly described, but who the party is who is described in the indictment as having been assaulted." But generally if the father and son be both named A. B., by A. B., simply the father shall be intended. *Wilson v. Stubs*, Hob. 330; *Lepiot v. Browne*, 1 Salk. 7; *Sweeting v. Fowler*, 1 Stark. N. P. C. 106; 1 Stark. Ev. 472.

So, where an indictment laid the property of a horse in Joshua Jennings, it was held to be supported by proof of property in Joshua Jennings the younger. *Hodgson's case*, 1 Lewin, 236, Parke, J.; *S. P. Bland's case*, *ibid.*, Bolland, B. So, where an indictment for perjury alleged a suit to have been between Peacock and R. Miles, and the proceedings stated the suit to have been between Peacock and R. Miles the elder, it was held no variance. *Rex v. Bailey*, 7 C. & P. 264, Williams, J., who cited a MS. case, where it was alleged that there was an indictment against A. B. and C. D., at a former time, and on the record being produced, it appeared that it was an indictment against A. B. and C. D. the younger, and Lawrence, J., held it a fatal variance; on which it was observed, that that must have been on the ground that if a person was named simply, it meant the elder.

The prosecutor may be described by the name he has assumed, though it is not his right name; thus, where the goods stolen were laid to be the property of Mary Johnson, and the prosecutrix stated that her original name was Mary Davies, but that she had been called and known by the name of Mary Johnson, and not Mary Davies, for the last five years, and had not taken the name of Johnson for any purpose of concealment or of fraud; the judges, on a case reserved, were of opinion that the time the prosecutrix had been known by the name of Johnson, warranted her being called so in the indictment. *Rex v. Norton*, Russ. & Ry. 510. And so a person is well described by the name by which he is generally known. Thus, where a count for offering a bribe to an officer of the customs, stated his name as Thomas Dabbs, and he proved that his true name was Thomas Tyrrell Dabbs, but that he generally went by the name of Thomas Dabbs, and signed his name Thomas Dabbs, without Tyrrell; it was held that this was no variance. *Attorney-general v. Hawkes*, 1 Tyrw. 3, and per Alexander, C. B.: "By the aid of an averment of the identity of Thomas Dabbs and Thomas Tyrrel Dabbs, the defendant might plead an acquittal on this information, by way of *autrefois acquit* to information for offering a bribe to Thomas Tyrrel Dabbs on this occasion.

So, where an indictment for robbery laid the property in John Hancox, and it appeared that his name was John Walter Hancox, but that he was generally known by the name of John Hancox; Parke, J., held that this was sufficient. *Rex v. Berriman*, 5 C. & P. 661; see *Rex v. Sheen*, 2 C. & P. 634; and see *Rex v. —*, 6 C. & P. 408, where an indictment for stealing a whip, the property of Richard Pratt, was held to be sustained by evidence that the prosecutor was generally known by that name, although his proper name was Richard Jeremiah Pratt. And see *Williams v. Bryant*, 5 M. & W. 477, where the defendant executed a bond in the name of William Bryant, being known at that time by that name, his

prove a larceny, the jury may acquit the prisoner of the embezzlement, and find him guilty of simple larceny, or of larceny as clerk or ser-

real name being William Francis Bryant, and the court held that the proof was sufficient upon the plea of *non est factum*.

So, where in an indictment a boy was called Edward Dobson, and he stated that his right name was Dobson, but that most persons who knew him called him Peach, and that his mother had married two husbands, the first named Peach and the second Dobson, and that he was told by his mother that he was the son of the latter, and that she always used to call him Dobson; it was held that the evidence that the boy's mother had always called him Dobson, must be taken to be conclusive as to his name, and that, therefore, he was rightly described in the indictment. *Rez v. Williams*, 7 C. & P. 298; Williams, J., after consulting Alderson, B.

But where, on the indictment of Frances Clark, for the murder of "George Lakeman Clark, a base-born infant male child," it appeared in evidence that the deceased child was a bastard son of the prisoner, and that she murdered it, as charged in the indictment, but that the child was christened George Lakeman, being the name of its reputed father, and that it was called George Lakeman, and not by any other name known to the witnesses, and that the prisoner called it George Lakeman; the judges held that as the child had not obtained his mother's name by reputation, he was improperly called Clark in the indictment, and as there was nothing but the name to identify him in the indictment, the conviction could not be supported. *Rez v. Clark*, Russ. & Ry. C. C. R. 358.

And so, where an illegitimate child, three weeks old, had been baptised by the name of "Eliza," but no surname was mentioned at the time of baptism, and neither the register, nor any copy of it, was produced at the trial, and an indictment for murder described her as "Eliza Waters," Waters being the name of her mother; it was held, upon a case reserved, that the child had not acquired the name of Waters by reputation, and that the conviction was wrong. *Rez v. Waters*, R. & M. C. C. R. 457; S. C. 7 C. & P. 250.

Where, however, an indictment charged the murder of Emma Evans, and it appeared that the deceased was an illegitimate child born in a workhouse, and baptized on the 9th of September by the name of Emma, and drowned on the 11th of the same month, when about six weeks old, and that up to the time of the baptism she was not called by any name, but that from the 9th to the 11th of September she was called Emma Evans, Evans being the mother's name; it was held that there was sufficient evidence of reputation for the consideration of the jury, and that this case was distinguishable from the last, because there was no evidence there that the child was ever called Waters at all. *Reg. v. Evans*, 8 C. & P. 765; Erskine, J., after consulting Patteson, J.

And where, on an indictment for the murder of "a certain female child whose name to the jurors was unknown," it appeared that the child had not been baptised, but the prisoner had said she should like it to be called "Mary Ann," and had called it "her Mary Ann" at one time, and "Little Mary" at another; the father was a Baptist, and the child was a bastard, and twelve days old; and, upon a case reserved, it was held that the child had not gained a name by reputation, and therefore the indictment was right. *Rez v. Smith*, R. & M. C. C. R. 402; S. C. 6 C. & P. 151.

Where an indictment for larceny laid the goods stolen to be the property of *Victoria Baroness Turkheim*, and the prosecutrix proved that Baroness Turkheim was her title only, and no part of her proper name, but that she was not only reputed to possess that title, but did actually possess it in right of an estate inherited from her father, and that she had constantly and uniformly acted in and been known by that appellation, but that her name, without her title, was *Salina Victoria*; the judges held the description sufficient. *Sull's case*, 2 Leach, 861. An indictment for robbery on an unmarried woman in her maiden name is good, although she marry before the indictment is found. *Rez v. Turner*, 1 Leach, 536. Where an indictment charged the prisoner with the manslaughter of Mark Robinson, and a witness stated that the deceased stayed three days and nights at his inn, and that he asked

vant;(a) or upon an indictment for larceny, if the evidence prove an embezzlement, the jury may acquit the defendant of the larceny, and find him guilty of the embezzlement;(b) upon an indictment for obtaining goods or money under false pretences, if the evidence prove a larceny, the defendant notwithstanding may be convicted of false pretences;(c)

(a) See 14 & 15 Vict. c. 100, s. 13.

(b) Id. s. 11.

(c) See 7 & 8 G. 4, c. 29, s. 53."

the deceased his name, and that letters came directed in that name, which letters were delivered to the deceased, and received by him; Patteson, J., held that the witness might be asked what name the deceased told him, as it was evidence to show the name by which he usually went. *Rez v. Timmins*, 7 C. & P. 499.

But if the name proved be *idem sonans* with that in the indictment, and different in spelling only, the variance will be immaterial. Thus, Segrave for Scgrave is no variance, (*Williams v. Ogle*, 2 Stra. 889,) nor is Benedetto for Beniditto. *Abithol v. Beniditto*, 2 Taunt. 401. So, on an indictment for committing an offence on one John Whyneard, it appeared that his name was spelt Winyard, but it was pronounced Winnyard; and the judges, on a case reserved, held that the prisoner had been rightly convicted. *Rez v. Foster*, Russ. & Ry. 412. But an indictment charging the prisoner with having personated "Peter M'Cann is not supported by evidence that he personated "Peter M'Carn." *Rez v. Tannet*, Russ. & Ry. 351. So, it has been decided that "Shakespeare" cannot be considered as *idem sonans* with "Shakepear." *Rez v. Shakespeare*, 10 East, 83. So Tarbart for Tabart is a fatal variance in a bail piece. *Bingham v. Dickie*, 5 Taunt. 14.

Where the indictment alleged that the defendant committed adultery with one L. W. and it appeared that there were two individuals of that name in the town, father and son, and that the latter used the addition of *junior* to his name it was presumed that the father was the *particeps criminis*, and evidence to show adultery with the son L. W. *junior*, was not admitted. *State v. Vitlum*, 9 New Hamp. Rep. 519. On an indictment charging the stealing of the horse of Stephen Harris, the evidence proved that the man whose horse had been stolen was named Harrison. The witness stated that his name of baptism was Harrison, though his neighbors sometimes called him Harris; it was held that the owner's name was sufficiently described. *State v. France*, 1 Tenn. Rep. 434. Where the indictment charged the forgery of an order on "the cashier of the corporation of the President and directors of the Bank of the United States," and the order was drawn on "the cashier of the Bank of the United States," it was held that this was not a fatal variance. *U. S. v. Kinman*, 1 Bald. Rep. 292.

Keen for Keene, Deadema for Diadema, Autron for Autrum or Autrium, form no variance. *Com. v. Riley*, Thach. C. C. 67; *State v. Patterson*, 2 Iredell, 346; *State v. Scurry*, 3 Richard, 18. Burrall and Burrill, Prison and Brisson, Donnel and Donald, Ratharine and Catharine, are not the same in sound. *Com. v. Gillespie*, 7 Serg. & Rawle, Rep. 469; Add. Rep. 141; *Donnel v. U. S.*, 1 Morris, 141; *Swails v. State*, 7 Blackf. 724.

Many fatal variances have arisen in cases where it is necessary to state a record, deed, or other writing in the indictment, between such statement and the record deed, or writing, when produced in evidence. Where the matter of a written instrument is introduced in pleading by the words "according to the tenor following," or "of the tenor following," or "in the words and figures following," or "the words and matters following," or in fact any words which imply that a correct recital is intended, any—the slightest—variance between the instrument set out, and that produced in evidence is fatal.

A mere literal variance however, where the omission or addition of a letter does not alter or change a word so as to make it another word, will not be material. See Barb. Cr. Law, 2d ed. p. 334.

upon an indictment for a misdemeanor, if the evidence prove a felony, the defendant shall not on that account be acquitted, unless the court think proper to discharge him from that indictment, and order him to be prosecuted for the felony;(a) upon an indictment against a principal in the first degree, if the evidence prove him to have been principal in the second degree,—or upon an indictment against him as principal in the second degree, if the evidence prove him to have been principal in the first degree,—he shall be convicted.(b)

There are also some cases, where the evidence prove only part of the charge laid, and the defendant shall be convicted of that part, and acquitted of the residue. Where a man is indicted for murder, he may be found guilty of manslaughter;—upon an indictment for burglary and larceny, he may be acquitted of the burglary, and found guilty of the larceny;—upon an indictment for breaking and entering a church, house, shop, or warehouse, and stealing therein, he may be acquitted of the breaking and entering, and convicted of the larceny;—upon an indictment for stealing from a dwelling-house to the value of five pounds, or some persons therein being put in fear, the defendant may be convicted of the simple larceny;—upon an indictment for robbery, the jury may acquit him of the robbery, and convict him of an assault with intent to commit it;(c) so in all cases of indictments for felony or misdemeanor, if the evidence prove only an attempt to commit it, the defendant may be found guilty of the attempt.(d)[2]

(a) 14 & 15 Vict. c. 100, s. 12.

(c) 14 & 15 Vict. 100, s. 11.

(b) *Ante*, p. 13.

(d) *Id.* s. 9.

[1] As a general rule, where an accusation includes an offence of an inferior degree, the jury may discharge the defendant of the high crime, and convict him of the less atrocious; and in such case, it is sufficient if they find a verdict of guilty of the inferior offence, and take no notice of the higher. Of this, the books give numerous instances. Thus on an indictment for rape one may be convicted of assault and battery; or on the same charge incest; or on an indictment for manslaughter, of assault and battery. *Com. v. Drum*, 19 Pick. 479; *Com. v. Goodhue*, 2 Metcalf, Rep. 193; *Com. v. Hope*, 22 Pick. 17; *Com. v. Griffin*, 2 Pick. 523. In New York it has been determined that under an indictment for procuring an abortion of a quick child, which by the revised statutes is a felony, the prisoner may be convicted though it turn out that the child was not quick, and the offence therefore a mere misdemeanor. *People v. Jackson*, 3 Hill, N. Y. Rep. 92. On an indictment for assault with intent to kill the defendant may be convicted of assault and battery or assault alone. *Stewart v. State of Ohio*, 5 Ohio Rep. 242. An indictment under the South Carolina act of 1821 for the murder of a slave, includes within it the inferior offence of "killing in sudden heat and passion," to the same extent and for the same reason that murder at common law includes manslaughter; and therefore, on such an indictment, the prisoner may be convicted of the inferior offence described in the second clause of the same act. *State v. Gaffney*, Rice, Rep. 431. In Massachusetts in *Com. v. Roby*, (12 Pick. Rep. 496,) it was held that at common law one charged with a felony could not be convicted of part of the charge unless the part amounted to a felony. But by Rev. Sta. of Mass. ch. 137, sec. 11, on such an indictment, if the jury acquit of part of the charge the defendant may be sentenced for any offence substantially charged by the residue of such indictment. *Com. v. Drum*, 19 Pick. Rep. 479.

[\*125] \*2. *The Manner of proving the Matter in issue.*

(a) *By Confessions.*

*Confession to a prosecutor, constable, &c.*] A confession by the defendant, if obtained fairly, and without holding out any inducement to him to make it, is nearly the strongest evidence that can be given of the facts stated in such confession, against the party making it; and is abundantly sufficient of itself, without any confirmation, to warrant a verdict against him.(a)[1]

(a) 2 Hawk. c. 46, ss. 33, 39.

[1] A free and voluntary confession of guilt made by a prisoner, whether in the course of conversation with private individuals, or under examination before a magistrate, is admissible in evidence as the highest and most satisfactory proof, because it is fairly presumed that no man would make such a confession against himself, if the facts confessed were not true. And the highest authorities have now established, that a confession, if duly made, and satisfactorily proved, is sufficient alone to warrant a conviction, without any corroborating evidence *aliunde*. A distinction may be properly made in the weight to be attached to confessions. If a confession be reduced into writing, either by the prisoner, or by some one else, and read over to him, and if it be clearly shown that the confession was the spontaneous and voluntary act of the prisoner, such a confession would be entitled to great consideration. But if a confession were proved by a witness, and rested upon his capability of understanding what was said by the prisoner, his competency to remember the very words used, and his fidelity and accuracy in relating them to the jury, it ought to be received with very great caution. For, besides the danger of mistake, from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner himself is oppressed by the calamity of his situation, and that he is often influenced by motives of hope or fear, to make an untrue confession. The zeal, too, which so generally prevails to detect offenders, especially in cases of aggravated guilt, and the strong disposition in the persons engaged in pursuit of evidence to rely on slight grounds of suspicion, which are exaggerated into sufficient proof, together with the character of persons necessarily called as witnesses in cases of secret and atrocious crime, all tend to impair the value of this kind of evidence, and sometimes lead to its rejection where, in civil actions, it would have been received. The weighty observation of Mr. J. Foster, is also to be kept in mind, that "this evidence is not in the ordinary course of things, to be disproved by that sort of negative evidence by which the proof of plain facts may be and often is confronted." Fost. 243.

It was held in one case before the general sessions in the city of New York, (Radcliff, mayor, presiding,) that even a full confession of guilt before the magistrate was insufficient to warrant a conviction, there being no other proof of the *corpus delicti*, i. e., that a felony had been committed; which it was said must be shown before the examination could be read. *Hope's case*, 1 O. H. Rec. 150. But in another and subsequent case in the same court, Dec. 1822, before Riker, recorder, (1 Wheel. Cr. Cas. 107, 8,) the doctrine in the text is recognized; though it is said to be very desirable that some evidence other than the mere confession should be adduced. And in *Hall's case*, (Macnally, 40,) it was held that a conviction may follow on oral evidence of such confession, the magistrate having omitted to commit it to writing; and that a conviction may follow though it be wholly uncorroborated.

Confessions by infants are competent as well as those of adults. *Rex v. Thornton*, Ry. & Mod. Cr. Cas. 27. "He who is a rational and moral agent, and can merit the infliction of legal sanctions, must be able to detail his motives and acts. If, therefore, the prisoner be of an age to be punished, he was of an age to confess his guilt." Per Southard, J., in *Aaron's*

But it is only evidence against the party making it, and not against others,(a) except perhaps in treason and conspiracy, in cases where the

(a) 2 Hawk. c. 46, s. 34.

case, 1 South. 246; cited 5 Halst. 189; 4 Bl. Com. 24; *York's case*, Fost. 70. And in one case the confessions of a boy under 11, (*State v. Aaron*, 1 South. 231,) and in another under 13 years of age, (*State v. Guild*, 5 Halst. 163,) were received and acted upon in charges of murder. The latter verdict was sustained by the confessions being connected with and fortified by circumstances; (id.;) but in the former a new trial was granted for want of such ingredient. 1 South. 231, 238, 243. As an infant under 7 is not capable of crime, (per Kirkpatrick, C. J., in *State v. Aaron*, 1 South. 238,) it follows that his confessions are not receivable. And in all these cases of extra-judicial confession by infants under the age of discretion, it seems desirable, if not essential, that corroborating circumstances should appear. The question of their necessity was much considered in the two cases last cited, as well as their nature, their mode of application, and the cautions under which they are to be received. They are said to be such as serve to strengthen the confession, to render it more probable; such, in short, as may tend to impress a jury with a belief of its truth. They are distinguished from facts which, independent of the confession, will warrant a conviction; for then the verdict would stand not upon the confession, but upon those independent circumstances. "To corroborate is to strengthen, to confirm by additional security, to add strength. The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or to comport with some facts otherwise known and established. In this view of the subject, the evidence in this cause affords circumstances corroborating in a singular and remarkable manner the confessions which were proved. I shall briefly state them. The prisoner said he went to the house of the deceased, for the purpose of borrowing a gun. It was proved a gun had been kept there, and that the prisoner knew it. He said she (the deceased) refused him the gun, and accused him of having done mischief to her pig and pigeons. It was proved that she had entertained a belief that such mischief had been done by him. He confessed he had struck her with a yoke. The witness who first saw her after the disaster, testified that he found a yoke and blood on it lying near her. The prisoner confessed that as he was going out, after she had refused his request, he saw the yoke *by the door*, picked it up, and went back. Johnathan Van Kirk, who resided in the house, testified that when he went out about noon to work, the yoke was by the side of the door. The prisoner stated that she was on the hearth. M'Coy, the first who saw her, found her lying in the corner of the fire place. He stated that she was starching a cap. A cap, says M'Coy, lay on the hearth by the side of her. To Phillip Knowles he related the story, and confessed he struck her a first, second, third and fourth time. M'Coy testified there were four wounds, one on the top of her head, one on the right temple, one on the right eye, and one on the under-jaw. The minute detail of incidents and the steady uniformity of his relations to a number of persons, are not among the least striking of the circumstances which mark these confessions. One supposed discrepancy only has been pointed out. To one of the witnesses he said, the deceased was sitting by the fire, blowing the fire. To another that she was starching a cap and stooping down on the hearth. No difficulty however, seems to exist in reconciling these representations by supposing that he spoke of different points of time." Per Ewing, C. J. in *State v. Guild*, 5 Halst. 187. Again, Aaron, a colored boy under twelve years of age, a slave, confessed that he had drowned a child by throwing him into the well. He was seen at play with the child near the well shortly before the child was missed, no other person being with them; in searching for the child, the prisoner was found up in a cherry tree; he pretended the child had gone up the road, looked round and called for him; went to bed at night without his supper; admitted next morning he saw the child fall into the well; gave no reason why he neglected to tell of it, but quietly continued his work. When the child was found and taken out of the well he came up, and seeing the corps lying on the earth, said, "So you have found Stephen."

confession or declaration of one of the conspirators may amount to an overt act;(a) and except upon indictments against the inhabitants

(a) See *R. v. Watson*, 2 Stark. 140, 141.

These were relied on by Mr. Justice Southard, as corroborating circumstances. *The State v. Aaron*, 1 South. 232, 747. But a new trial was granted in this case. Kirkpatrick C. J. at p. 240, says, the circumstances were not brought out by the confession. The confession itself was pregnant with no circumstances to give it authority, or in any way to corroborate it. In this, Rozell, J., concurred.

A confession, at least in a capital case, from the nature of the thing, is a very doubtful species of evidence, and to be received with great caution. It is hardly to be supposed, it is said, that a man perfectly possessed of himself, would make a confession to take away his own life. It must generally proceed from a promise or hope of favor, or from a dread of punishment, and in such situations the mind is agitated; the man may be easily tempted to go further than the truth. Besides, the witness, respecting the confession, may have mistaken his meaning. *State v. Long*, 1 Hayw. 455. A remarkable instance of this kind is mentioned by Mr. Dickenson, as singularly illustrative of the propriety of this caution. Two brothers committed a robbery in a dark night to a large amount, and fled. A younger brother, who was innocent, in order to favor their escape, contrived to draw suspicion on himself, and when examined, tacitly admitted his guilt. He was afterwards committed to prison, and all pursuit of his brothers was discontinued. On the trial he proved an alibi on the clearest and most satisfactory evidence, and was consequently acquitted. In the mean time, the actual felons had safely arrived in America with their plunder. 1 Dick. Just. 460.

In another case, a Frenchman named Hubert was convicted and executed on a most circumstantial confession of his guilt in having occasioned the great fire in London, "although," adds the historian, "neither the judges nor any one present believed him guilty, but that he was a poor, distracted wretch, weary of life, and who chose to part with it in that way." Continuation of Lord Clarendon's life, written by himself, p. 352.

Matthews relates an instance of a countryman who was convicted, on his own confession, of the murder of a widow, who, two years afterwards, returned to her home, and had never received any injury whatever. *Matth. de Prob. c. 1, n. 4.* See also the false confession of a man named John Sharpe, for the murder of Miss Catharine Elmes, *Ann. Reg. 1833, p. 74.*

An equally singular case in this country is that of two brothers named Boorns, who, on being charged with the murder of another, were convicted and sentenced to death, chiefly on their admissions, but were fortunately relieved from execution by the re-appearance of their alleged victim. *N. Am. Review*, vol. 10, p. 418; 5 *Law Reporter*, 195; 1 *Greenleaf on Ev.* sec. 214. Subject to the restrictions which are thus suggested, remarks Mr. Greenleaf, 1 *Ev. sec. 215*, however, deliberate confessions, when made advisedly and with a due sense of their meaning, are among the most effectual proofs in the law. *Dig. Lib. 42, tit. 2 Confess.*; *Van Leenwen's Comm. B. 5, ch. 21, sec. 1*; *Poth. on Obl. (by Evans.) App. Numb. xvi. sec. 13*; 1 *Gilb. Evid. by Loft*, 216; 4 *Hawk. P. C. 425, b. 2, ch. 46, sec. 35*; *Mortimer v. Mortimer*, 2 *Hagg. Con. R.* 315; *Harris v. Harris*, 2 *Hagg. Eccle.* 409. Their value depends on the supposition, that they are deliberate and voluntary, and on the presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience. Such confessions, so made by a prisoner, to any person at any moment of time, and at any place, subsequent to the perpetration of the crime, and previous to his examination before the magistrate, are at common law received as evidence, as among the proofs of guilt. *Lambe's case*, 2 *Leach. Cr. Cas.* 625, 629, per *Grose, J.*; *Warickshall's case*, 1 *Leach, Cr. Cas.* 298; *M'Nally's Evidence*, 42, 47. Confessions, too, like admissions, may be inferred from the conduct of the prisoner, and from his silent acquiescence in the statements of others, respecting him, and made in his presence, provided they were not made under circumstances which prevented him from replying to them. See also *Rex v. Bartlet*, 7 *C. & P.* 832; *Rex v. Smith*, 5 *C. & P.* 332; *Rex v. Appleby*,

of a parish or township, &c., where the admission of one is deemed evidence, though perhaps slight, against the parish or township generally.(a)[2] Even where one of three prisoners, on examination before a

(d) See *R. v. Whitty Lower*, 1 M. & S. 636; *R. v. Hardwick*, 11 East, 578.

3 Star. R. 33; Joy on Confessions, &c., 77, 80. The degree of credit due to them is to be estimated by the jury, under the circumstances of the case.

To the same effect is a case in Illinois, in 1841, where three brothers named Traylor, were arrested on the charge of murdering a man named Fisher, who, when last seen, had been in their company. Strong circumstantial evidence was produced showing the traces of a death struggle in the spot where the homicide was alleged to have been committed; and the case was fortified by expressions alleged to have been subsequently used by one of the brothers as to his having become legatee of the deceased's property. The examinations had scarcely finished, before one of the three defendants made a confession, detailing circumstantially the whole transaction, showing the previous combination, and ending with a direct statement, under oath, of the homicide. To the amazement of the whole country, however, the deceased made his appearance in just time enough to intercept a conviction; and the only way of accounting for the confession which had been produced, was that the party who made it, in the desperation of impending conviction, took this method of cutting short suspense. See 4 West. Law Journal, 25.

Mr. Abercrombie relates an instance where a *quasi* confession was made by an innocent person, which shows also that it may be not impracticable for an artful man to so operate upon the nervous sensibility of another less intelligent, as to lead the latter to declarations or conduct which would produce a strong presumption of guilt.

During a late investigation in the north of Scotland, respecting an atrocious murder committed on a pedlar, a man came forward voluntarily and declared that he had had a dream, in which there was represented to him a house, and a voice directed him to a spot near the house, in which there was buried the pack, or box for small articles of merchandise, of the murdered person. On search being made, the pack was found, not precisely on the spot which he had mentioned but very near it. The first impression on the minds of the public authorities was that he was either the murderer or an accomplice in the crime. But the individual accused was soon after clearly convicted; and before his execution he fully confessed his crime, and in the strongest manner exculpated the dreamer from any participation in, or knowledge of the murder. The only fact that could be discovered calculated to throw any light upon the occurrence was, that immediately after the murder the dreamer and the murderer had been together in a state of almost constant intoxication, for several days; and it is supposed that the latter might have allowed statements to escape from him which had been recalled to the other in his dream, though he had no remembrance of them in his sober hours. Abercrombie on the Intel. Powers, 12 ed. 222. Wharton's Cr. Law, 252, 523, 254.

In the United States there is a growing unwillingness to rest convictions on confessions alone. It has been held in several of the states that the confessions of a party not made in open court, or on examination before a magistrate, but to an individual, uncorroborated by circumstances and without proof *aliunde* that a crime has been committed will not justify a conviction. *People v. Hennessy*, 15 Wendell 147; *People v. Badgely*, 1 Wendell 53; *State v. Fields*, Peck. Rep. 140; *State v. Gardiner*, Wright's Rep. 392.

[2] In cases of conspiracy, riot or other crime perpetrated by several persons, when once the conspiracy or combination is established, the act or declaration of one conspirator, or accomplice, in the prosecution of the enterprise, is considered the act of all, and is evidence against all. *U. S. v. Harman*, 1 Baldwin, 292; *Martin v. Com.*, 11 Leigh, 745; *U. S. v. Goodwin*, 12 Wheaton, 469; *State v. Soper*, 13 Maine, 293.

When, however, the common enterprise is at an end, whether by accomplishment or abandonment, it is not material, no one is permitted by any subsequent act or declaration of his



magistrate, stated that he and another of the prisoners committed the felony, and the other who was present did not deny it: *Holroyd, J.*, held that this confession could not be given in evidence against the other prisoner, and he said that it had so been decided.<sup>(a)</sup>[3] And where on the trial of two, a confession of one of them, affecting also the other, is to be given in evidence, the judge, if the confession be in writing, usually orders the officer, whose duty it is to read it, to read it in such a way as not to disclose the name of the other defendant; or if the confession be not in writing, many of the judges give a similar caution to the witness who proves it. This, however, is entirely discretionary.

A confession to be given in evidence, must be of the offence charged in the indictment, or of some matter relating to it: you cannot give in evidence any confession or declaration of the prisoner of his having committed similar crimes upon other occasions, or of his general disposition to commit them.<sup>(b)</sup> But where there were two indictments against a prisoner, one for receiving tin, and the other for stealing iron, —on the trial for receiving the tin, it was holden that the whole of a statement made by him might be given in evidence, although only part of it related to the tin, the rest relating to the iron.<sup>(c)</sup> And on the

(a) *R. v. Appleby, et al.* 3 Stark. 33; S. P. 1 Car. & K. 221.

*R. v. Swinnerton et al.* Car. & M. 593.

(c) *R. v. Mansfield*, Car. & M. 140.

(b) *R. v. Cole*, 1 Ph. Ev. 170; *R. v. Butler*,

own to affect the others. His confession, therefore, subsequently made, even though by the plea of guilty, is not admissible in evidence, as such, against any but himself. Under no circumstances can the most solemn admission made by him on trial be evidence against his accomplices. Thus, on an indictment against A., for concealing a horse-thief, knowing him to be such, it is not competent for the prosecutor to give evidence of what the alleged horse-thief subsequently confessed in the presence of A., to establish the fact that a horse was stolen. *Rex v. Turner*, 1 Mood. Cr. Cas. 347; *Rex v. Appleby*, 3 Stark. 33; and see *Melen v. Andrews*, 1 M. & W. 336, per Parke, J.; *State v. Poll*, 1 Hawks, 442; see *State v. Hanney*, 2 Dev. & Bat. 390; *Kirby v. State*, 7 Yerger, 259; *Morrison v. State*, 5 Ohio Rep. 439; *Lowe v. Boteler*, 4 Har. & McHen. 349.

[3] The declarations of a third person, made in the presence of a defendant, and assented to by him, are admissible evidence against him, and stand on an equal footing with admissions by himself. *Com. v. Call*, 21 Pick. Rep. 515; though see *Norman v. State*, 1 Sm. & Marsh. 562. But where the declarations were made in the presence of a party who was partially intoxicated, and not contradicted by him, it is a question for the jury whether whether the party was too much intoxicated to understand the statement when made. *State v. Perkins*, 3 Hawkes, 377. The assent of the party is presumed if nothing be said by him inconsistent with that presumption. *Ib.* But it is a question for the jury whether the defendant's apparent assent in such case, arose from inattention or ignorance. *State v. Perkins*, 3 Hawkes Rep. 377. The silence of a prisoner when accused of larceny, or when the stolen property is identified is not to be construed into an admission of the larceny, or the ownership of the property. *Com. v. Kenney*, 12 Met. 235.

Where a man at full liberty to speak, and, not in the course of a judicial inquiry, is charged with a crime and remains silent, that is, makes no denial of the accusation by word or gesture, his silence is a circumstance which may be left to the jury. *State v. Swink*, 2 Dev. & Batt. 9; *State v. Stone*, Rice Rep. 187.

other hand, the prisoner may insist on the whole of his confession being stated, for the part omitted may qualify or control the meaning of the part stated.(a)[4]

(a) 2 Hawk. c. 46, s. 42.

[4] That the confessions of a criminal shall be taken together, in the ordinary sense of that phrase, is extremely well settled. Per M'Kean, C. J. at the close of his charge, in *Respublica v. M'Carty*, a case of treason, 2 Dall. 86. This has been expressly extended to the examination before the magistrate. Hick's case, 1 C. H. Rec. 66. *People v. Weeks*, N. Y. Gen. Sess. Oct. 1818, Jud. Repos. 138. *People v. Johnson*, N. Y. Oyer & Term., Edwards, C. Judge presiding, 2 Wheel. Cr. Cas. 377. Though it was said in another case, that the district attorney might read such part of the written examination as he pleased, and the prisoner could not demand to have the whole read. *People v. Jordine*, N. Y. Gen. Sess. Oct. 1818, Jud. Repos. 107, 8. Quere. The contrary was declared to be well settled in *People v. Johnson*, supra.

But per Ch. J. M'Kean, at the close of his charge in *Respublica v. M'Carty*, supra, "Though the whole confession must be considered together, yet the jury may, unquestionably, on this as on every other point of evidence, believe one part and disregard the other." To what extent this may be done, will appear by the following cases. The prisoner was indicted for secreting counterfeit money. He had confessed that it was true he had counterfeit money, but he had received it from a good man on New River, but would not name the person, and that he had destroyed nine of the dollars. Afterwards, while drunk, he said he was a counterfeiter, or was accused of passing counterfeit money: while the witnesses did not agree; but they agreed that he said he had counterfeit money, and would pass as much as he pleased. Afterwards he said he had it from one Hart of New River; afterwards that he had it from a good man, had never attempted to pass it, and would never pass any. He showed thirteen dollars, and threw it into a mud hole. The court charged that confessions made at the same time were all to be taken together, and the jury was to draw such inferences from them as the truth of the case warranted, that they were not bound to credit the whole. On error upon a bill of exceptions, it was held that the charge was too unqualified, that no part of the confession could be rejected, unless it was proved to be untrue; that the jury could not arbitrarily reject that part which went in discharge of the prisoner, and go upon that part only which criminated him. *Tipton v. The State*, Peck's Rep. 308. And see *infra*, *Rex v. Jones*, and *Rex v. Higgins*. On trial of an indictment for larceny, the theft was proved, and on examination, the prisoner stated that he had the property in his possession, but denied that he had stolen it. The two sitting aldermen (the mayor dissenting) held this *prima facie* sufficient, and that the prisoner should be put to account for the possession. The mayor told the jury that in his opinion, the whole case resting in the prisoner's confession, that must be taken together, and did not make out a case. Verdict not guilty. *People v. Weeks*, N. Y. Gen. Sess., Oct. term, 1818, Jud. Repos'y. 138.

If a prisoner charged with murder, say in his confession, which is read in evidence against him, that he was present at the murder, but took no part in the commission of it, this is evidence for him as well as against him; but the judge will not direct an acquittal, as the jury may believe one part of the confession and disbelieve another. However, if it is meant to be charged that the prisoner did more than is stated in the confession, there ought to be some evidence to show that. *Rex v. Clewes*, 4 Car. & Payne, 221.

On the trial of a larceny of a ram, proved to have been stolen and traced to the prisoner's house, the carcass being found concealed in his bed, where he was himself; it came out also, in the evidence for the prosecution, that he there said his brother had bought the carcass. Parke, J. told the jury they were not bound to take the exculpatory part of the confession as true merely because it was given in evidence; but should say looking at the whole case, whether they thought the prisoner's statement consistent with the other evidence. *Rex v. Steptoe*, 4 Carr. & Payne, 397.

Also, a confession to be given in evidence, must not have [\*126] been \*upon any examination upon oath: if upon taking the examination of a prisoner before a magistrate, the prisoner be examined upon oath, his examination cannot afterwards be read against him at the trial.(a)[1] But where a prisoner was thus sworn by mistake, it being supposed that he was a witness, and, upon the mistake being discovered, the magistrate ordered the deposition to be destroyed, cautioned the party, and then took his examination: Garrow, B., held this latter examination to be receivable in evidence.(b) Where a statement made by a prisoner upon oath, at a time when he was not under any suspicion, was tendered in evidence, Vaughan, B., held it to be admissible.(c) But in another case, upon a trial for administering poison, where it appeared that the prisoner and several other persons were examined upon oath before a magistrate upon the subject, no specific charge being at that time made against any person, but in the result the prisoner was committed for the offence: Gurney, B., refused to receive in evidence what the prisoner stated upon that occasion; the above case of *R. v. Tubby*, was cited, and he admitted he was disposed to agree with that decision, and mentioned a case of *R. v. Walker*, for forgery of a will, tried at the Old Bailey, where the prisoner's affidavit in the Ecclesiastical Court, was read in evidence against him; but he distinguished *R. v. Tubby*, from the present case, the examination in this case

(a) 2 Hawk. c. 46, s. 37; and see *R. Sandys et al.* Car. & M. 345.

(b) *R. v. Webb*, 4 Car. & P. 564.

(c) *R. v. Tubby*, 5 Car. & P. 530.

How far a declaration made by a prisoner shall be received in his own favor, on the ground that the prosecution have used it against him, may be gathered from the following cases, in connection with which see *Tipton v. The State*, *supra*. On trial of an indictment for child-murder, the prosecution proved by some witnesses that the prisoner confessed she cut the child's throat, and others said she declared it was still-born. Her counsel insisted on an acquittal being directed, and cited a case before Garrow, B. in which, on trial for larceny, in addition to the prisoner's possession of the goods stolen, his statement before the magistrate was put in, that he had bought the goods; upon which an acquittal was directed. *Bosanquet*, Serjt. said he should hold the same thing in such a case. If a prosecutor uses the prisoner's declarations he must take the whole together; and if there be no other evidence incompatible with it, the declaration so adduced must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so; and then the statement of the prisoner, and the whole of the other evidence, must be left to the jury, precisely as in any other case where one part of the evidence is contradictory to another. And he took that course with this case. *Rez v. Jones*, 2 Carr. & Payne, 629. A case precisely like the one decided by Garrow, B. came before Parke, J. The prisoner was proved to have possessed and sold the article stolen shortly after the felony committed; and the prosecutor proved his examination, wherein he said the article had been honestly bought and paid for. Parke, J. said the declaration thus became evidence for the prisoner; but he put it to the jury whether they would believe it; and they found him guilty. *Rez v. Higgins*, 3 Carr. & Payne, 603.

[1] 2 N. Y. Rev. St. 708, sec. 14.

being taken at the time the prisoner was committed.(a) Another distinction, perhaps, might with propriety be taken, namely, between a case where the oath is merely voluntary, as the affidavit in Walker's case above mentioned, and where the party is in strictness bound upon his oath to speak the whole truth, as in an examination before a magistrate, or the like.[2]

(b) *Without inducement.*

If any inducement, by promise of favor or by threat, be held out to the prisoner,—as by telling him that he had better tell all he knew,(b) or that he had better tell where he had got the property,(c) “I will forgive you if you tell the truth,”(d) “you had better split, and not suffer for all of them,”(e) “it is of no use for you to deny it, for there are the man and the boy who will swear they saw you do it,”(g) “it would have been better if you had told at first,”(h) “that unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle,”(i)—or the like: any confession the prisoner may have been \*thereby [\*127] induced to make, cannot be given in evidence against him.(k) And where a female servant was indicted for attempting to set fire to

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| (a) <i>R. v. Lewis</i> , 6 Car. & P. 161.            | (e) <i>R. v. Thomas</i> , 6 Car. & P. 353.            |
| (b) <i>R. v. Kingston</i> , 4 Car. & P. 387, and see | (g) <i>R. v. Mills</i> , 6 Car. & P. 146.             |
| <i>R. v. Garner</i> , 18 Law J. 1 m., 2 Car. & K.    | (h) <i>R. v. Walkley &amp; Clifford</i> , 6 Car. & P. |
| 920.   | 175.  |
| (c) <i>R. v. Dunn</i> , 4 Car. & P. 543.             | (i) <i>R. v. Parratt</i> , 4 Car. & P. 570.           |
| (d) <i>R. v. Hewett</i> , Car. & M. 534.             | (k) 2 Hawk. c. 46, s. 36.                             |

[2] With respect to the examination of the prisoner himself, it has been observed that the statutes of Philip and Mary were the first warrant given for the examination of a felony by the English law. 4 Bla. Com. 596; Bac. Abr. Evidence, L. Kel. 19; 2 Leach, 558. For, at common law, the maxim, *nemo tenebatur prodere se ipsum*, prevailed in its full strictness, and the guilt of an offender was not to be wrung out of himself, but rather to be discovered by other means and other men; and though the statutes just noticed authorize an examination, they are not compulsory on the prisoner to accuse himself. Dick. J. Examination, III. At common law, his voluntary confession was always available in evidence against him, (Bac. Ab. Evidence, L.; 1 Leach, 559;) and this, even in the case of treason, if made before a magistrate or person having competent authority to take it, and proved by two witnesses. Fost. 240, 244; 4 Bla. Com. 357. But there is no mode of extorting such confession or other statement from the prisoner. And, indeed, the examination has been considered rather as a privilege in favor of the party accused, afforded by law for the benefit of an innocent man, who perhaps may, on examination, clear himself from suspicion, and then he will immediately regain his freedom than as any additional peril; and it is said, that in case of felony, the justice of peace is bound to take his examination. Fortes. 142. If the magistrate examine the prisoner rather as a witness than a charged offender, the evidence given by him, although no threat or inducement was held out to him, cannot be read against him. Holt. C. N. P. 597. If the examination, previous to committal, purports to have been taken on oath, evidence upon the trial of the prisoner for felony, is not admissible to show that in fact the examination was not on oath. 1 Stark. 242.

her master's house, and it appeared that the bed furniture and bedding of two rooms had been set on fire, and that a silver spoon and a few other things had afterwards been found in the sucker of the pump; and the master stated at the trial, that he said to the prisoner that if she did not tell the truth about the things that were found in the pump, (but saying nothing about the fire,) he would send for the constable: Coltman, J., refused to hear what the prisoner said in answer.(a) So, a reward offered by government for the the discovery of the persons who committed a murder, with a promise of pardon to any but the person who struck the blow,—if it can be proved that it came to the knowledge of the prisoner before he made any statement, will prevent that statement from afterwards being given in evidence against him.(b)

But nothing short of a threat, or of a promise of favor with respect to the offence charged against the prisoner, will have this effect. Where a prisoner, on being charged with robbing her mistress, voluntarily, said "I shall confess, for I think it will be best for me," to which her mistress said "I do not know that," but neither sanctioned her hope or checked it: it was holden that a confession made by the prisoner after that, was admissible in evidence.(c) Where a magistrate, before taking a prisoner's statement, said to him "be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial," it was holden that a statement made by the prisoner after that, was admissible in evidence against him.(d) Where a confession was obtained from a boy of fourteen years of age, by questions put to him by the constable who apprehended him, and at a time when the boy had not had food for nearly a day, a majority of the judges held that the confession was receivable in evidence.(e) So, where a confession was obtained by means of questions from the magistrate, it was holden that it might be read in evidence against the prisoner at his trial;(g) yet such a mode of obtaining a confession is not very commendable, and ought to be avoided. Where a man, committed for murder, was visited by the chaplain of the jail, who, in a long and very earnest discourse with him upon the necessity of repentance, and of confessing his sins, wrought so much upon the man's mind, that in a subsequent interview with the jailer, the prisoner said that he would tell him all about it; the jailer told him not to say anything which he wished the magistrates not to know, as it would be his duty immediately to tell them of it; the prisoner said that he wished [\*128] \*it, and then gave the details of the murder: the judges were unanimously of opinion, that this confession was receivable in

(a) *R. v. Hearn*, Car. & M. 109.

(b) See *R. v. Boswell et al.*, Car. & M. 584.

See *R. v. Dingley et al.*, *infra*.

(c) *R. v. Warren*, 12 Shaw's J. P. 571.

(d) *R. v. Holmes*, 1 Car. & K. 248.

(e) *R. v. Thornton*, Ry. & M. 27.

(g) *R. v. Ellis*, Ry. & M. N. P. C. 432.

evidence.(a) So, where a man, committed with others for murder, told the chaplain of the prison that he wished to see a magistrate, and asked if any proclamation had been made, and any offer of pardon; and the chaplain answered that there had, but the prisoner must understand that he could not hold out to him any inducement to make any statement, as it must be his own free and voluntary act; and when the prisoner afterwards saw a magistrate, he told him that no inducement had been holden out to him to confess anything, but that what he was about to say was his own free and voluntary act, and he then made a statement: it was holden by Pollock, C. B., that this was receivable in evidence against the party, upon his subsequent trial with the others for the murder.(b) So, where a boy of ten years of age, after being enjoined by a clergyman to "speak the truth in the face of God," made a disclosure of his guilt to a policeman, it was holden to be admissible in evidence against him upon his trial.(c) Where a constable told a prisoner "if you will tell where the property is, you shall see your wife," Patteson J., held that this was not such an inducement as to exclude evidence of what the prisoner said.(d) So, a statement made by a person as a witness before a committee of the house of commons, and under compulsory process, was received in evidence by Abbot, C. J., upon an indictment afterwards preferred against the witness for perjury.(e) So, where a prisoner in jail, on a charge of felony, asked the turnkey of the jail to put a letter in the post for him, directed to his father, and the turnkey, instead of putting it into the post, sent it to the prosecutor: Garrow, B., held that the letter was admissible in evidence against the prisoner, notwithstanding the manner in which it had been obtained.(g)[1]

(a) *R. v. Gilham*, Ry. & M. 186.

(d) *R. v. Lloyd*, 6 Car. & P. 393.

(b) *R. v. Dingley et al.*, 1 Car. & K. 637.

(e) *R. v. Mercer*, 2 Stark. 366.

(c) *R. v. Risborough*, 11 Shaw's J. P. 280.

(g) *R. v. Derrington*, 2 Car. & P. 418.

[1] The captain of a vessel said to one of his sailors, suspected of having stolen a watch, "That unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle; you are a damned villain, and the gallows is painted in your face;" on which the sailor confessed. Held not admissible against him. *Rex v. Parrott*, 4 Carr. & Payne, 570. So, where a man said to an accused boy, if you will confess, you will probably get clear. *State v. Guild*, 5 Halst. 163, 167-8. So, where, in the presence of the prosecutor, one stranger told the prisoner if he would confess, being in custody, his confession could not be used against him; and another stranger told him, that being young, if he would confess, it would be more to his credit. *State v. Roberts*, 1 Dev. 259. So, where the surgeon said to a girl, who was charged with administering poison with intent to murder, "You are under suspicion of this, and you had better tell all you know." *Rex v. Kingston*, 4 Carr. & Payne, 387. So where the prosecutor said to the prisoner, on his apprehension, "he only wanted the money, and if the prisoner gave him that, he might go to the devil;" in consequence of which the prisoner said on delivering part that it "was all he had left;" a majority of the judges held such evidence not receivable. *Rex v. Jones*, C. C. M. & R. 152. S. C. cited, 1 Burn. J. 565. So where on a stolen bank bill being found on the prisoner, the prosecutor observed, "Unless you give a more satisfactory

But where a threat or promise is thus used, it must appear to have been used by some person concerned in apprehending, examining, or

account, you shall be taken before a magistrate;" and the prisoner then confessed having stolen the bill; the court were of opinion that this amounted to a threat to prosecute; and therefore the confession was inadmissible. They said he understood that his confession would save him from being taken before a magistrate. *Rex v. Thompson*, 1 Leach, 291. While the prisoner was in custody on a charge of burglary, he said to the officer having him in charge, "If you will give me a glass of gin, I will tell you all about it." The officer gave him two glasses of gin, and he made a confession of his guilt. But this was held inadmissible. Nor would the court allow a subsequent confession before the magistrate to be read, the manner of the first confession not appearing to him, and he, of course, having taken no pains to remove its influence. *Rex v. Sexton*, Cor. Best, J. Chetw. Supp. to Burn. J. 103, 6 Peterad. 83, S. C.

But mere advice to tell the truth, after a promise so to do, will not exclude the confession. Thus, where, after the prisoner had offered to confess and tell the truth of a murder, the witness advised her so to do; and then going out of the house to confess to the witness, a rude voice followed, (in what terms, the case does not state.) The confession was held admissible. But the court said "the evidence of such confessions is liable to a thousand abuses. They are made by persons generally under arrest, in great agitation and distress, when each ray of hope is eagerly caught at, and frequently under the delusion, though not expressed, that the merit of a disclosure will be productive of personal safety. To disclose the confession is odious as a breach of confidence, which it is at all times. The confession is made in want of advisers, under circumstances of desertion by the world, in chains and degradation, with spirits sunk, fear predominant, hope fluttering around, purpose and views momentarily changing, a thousand plans alternating, a soul tortured with anguish, and difficulties gathering into a multitude. How easy is it for the hearer to take one word for another, or to take a word in a sense not intended by the speaker. And for want of an exact representation of the tone of voice, emphasis, countenance, eye, manner and action of the one who made the confession, how almost impossible is it to make third persons understand the exact state of his mind and meaning. For these reasons such evidence is received with great distrust, and under apprehensions for the wrong it may do. Its admissibility is made to depend on its being free of the suspicion that it was obtained by any threats of severity, or promises of favor, and of every influence even the minutest." *State v. Fields & Webber*, Peck's Rep. 140.

Nor will the confession which follows be excluded even where undue influence is exerted, if it be left in doubt whether it had no kind of effect on the mind of the prisoner. Francis Knapp having been indicted as principal, with Joseph J. Knapp and G. C. as accessories, and being on trial for the murder of J. W., the prisoner's confessions were offered in evidence. The facts upon which their admissibility arose, were stated by the Rev. H. Coleman, thus: "I went to the prisoners' cell with his brother, N. P. Knapp. N. P. said, 'well Frank, Joseph has determined to make a confession, and we want your consent.' The prisoner said, in effect, he thought it hard, or not fair that Joseph should have the advantage of making the confession, since the thing was done for his benefit; 'I told Joseph, when he proposed it, that it was a silly business, and would only get us into difficulty.' N. P., as I supposed to reconcile Frank to Joseph's confessing, told him that if Joseph was convicted, there would be no chance for him; but if he (Frank) was convicted, he might have some chance for procuring a pardon. N. P. then appealed to me, and asked me if I did not think so. I told him I did not know. I was unwilling to hold out any improper encouragement." It was now objected that any further confessions would be inadmissible, on the ground that a hope of pardon was held out; and Wilde and Morton, Js., (*dissentiente*, Putnam, J.,) were at first of this opinion; but all the judges at this stage supposed that the counsel for the prosecution intended to prove the prisoner's assent. The counsel then disavowed any such object, and stated that the ulterior testimony would be, that he refused his assent to Joseph's confessing. The court then said, that such being the case, it was obvious that the suggestions made, had

prosecuting the prisoner, or by the person to whom the confession is made, to have the effect of preventing such confession from being given

in fact exerted no influence over the prisoner's mind; and being free from influence, his confessions were, of course, equally admissible as if the attempt had never been made. The witness, Mr. Coleman, then answered that no assent was given or refused, which the court said, left the matter in doubt whether the subsequent confessions were caused by the inducement held out. That it lay with the prisoner to bring his confession within the exception. *Commonwealth v. Knapp*, 9 Pick. 496, 500 to 510.

A confession obtained by a promise from one concerned in the prosecution, that the prisoner shall be a state's evidence, is inadmissible. *Thorn's case*, 4 C. II. Rec. 81, 85, 6. So a confession made under a notion derived from a magistrate of being admitted a witness for the crown. Per Lord Mansfield in *Rex v. Rudd*, 1 Leach, 115. So of any disclosures made to the authority examining, or to the state's attorney, under such circumstances that the prisoner considered himself a witness, (*The State v. Thompson*, Kirby, 345,) or when he applied to the state's attorney to be admitted as a witness; and this on the ground of policy. *The State v. Phelps*, id. 282. So semb. of the testimony given by an accomplice received to testify on motion; on account of the implied promise of pardon. Per Duer, Circ. Judge, *People v. Whipple*, 9 Cowen's Rep. 707. But in *Commonwealth v. Knapp*, (10 Pick. 477, 489 to 495,) where an accomplice was promised by the attorney general, that if he would testify, he should not be prosecuted, and he promised to testify and made a full disclosure, but afterwards refused to testify, his confession was received as evidence against him. So would be the confessions of a prisoner, while he is persuading any one to use their influence to have him examined against his associates. *The State v. Thompson*, Kirby, 345.

To work an exclusion, the influence must have arisen from the assurance of some temporal advantage. Urging and obtaining confessions upon religious considerations will not have that effect. That question was mooted in the following case. The prisoner was suspected of setting fire to an out house. Her mistress pressed her to confess, and told her, among other things, if she would repent and acknowledge her guilt, God would pardon her; but she concealed from her that she would not forgive her herself. She confessed. The next day another person, in her mistress' sight, though out of her hearing, told her her mistress said she had confessed, and drew from her a second acknowledgment. Lord Eldon, C. J. (O. P.) allowed the confession in evidence, and the prisoner was convicted. The jury on having the confessions offered to them, said they thought the first had been made under a hope of favor here, and the second under the influence of having made the first. On a case reserved the judges held these points were not for the jury; but if Lord Eldon agreed with the jury, which he did, the confessions were not receivable. But many of them thought the expressions not calculated to raise a hope of favor here; and if not, the confessions were evidence. *Rex v. Nate*, cited Chetw. Supp. to Burn. J. 101, 6 Petersd. 82.

This question of religious influence was afterwards directly decided. The prisoner being in custody on a charge of murder, requested the attendance of a chaplain, who had several interviews with him; and repeatedly urged the importance of his confessing himself to God; but he was not sure but that he might, at some times have spoken of confession generally, without saying to God. He also urged on the prisoner the importance of making temporal reparation for the injuries he had committed, and satisfying the violated laws of the country. These things were all urged upon religious considerations, and on assurances that such confessions, &c. would be of religious benefit, and tend to the prisoner's acceptance with God. The prisoner appeared to be strongly impressed. And he sent for the jailer, and after being admonished by him, that what he said would be used as evidence against him, he confessed the murder. He also confessed to the mayor, after the same admonition from him; and being warned to say nothing but what was right. Held, by the 12 judges, except Hullock, B. absent, that the confession was admissible. They assigned no reasons, but the ground evidently was as stated in the marginal note, that "a confession made in consequence of persuasion by a clergyman, not with any view of temporal benefit, is admissible." The counsel for the Crown insisted that if the persuasion would render the confession inadmissible,



in evidence. Thus, where upon a man being apprehended for larceny, several of his neighbors admonished him to tell the truth and consider his family, and he therefore made a confession to the constable: the judges held this confession to be receivable in evidence, because the inducement to confess was not holden out or sanctioned by any person who had any concern in the business.(a) Upon the trial of a girl for the murder of a bastard child, it appeared that a woman who was present when the surgeon was attending her, mentioned that \*she had advised her to confess, and the girl then made a confession to the surgeon; Parke, J. and Hullock, B., held that the confession was receivable in evidence, because the inducement to confess was holden out by a person who had no authority whatever to do so; if it had been by the constable, prosecutor or the like, it would have been otherwise.(b)

But where a married woman was apprehended for felony, and her husband being present told her that if she knew anything about it, to tell the truth: this was holden not to be receivable in evidence, as the inducement, being holden out in the presence of the constable, was the same as if it had been holden out by him.(c) So, where a girl, being apprehended for the murder of her child, was left by the constable in the custody of a woman, who told her she had better tell the truth, otherwise it would lie upon her, and the man would go free; upon which she made a confession to the woman: Parke and Taunton, J. J., held this confession not receivable, as it was made in consequence of an inducement held out to the prisoner by a person who had her in custody.(d) And where the committing magistrate told the prisoner, that if he would make a disclosure, he would do all he could for him, and the prisoner afterwards made a disclosure to the turnkey of the jail: Parke, J., held that it was not receivable in evidence after the promise holden out by the magistrate, more especially as the turnkey had not given any previous caution to the prisoner.(e)[1]

(a) *R. v. Row*, R. & Ry. 153.

(c) *R. v. Laugher*, 2 Car. & K. 225.

(b) *R. v. Gibbons*, 1 Car. & P. 97. And see  
*R. v. Tyler*, Id. 129.

(d) *R. v. Enoch*, 4 Car. & P. 539.

(e) *R. v. Cooper*, 5 Car. & P. 535.

yet the impression was countervailed by the warning from the mayor. The same thing was contended for at the trial, where Littledale, J. presided; and he refused to put it on that ground, saying any thing the mayor said could not do away the effect which the chaplain had produced on the mind of the prisoner. *Reg. v. Gilham*, Ry. & Mood. Cr. Cas. 186 to 205.

By undue means of obtaining a confession, the law generally alludes to illegal influence. The abstract objection that the confession was made while the prisoner was in jail, or otherwise, confined in a legal way, though for the very crime confessed, has never been recognized as an objection, but expressly denied. *Reg. v. Derrington*, 2 Carr. & Payne, 418. *People v. M'Collister*, before Riker, recorder, 1 Wheel. Cr. Cas. 392. And it was denied, though the prisoner was a boy only 14 years of age, who had been confined without food nearly a whole day. *Reg. v. Thornton*, Ry. & Mood. Cr. Cas. 27.

[1] The distinction whether the person who seeks to influence the confession held any autho-

If, however, after an inducement by threat or promise has been holden out to a prisoner to confess, and, before any confession actually made, the prisoner be undeceived as to the promise or threat, and assured that he has nothing to hope from the one or fear from the other, any confession he makes afterwards will be receivable in evidence. Where a man, committed for murder, was told by a magistrate, that, provided he was not the person who struck the fatal blow, he would use all his endeavors and influence to prevent any ill consequences to him, if he would disclose all he knew of the murder; and the magis-

trity, or connection with the prosecution, has not always been strictly attended to. It has been recently noticed with more particularity than usual in England, and the following cases give the result. The confession of a prisoner to one person is evidence, though induced by another, if that other had no authority. Thus, where a prisoner had made certain confessions to her attending surgeon; some time after, a woman present said to her she had better tell all; on objection, Park, J. and Hullock, B., said that as the surgeon held out inducement, and the woman had no sort of authority, holding no office of constable or any other, nor being prosecutrix, it must be presumed the confession was free and voluntary. The case would be different, if the inducement had come from any one holding any office or authority. No confession followed the advice of the woman immediately; but some time after, to another person, the prisoner, without any inducement held out, confesses. The two judges had not the least doubt that the confession was admissible. *Rex v. Gibbons*, 1 Carr. & Payne, 97. To this case the learned reporter adds, in a note, *Rex v. Hardwick*, before Wood, B., at Nottingham, 1811, cited also in the text, where the prisoner's confession before a magistrate, made after the constable's wife had told him he had better confess, was held admissible; which, he adds, could only have been on the ground that the constable's wife was a person having no authority or influence. "I believe," he adds, "no case has decided that a confession to a person in no authority, after threat or promise by that person, is admissible in evidence. *Rex v. Dunn*, *infra*, *acc.* And in the subsequent case of *Rex v. Tyler & Finch*, (1 Carr. & Payne, 129,) the prisoner Finch being looked up alone in a room, was told by a man that the other prisoner had told all, and he had better do the same to save his neck; and on this, Finch confessed to the constable. On objection, Hullock B. held, that as the promise (if any) was by a person wholly without authority, the subsequent confession to the constable, who had held out no inducement, must be considered as voluntary, and was therefore evidence. See *Milligan and Welchman's case*, stated post, wherein it was held that a confession to a third person, made after the person who arrested the prisoner had obtained a confession by undue influence, might be received, if the person who arrested was absent. *Quere.* On trial for stealing a hymn book, one Fieldhouse testified that on the prisoner's offering to sell the book to him, he told the prisoner he had better tell where he got it. Bosanquet, J. stopped the witness, and said, "You must not tell what he said." Scott, for the prosecution, said the witness was not a person in any authority. Bosanquet, J. said any person offering an inducement would exclude a confession to that person. If made to another, it often became a nice question. *Rex v. Dunn*, 4 Carr. & Payne, 543.

The prisoner being in custody of constable A., constable B. came in, and A. left, when the prisoner immediately confessed to B. Held that to prevent collusion between constables in such a case, A. should be called to negative all inducements before the confession should be received, as B. did not caution the prisoner not to confess. But it appearing, on further examination, that the prisoner was not then detained as an accused party, but merely as an unwilling witness, the testimony was received without putting the prosecution to call the other constable. *Rex v. Swatkins*, 4 Carr. & Payne, 548.

Whether one or more of the jury of inquest before the coroner, taking the accused boy aside and telling him he had better confess the whole truth, shall he considered undue influence? *Quere.* *State v. Aaron*, 1 South. 231, 240.

trate wrote upon the subject to the secretary of state; but upon learning from him that mercy could not be extended to the prisoner, he informed the prisoner of it; afterwards the prisoner made a confession before the coroner, but he was previously told by him that any confession or admission he should make would be given in evidence against him at the trial, and that no hope or promise of pardon could be held out to him: Littledale, J., held clearly, that this confession was receivable in evidence.<sup>(a)</sup> So, upon the trial of a girl for administering poison, it appeared that she was threatened by her mistress, that, if she did not tell all about it that night, a constable should be sent for [\*130] the \*next morning, to take her before the magistrates; and she made a statement accordingly, which the judge refused to receive in evidence; but it appeared, also, that the constable was actually sent for the next morning, and took her into custody, and that whilst on the way to the magistrates, in his custody, she made another confession to him: Bosanquet, J., held this latter confession to be admissible in evidence, for, at the time the prisoner made it, the inducement was at an end.<sup>(b)</sup> So, where the constables had induced a prisoner to confess, by telling him that his companions had "split," and he might as well do so; but afterwards, upon this appearing before the magistrate who took the examination, he informed the prisoner that his confessing would do him no good, but that he would be committed to prison to take his trial: Denman, C. J., held, that a confession by the prisoner to the magistrate, after this caution, was receivable in evidence.<sup>(c)</sup>[1]

(a) *R. v. Clieves*, 4 Car. & P. 221.

(b) *R. v. Richards*, 5 Car. & P. 318.

(c) *R. v. Howes*, 6 Car. & P. 404. See Stat.

11 & 12 Vict. c. 42, s. 18; *post*, pp. 132, 133.

[1] It is said by Mr. Justice Buller, that there must be very strong evidence of an explicit warning by a magistrate not to rely on any expected favor, and that it ought most clearly to appear, that the prisoner thoroughly understood such warning, before his subsequent confession can be given in evidence. 2 East, P. C. 658. In the following case the warning was not considered sufficient. A confession having been improperly obtained, by giving the prisoner two glasses of gin, the officer to whom it had been made, read it over to the prisoner before a magistrate, who told the prisoner that the offence imputed to him affected his life, and that a confession might do him harm. The prisoner said, that what had been read to him was the truth, and signed the papers. Best, J., considered the second confession, as well as the first, inadmissible; and said, that had the magistrate known that the officer had given the prisoner gin, he would, no doubt, have told the prisoner, that what he had already said could not be given in evidence against him; and that it was for him to consider whether he would make a second confession. If the prisoner had been told this, what he afterwards said would have been evidence against him; but for want of this information he might think that he could not make his case worse than he had already made it, and under this impression might sign the confession before the magistrate. *Sexton's case*, Burn. tit. Confessions. So where the committing magistrate told the prisoner, that if he would make a confession, he would do all he could for him, and no confession was then made, but after his committal, the prisoner made a statement to the turnkey, who held out no inducement, and gave no caution; Parke J., said he thought the evidence ought not to be received after what the committing

But even in cases where the confession of a prisoner is not receivable in evidence, on account of it having been obtained by means of

magistrate had said to the prisoner, more especially as the turnkey had not given any caution. *Cooper's case*, 5 C. & P. 525.

A constable having a search warrant found in the prisoner's house the two hams charged in the indictment, and thereupon, in the presence of one of the prosecutors, said to the prisoner, "You had better tell all about it." The prisoner then made a confession, which, it was admitted, could not be given in evidence. In the afternoon of the same day another of the prosecutors went to the prisoner's house and entered into conversation with her about the hams, when she repeated the confession she had made to the constable in the morning, but no promise or menace was on this occasion held out to her. Taunton J., said that the second confession was not receivable, it being impossible to say, that it was not induced by the promise which the constable made to the prisoner in the morning. *Meynell's case*, 2 Lewin, C. C. 122.

The prisoner, who was indicted for murder, worked in a colliery, and some suspicion having fallen upon him, the overlooker charged him with the murder. The prisoner denied having been near the place. Presently, the overlooker called his attention to certain statements made by his wife and sister, which were inconsistent with his own, and added, that there was no doubt he would be found guilty; it would be better for him if he would confess. A constable then came in, and said to the overlooker in a tone loud enough for the prisoner to hear, "Robert, do not make him any promises." The prisoner then made a confession. Patteson, J., "That will not do. The constable ought to have done something to remove the impression from the prisoner's mind." The overlooker, in about ten minutes after the above confession, delivered the prisoner to another constable, who stated that when he received the prisoner the overlooker told him (but not in the prisoner's hearing) that the prisoner had confessed. That he took the prisoner to his house and there said, "I believe Sherington has murdered a man in a brutal manner." That the wife and brother of the prisoner were there, and they said to the prisoner, "What made thee go near the cabin?" That the prisoner in answer made a statement similar in effect to the one he had made before. That he used neither promise nor threat to induce the prisoner to say anything, but did not caution him. That it was not more than five minutes after he received the prisoner into his charge that the prisoner made the statement. That he was not aware that the overlooker had held out any inducement, and that the overlooker was not present when the statement was made. Patteson, J., rejected the second confession, saying, "There ought to be strong evidence to show that the impression, under which the confession was made, was afterwards removed, before the second confession can be received. I am of opinion in this case, that the prisoner must be considered to have made the second confession under the same influence as he made the first; the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination." *Sherington's case*, 2 Lewin, C. C. 123. A female servant being suspected of stealing money, her mistress on a Monday, told her that she would forgive her if she told the truth. On the Tuesday she was taken before a magistrate, and no one appearing against her, was discharged. On the Wednesday, the superintendent of police went with her mistress to the bridewell and told her, in the presence of her mistress, that she "was not bound to say anything unless she liked; and that if she had anything to say her mistress would hear her," but (not knowing that her mistress had promised to forgive her) he did not tell her, that if she made a statement, it might be given in evidence against her. The prisoner then made a statement. Patteson, J., held, that this statement was not receivable in evidence, as the promise of the mistress must be considered as still operating on the prisoner's mind at the time of the statement, but that if the mistress had not been then present, it might have been otherwise. *Hevet's case*, 1 Carr. & M. 534.

"As the human mind under the pressure of calamity is easily seduced, and liable in the alarm of danger to acknowledge indiscriminately a falsehood or a truth, as different agitations

some threat or promise, any discovery made in consequence of it may be proved;(a) and in such a case, the counsel for the prosecution is

(a) 2 Hawk. c. 46, s. 38.

may prevail, a confession whether made upon an official examination or in discourse with private persons, which is obtained from the defendant either by the flattery of hope or by the impressions of fear, however slightly these motions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction." 2 Curw. Hawk. 595, cited from Leach's Hawk. and approved in *State v. Aaron*, 1 South. 239. And see *State v. Fields*, stated *ante*, p. 128—1.

The prisoner was threatened by the prosecutor, that unless he confessed the larceny charged on him, he would be sent to the state prison; whereupon he confessed, and repeated the same confession the next day in the police office, in the prosecutor's presence, when the magistrate wrote it down. The case went to the jury without objection; but Radcliff, mayor, charged, that although *prima facie* a confession made in the police should be presumed to have been taken freely and voluntarily, yet should the jury believe from the circumstances, that at the time the confession was reduced to writing the mind of the prisoner was under the influence of fear previously excited, it would be their duty to reject such written confession equally with the other. Verdict not guilty. *William's case*, 1 C. H. Record. 149. A boy, 12 years and 5 months old, accused of murder, was encouraged to confess by a promise of impunity, "if you will confess, you will probably get clear," by one among several who were interrogating him. His examination was taken the next day before the magistrate, who cautioned him solemnly and repeatedly to tell nothing but the truth, but knew nothing of the previous practices with the boy. He confessed; but the examination was rejected, on the presumption that the boy's mind was not clear of the previous influence. *State v. Guild*, 5 Halst. 163, 167, 8, 178, 9. The justice, after the high constable had arrested the prisoner, told his wife in his presence in the afternoon, that if what she had told him was true, it would be better for the prisoner to confess; and the next morning, before the committing magistrate, he did confess, though then cautioned by him not to expect any favor; but the court refused to receive the confession against the prisoner. They said they would presume the influence lasted till the examination. *People v. Robertson*, before Riker, recorder, N. Y. Gen. Sess. Nov. Term. 1822; 1 Wheel. Cr. Cas. 66. A confession made before the police clerk, after a threat to the prisoner by one of the marshals while bringing her to the office, that if she did not tell all she knew, she would be put into the dark room and hanged, was rejected. *People v. Rankin*, New York O. and T. before Van Ness, J. 2 Wheel. Cr. Cas. 468, 9.

With respect to a police confession, made after a promise by the prosecutix to the prisoner, and before the prisoner's apprehension, the effect of which did not appear to have been counteracted, the N. Y. general sessions say, "the confession before the police officers, we have ever received as good evidence; although before the prisoner was apprehended, a promise of favor may have been made by persons not attached to that department." Per Curiam, including Radcliff, mayor, in *Charity Jackson's case*, 1 O. H. Rec. 28.

The prisoner was committed for arson, and was visited in the jail by various persons, among whom were the inspectors of the prison; and various means were used to persuade and terrify him into a confession. A short time after his commitment he made a full and apparently voluntary confession to the mayor; nothing, however, having been done to remove the influence of previous promises or threats. His confessions were received; but the jury acquitted him. They were told that they might decide on the credit to be given to the confessions; and that merely cherishing the hope of mercy would not, though the confessions were made under such influence, render them inadmissible. Though the prisoner, in this case was acquitted of the arson, he was afterwards indicted, and convicted on the same facts of a misdemeanor. *The Commonwealth v. Dillon*, 4 Dall. 116.

The prisoner, charged with conspiring to obtain money from a bank, was arrested on civil

merely allowed to ask the witness, whether, in consequence of something he heard from the prisoner, he found anything, and where, &c., and the witness in answer can only give evidence of the fact of the discovery. In one case, indeed, the judges are reported to have gone further. The case was thus: the prisoner was indicted for stealing a guinea and two bank notes for 5*l.* each; the prosecutor in his evidence was about to state a confession of the prisoner, but admitting that he had previously told the prisoner that it would be better for him to confess, *Chambre, J.*, who tried the case, would not allow the confession to be given in evidence; but he allowed the prosecutor to prove "that the prisoner brought him a guinea and a 5*l.* bank note, which he gave up to the prosecutor as the guinea and one of the notes had been stolen from him:" and a majority of the judges (*Lord Ellenborough, Mansfield, Macdonald, Heath, Grose, Chambre, and Wood,*) held that the

process at the suit of the bank, and remained with the arresting officer several days, at the house of the president of the bank, who promised him favors if he would confess. He did so after a considerable lapse of time from the promise made, and immediately afterwards said the confession was free and voluntary; yet the court presumed the confession, and every thing which followed, were influenced by the promise; and said it made no difference whether the confession was made to one having a concern in the administration of justice or not. *Thorn's case*, before *Colden*, mayor, 4 C. H. Rec. 81.

The prisoner being arrested for a burglary, was told by a stranger, in presence of the prosecutor, that, being in custody, his confession could not be used as evidence against him; and another stranger told him that being young, if he would confess, it would be more to his credit. He accordingly confessed; and two or three days after, there being no immediate influence exercised, he made a fuller confession. Both held inadmissible, though corroborated by circumstances; as the latter might have been made under the first influence. This shall be presumed to continue till palpably done away. *State v. Roberts*, 1 Dev. 259.

But, as intimated by the last case, the presumption of a continuing influence may be repelled; and then a subsequent confession becomes admissible. (*Rex v. Sexton*, 6 Peters. 83.) Thus where the prisoner, being arrested by D., was induced to confess by a promise from D., the court would not receive a subsequent confession made to D., or any one in D.'s presence; but said that a confession to a third person, D. being absent, would be receivable. *Milligan & Welchman's case*, before *Riker*, recorder, N. Y. Gen'l Sessions, 6 C. H. Rec. 69, 77, 8.

Again, an infant under 14 had been wrought upon by assurances of favor; "If you will confess, you will probably get clear," to confess a murder, in consequence of which his then confession and the examination before the magistrate were refused as evidence. But, after lying in jail 5 months, and being told by a stranger, and by a magistrate whom he knew, that he must not expect to escape, but must expect death, he made a full and circumstantial confession, repeating it to various persons. Held admissible in evidence against him. And the court deny what is said in *Stark. Ev. pt. 4*, p. 49: "Where a confession has once been induced by such means, all subsequent admissions of the same or the like facts must be rejected, for they may have resulted from the same influence," to be law. The court adopt this rule: "Although an original confession may have been obtained by improper means, subsequent confessions of the same, or of like facts may be admitted, if the court believe, from the length of time intervening, from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears under the influence of which the original confession was obtained, were entirely dispelled. *State v. Guild*, 5 Halst. 163, 179 to 181.

evidence was properly receivable.(a) On the very same day, the judges appear to have decided another case, which was thus:—the prisoner was indicted for stealing money, to the amount of 1*l.* 8*s.*; when he was apprehended, the prosecutor went to him, and asked him what he had done with his money which he had taken out of his pack, saying at the same time “that he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased; the prisoner therefore took 11*s.* 6 1-2*d.* out of his pocket, and said it was all that was left of it: a majority of the judges (Macdonald, Chambre, [\*131] Lawrence, LeBlanc, \*and Heath,) held, that this was not receivable in evidence; Wood, Grose, and Mansfield were of a different opinion, Lord Ellenborough, *dubitante*.(b) There is also another case upon the same subject, decided at a later period; the former cases were decided in 1809, the following case in 1822: the prisoner was indicted for stealing several gowns and other articles; he was induced, by promises of the prosecutor, to confess his guilt, and after that confession he took the officer to a particular house, as the house where he had disposed of the property, and pointed out the person there to whom he had delivered it; that person denied having received it, and the property was never found: the confession was not admitted in evidence, but the taking of the officer to the house above mentioned was, and the prisoner was convicted; Bayley, J., who tried the prisoner, entertaining a doubt whether the latter evidence was properly receivable, submitted the matter to the judges, who held that it was not, and that the conviction therefore was wrong: that the confession was excluded, because being made under the influence of a promise, it could not be relied on; and the act of the prisoner, under the same influence, not being confirmed by the finding of the property, was open to the same objection; the influence which produced a groundless confession, might also produce a groundless conduct.(c) The above case of *R. v. Jones*, however, shows that the finding of the property makes no difference. There is no doubt that if the goods in *Jenkins’s* case had been found at the house, the officer might prove that he found them there in consequence of something he learned from the prisoner; but whether that would also let in evidence of the prisoner’s act in accompanying the officer to the house, is another question.[1]

(a) *R. v. Griffin*, R. & Ry. 150.

(c) *R. v. Jenkins*, R. & Ry. 492.

(b) *R. v. Jones*, R. & Ry. 151.

[1] Though some have thought otherwise, the latter cases are uniform to the point that a circumstance tending to show guilt may be proved, although it was brought to light by a declaration inadmissible, *per se*, as having been obtained by improper influence. Holt’s N. P. Rep. 498, note. *Charity Jackson’s case*, 1 C. H. Rec. 28; *Tucker’s case*, 5 id. 164; 2 Curw. Hawk. 595, cited and approved in *State v. Aaron*, 1 South. 235. Conceded by Emmet, arg. in *Milligan and Welchman’s case*, 6 C. H. Rec. 69, 78.

(c) *Before a magistrate.*

A confession made by a party charged with felony [or misdemeanor] on his examination before a magistrate, or before a secretary of state upon a charge of treason, has always been allowed to be given in evidence against the defendant upon his trial.<sup>(a)</sup> And by a recent statute,<sup>(b)</sup> we have seen,<sup>(c)</sup> that where a prisoner is brought before a justice of the peace, charged with an indictable offence,—after the examination of the witnesses on the part of the prosecution has been completed, the justice, or one of the justices, by or before whom such examination shall have been so completed, shall read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: “Having heard the

(a) 2 Hawk. c. 46, ss. 31, 32.

(c) *Ante*, p. 42.

(b) 11 & 12 Vict. c. 42, s. 18.

Though, the fact or circumstance discovered in consequence of a disclosure obtained by improper influence, be admissible as an independent fact disconnected with the disclosure, yet there are very respectable authorities which deny that the disclosure itself may be shown in connection with it, or be in any way coupled with it or explained by it. 2 Curw. Hawk. 595, cited and approved in *State v. Aaron*, 1 South. 235; *Charity Jackson's case*, 1 C. H. Rec. 28; *Milligan and Welchman's case*, 6 C. H. Rec. 69, 77, 8, semb; *State v. Roberts*, 1 Dev. 259. Yet there is a strong current of authority running with the text that both the disclosure and the fact or circumstance connected with it, and going to its corroboration, shall also be received in evidence, and they go to the jury with their joint force. This was so held where a boy, being threatened, admitted that he stole the prosecutor's bearskin and concealed it in the oven, where it was found. *Stage's case* 5 C. H. Rec. 177, 8 before Colden, mayor. And similar ground was taken by the same learned judge, charging the jury in *Tucker's case*, 5 id. 164, 166.

On trial for murder, it appeared that two men met the prisoner and he produced some money of the deceased. They then charged him with the crime and beat him because he denied it. They tied him and ordered him to produce the deceased's money. He then led them to a swamp and showed the residue; acknowledged the murder and the manner of it: viz. striking on the left side with a club, as the deceased rode along the road; said he dragged the body out of the road, and left the club lying by it; covered the body with brush where the old road formerly ran, about 10 or 12 yards from the present road. Some time afterwards, about 4 miles distant, he pointed out a log, not far from the road, as containing the deceased's saddle-bags. All these circumstances were proved to be true, and the deceased's clothes were found with the bags. It was objected that the prisoner's confession, being extorted, could not be received; that the circumstances showed his knowledge, but his confession alone showed his commission of the crime. But the court said a confession, though extorted, which relates a number of circumstances (established by other proof) with which the prisoner could not well be acquainted but as a perpetrator of the crime, is admissible, and may go to the jury. *State v. Moore*, 1 Hayw. 482. In *The State v. Jenkins*, 2 Tyl. 377,) it was said a confession is evidence though extorted, but the jury are to determine its weight; and if extorted or obtained by promises, it should be disregarded, unless supported by corroborating facts. Where a fact has been ascertained, e. g. the finding of a weapon, in consequence of a prisoner's confession improperly obtained, as by encouragement to hope for a pardon, yet such fact may be shown; and also that it was ascertained in consequence of such confession, though without such ascertainment, the confession would have been inadmissible. *Commonwealth v. Knapp*, 9 Pick. Rep. 496, 511.



evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, [\*132] but whatever you say will be taken down in \*writing, and may be given in evidence against you on your trial;" and whatever the prisoner shall then say in answer thereto, shall be taken down in writing, and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them to the proper officer of the court where the defendant is to be tried; and afterwards, upon his trial, the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same, did not in fact sign the same.(a) Such is the humane provision of the English law, to prevent a prisoner from committing himself, by any unadvised admission, which otherwise, in his confusion and agitation arising from the proceedings against him, he might make without calculating on its consequence. It is in the true spirit of fairness towards the prisoner, which distinguishes the administration of criminal justice in this country, from its administration in any other country in Europe.[1]

(a) 11 & 12 Vict. c. 42, s. 18.

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[1] The following is the statute of New York on this subject. By pt. 4, ch. 2, tit. 2, § 12, persons arrested under a warrant issued for any offence, are to be brought before a magistrate; a proper return on the warrant is to be endorsed and signed, and the warrant delivered to the magistrate. By § 13, the magistrate is then to examine the complainant and witnesses on oath in the prisoner's presence.

By § 14. "The magistrate shall then proceed to examine the prisoner in relation to the offence charged. Such examination shall not be on oath; and before it is commenced, the prisoner shall be informed of the charge made against him and shall be allowed a reasonable time to send for and advise with counsel. If desired by the person arrested, his counsel may be present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner."

By § 15, "At the commencement of the examination, the prisoner shall be informed by the magistrate that he is at liberty to refuse to answer any question that may be put to him."

§ 16 "The answer of the prisoner to the several interrogatories shall be reduced to writing by the magistrate, or under his direction. They shall be read to the prisoner, who may correct or add to them; and when made conformable to what he declares is the truth, shall be certified and signed by the magistrate."

Under the Stat. of Phil. and Mary, it does not appear to be necessary that the magistrate caution the prisoner or warn him of the effects of his examination as evidence, (Macnally, 38,) or that he is not bound to confess, or that his confession should be voluntary, or that it may be used in evidence against him. *People v. Maxwell*, before Riker, recorder, N. Y. Gen. Sess., 1 Wheel. Cr. Cas. 163. But even under the English statute of Phil. & Mar. or 7 Geo., his statement ought not to be taken till the evidence against him is gone through; and he should then be asked if he has any thing to say in answer to the charge. This was strongly suggested as the proper course by Garrow, B. who, however, received a confession made before the evidence had been gone through; but expressed strong doubts of its legality. *Rex v. Fagg*, 4 Carr. & Payne, 530.

The prisoner's statement, when required by the prosecutor for the purpose of being given in evidence before the grand jury or at the trial, is merely produced from amongst the depositions, and proves itself.(a) And as the usual form of such statement recites the charge against the prisoner, and that after examination of the witnesses against him the magistrates addressed to him the caution above mentioned, setting it out in the very words of the statute,—the written statement itself, purporting to be signed by the magistrate, and accompanying the depositions, proves all that recital, as well as what the prisoner said upon the occasion. But if the usual form have not been adopted, then the caution, the prisoner's statement, and the magistrate's signature, must be proved as at common law,(b) namely, by the magistrate or his clerk, or by some person who was present at the examination.(c)

But although the prisoner be thus cautioned before he makes his statement, yet if his statement amount to a confession, and he were in-

(a) *R. v. Sansome*, 19 L. J. 143 m.

(c) *R. v. Hearn*, Car. & M. 109. *R. v. Wil-*

(b) Per Alderson, B., in *R. v. Boyd*, 19 Law J. 141.  
*shaw*, Id. 145.

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On one occasion the confession was drawn out by questions put by the magistrate, the prisoner first having been refused professional assistance, though he had requested to be allowed the aid of an attorney; and though the confession was held technically receivable, Littledale, J. adverted to counsel having been refused, and thought the case ought not, for that reason, to be further pressed; and the prisoner was acquitted. *Reg. v. Ellis*, Ry. & Mood. N. P. Rep. 432.

It has often been ruled by the criminal courts of New-York, that a questioning of the prisoner by the justice forms no objection to his examination being read. *People v. Smith*, 1 Wheel. Cr. Cas. 54, N. Y. Gen. Sess. before Riker, recorder, Oct. term, 1822. And this was allowed though the whole examination stood by way of question and answer; and one question was improper, viz. whether the prisoner had not before been guilty of petit larceny. *People v. Smith*, before Riker, recorder, N. Y. Gen. Sess. Oct. term, 1822, 1 Wheel. Cr. Cas. 54. The same general doctrine was held before Holroyd, J. at Carlisle spring assizes, 1824. 2 Stark. Ev. 52, note.

See the statute of New York as to this, ante.

It is not necessary that the examination should be signed by the prisoner, in order to make it evidence. *People v. Johnson*, before Riker, recorder, 1 Wheel. Cr. Cas. 193. And Lambe's case has always been considered a leading one in this country. Id. *Pennsylvania v. Stoops*, Addis. 381, 383, S. P.

Where the confession is made to the district attorney, and by him reduced to writing, he may, notwithstanding, give parol evidence of it. The writing being a mere memorandum, need not be produced. *Fullon v. Freeman et al.*, Coxe's Rep. 113. See *Reg. v. Hollingshead*, 4 Carr. & Payne, 242.

Where a confession has been signed by a prisoner, it is read by the officer of the court; but where the examination is taken down by some person, and not signed by the prisoner, the person who took it down is called as a witness; and he states what the prisoner said, refreshing his memory from the paper. This was done by a magistrate in the case of *Reg. v. Jones*, Carr. Supp. 13, and by a magistrate's clerk, who had taken down what the prisoner said before the committing magistrate, in the case of *Reg. v. Watkins*, tried before Mr. Justice Bosanquet, at the Oxford spring assizes, 1831. See note (a) to the case of *Reg. v. Watkins*, 4 Carr. & Payne, 548.

duced to make it by any previous promise of favor or threat, as already mentioned,(a) it cannot be read in evidence against him,—unless, indeed, before he make the statement, he have been undeceived as to the threat or promise, and told that he has nothing to fear from the one or hope from the other.(b) To meet this difficulty, the same section of the statute which directs the above caution to be given, contains also this proviso, “that the said justice or justices, before such accused person shall make any such statement, shall state to him and give [\*133] \*him clearly to understand, that he has nothing to hope from any promise of favor, and nothing to fear from any threat, which may have been holden out to him, to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat: provided nevertheless, that nothing herein enacted and contained, shall prevent the prosecutor in any case from giving in evidence any admission or confession, or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person.”(c)

It was at one time attempted to be argued that no confession made after the first caution above mentioned, could be given in evidence against a prisoner, unless the second proviso were also complied with, and the defendant told that he had nothing to hope from any promise of favor, and nothing to fear from any threat which might have been holden out to him to induce him to confess; but the judges in the criminal appeal court, in the case of *R. v. Sansome*,(d) unanimously decided that this was necessary only in cases where such a threat or promise had actually been holden out, in order to undeceive the prisoner in respect of it, as mentioned,(e) and make his confession evidence against him notwithstanding; but that in all other cases, it is sufficient to give the first caution, after which any confession, not induced by threat or promise, may be given in evidence against the prisoner.

The case of *R. v. Sansome* was thus:—The prisoner was tried upon an indictment for murder; when he was before the committing magistrate, the ordinary caution, that first mentioned,(g) was read to him, after which he made a statement, amounting to a confession, which was signed by him, and by the committing magistrate, and transmitted with the depositions; at the trial, however, it was objected that the statement could be given in evidence against the prisoner, as the caution as to the threat or promise had not also been given to him by the magistrate: but the judges, on reference to them, held that this was not necessary: the latter was not a condition precedent to the admissibility

(a) *Ante*, p. 126.

(b) See *Ante*, p. 129.

(c) 11 & 12 Vict. c. 42, s. 18.

(d) 19 Law J. 143 m.

(e) *Ante*, p. 129.

(g) *Ante*, p. 131.

of a confession of the prisoner before the committing magistrate, and was necessary only where there had been a previous threat or promise; if given, it has the effect of rendering the confession admissible in evidence, notwithstanding such previous threat or promise; and if not given, the case remained as at common law, and the confession was admissible in evidence, unless the party were influenced by some previous threat or promise to make it.(a) So, where after the first of these cautions, the prisoner made a statement, which was taken down, but was not signed by him or by the magistrate; \*he was then [\*134] remanded, and upon being brought up again, some questions were put to the witness by the prisoner's attorney, who then objected that as an addition had been made to the evidence, the prisoner's former statement could not be evidence against him; afterwards at the trial, the same objection being made, the statement was admitted in evidence against the prisoner, and the point reserved for the opinion of the criminal appeal court: and that court afterwards held that the evidence was properly received.(b)

(d) *By Presumptions.*

A presumption is, where some facts being proved, another follows as a natural or very probable conclusion from them, so as readily to gain assent from the mere probability of its having occurred, without further proof.(c) The fact thus assented to, is said to be presumed; that is, taken for granted, until the contrary be proved by the opposite party: *stabitur præsumptioni donec probetur in contrarium*.(d) And it is adopted the more readily, in proportion to the difficulty of proving the fact by positive evidence, and to the obvious facility of disproving it, or of proving facts inconsistent with it, if it really never occurred. It is therefore, we have seen,(e) adopted in proof of intent, of the wilful doing of an act, of malice, and of guilty knowledge, for these can be proved only by the admission of the party, or from his overt acts from which the jury may infer or presume them. It is adopted also in proof of the commission of the offence itself, in the absence of evidence of any person who actually saw it committed, as shall be noticed presently.[1]

(a) *R. v. Sansone*, 19 Law J. 143 m.

(d) Co. Lit. 373.

(b) *R. v. Bond*, 19 Law J. 138 m.

(e) *Ante*, pp. 119-122.

(c) Arch. Pl. & Ev. Civ. Act. 362, 363.

[1] The ground of all presumptions is the necessary or usual connection between facts and circumstances; the knowledge of which connection results from experience and reflection. A presumption is, therefore, "an inference as to the existence of a fact not actually known, arising from its necessary or usual connection with others which are known. It is upon this principle that all our knowledge of those relations and existences, which are not perceptible to the human senses, must depend." The force of presumptions is almost intui-

Presumptions are of three kinds: *violent presumptions*, where the facts and circumstances proved, *necessarily* attend the fact presumed; (a) *pro-*

(a) Gilb. Ev. 157.

tively perceived by mankind; and that principle of the mind which prepares it to expect the future association of circumstances, because it has been accustomed to find them associated, cannot be accounted for, except by setting it down as imposed upon us by the law of nature. It is the same principle which leads us to reason upon cause and effect in all the regions of inductive philosophy; of which the doctrines of presumptive evidence rank as an important branch. The triors are to be satisfied that one circumstance has always, or at least usually been found in consecutive connection with another, the like conduct with the like motive the fact to be presumed with the fact established by direct proof. See 1 Stark. Ev. 23 to 29, 37 to 39, and 4 id. 493, 4. 1 Dom., B. 3, tit. 6. § 4, art. 3.

The law presumes that a man intended the result which naturally followed the means voluntarily used by him. On this principle, a libel injurious in its tendency was declared actionable per se. (*Haire v. Wilson*, 9 Barnw. & Cress. 643. *Rez v. Shipley*, 4 Doug. 177, per Willes, J. S. P.) And several persons having caused a plate to be struck calculated for the alteration of bank bills from a lower to a higher denomination, were held to intend the usual consequence, and were convicted of a conspiracy to defraud, though not a bill was altered. *Malone's case*, before Radcliff, mayor, N. Y. Gen. Sess. Jan. 1817, 2 C. H. Rec. 22; and see *The People v. Bradford*, 1 Wheel. Cr. Cas. 219, 221.

The seeking of opportunities and means to commit a criminal act; the flight of the accused; concealing or showing anxiety to conceal evidence of guilt; are circumstances for the prosecution. The fabrication of false or contradictory accounts is a familiar instance; as of the prisoner's residence or occupation, or acquaintances. (*Coe's case*, before Radcliff, mayor, N. Y. Gen. Sess. 1816, 1 C. H. Rec. 141, 3.) So making arrangements to escape. (*id.*) Using or signing a feigned name. (*id.*) So concealing instruments of violence or counterfeit money. (See 1 Stark. Ev. 29 to 33, and 2 Ev. Poth. 337, No. 16, § 14.) Fraudulently passing, or possessing with intent to pass counterfeit bills, is a crime where guilty knowledge and intent must generally be derived from circumstances. Among these are entries of the purchase of counterfeit bills in cabalistic language used among counterfeiters; coincidence between false bills found in the prisoner's pocket-book and those found in the recesses of his house or residence; that the prisoner had failed to show a good character; the possession of large quantities of spurious notes; (*The People v. Gardner*, Sept. 1822, N. Y. Gen. Sess. before Riker, recorder, 1 Wheel. Cr. Cas. 23, 25;) paying away the bill without calling for change due on the purchase; (*Rhode's case*, before Radcliff, mayor, N. Y. Gen. Sess. Jan. 1816, 1 Cit. H. Rec. 1, 2;) passing a comparatively large bill for a small quantity of liquor not drank, and immediately leaving the store; a short time after returning with a similar bill, attempting the same practice; and on being charged, fleeing into the woods, and not accounting for the possession of the bills. (*Helm's case*, before Riker, Rec. N. Y. Gen. Sess. March, 1816, 1 C. H. Rec. 46, 7.) So an attempt to conceal or destroy a counterfeit bill, the prisoner refusing to give an account of himself or to tell his name, a large amount of counterfeits being found in his portmanteau; (*Galbrant's case*, before Radcliff, mayor, N. Y. Gen. Sess. July, 1816, 1 C. H. Rec. 109, 10;) denying that he passed the forged check, and refusing to disclose from whom he obtained it; held sufficient to convict, no satisfactory account being given. (*Vosburgh's case*, before Radcliff, mayor, Aug. 1816, N. Y. Gen. Sess. 1 C. H. Rec. 130.) So two persons being engaged in passing the bill, and contradicting each other and giving unsatisfactory accounts on their separate examination. (*Reynold's case*, before Radcliff, mayor, N. Y. Gen. Sess. March, 1817, 2 C. H. Rec. 47.) Concealment or attempt to conceal false money, (called a strong circumstance in *Stewart's case*, bef. Radcliff, mayor, N. Y. Gen. Sess. June, 1817, 2 C. H. Rec. 87.) In this case one bill was found in the cuff of the prisoner's coat, and, on search at his boarding room, another was found in his pantaloons pocket. So pretending that the bill was received from S. in the

*bable presumptions*, where the facts and circumstances proved, *usually* attend the fact presumed; (a) and light or rash presumptions, which, however, have no weight or validity at all. (b)

Under this head is classed that very usual mode of proving offences, adopted from necessity, called circumstantial evidence. Direct and positive evidence of the commission of offences, cannot in all cases be procured; people do not always commit offences publicly, in the open day, but oftener commit them in secret, or at night; and if circumstantial evidence were excluded by our law, all secret offences might be committed with impunity. Circumstantial or presumptive evidence, therefore, \*is allowed in all cases, where direct and positive evidence of the defendant's having committed the offence

[\*185]

(a) 3 Bl. Com. 372.

see Arch. Pl. & Ev. Civ. Act. 363, and the

(b) Id. Gilb. Ev. 157. Co. Lit. 6 b. And cases and other authorities there collected.

market, without farther account, averring that the note was good, catching up the change in a hurried and confused manner without counting it; offering a sum of money to the officer to release him; and, on this being declined, attempting to escape by knocking the officer down, and giving a confused and unsatisfactory account of the transaction. *The People v. Quackenboss*, before Riker, recorder, N. Y. Gen. Sess. Dec. 1822, 1 Wheel. Cr. Cas. 91, 93.

On a charge of receiving stolen goods with knowledge; finding them secreted in the prisoner's store, in a place convenient for concealment; considerable stolen property being found up stairs; the prisoner, on being questioned, giving no satisfactory account of them; a great quantity of stolen goods being found in his house; with bad character of the accused; were allowed as proof of knowledge. (*People v. Teal*, bef. Riker, recorder, N. Y. Gen. Sess. March, 1823, 1 Wheeler's Cr. Cas. 199, 201.) So buying the goods at a reduced price, they being of a large amount, receiving them of a stranger; throwing them into a trunk in a confused and crowded manner; the trunk being found in a room up stairs, in the prisoner's house, though he kept a store. *People v. Cochrane*, before Riker, recorder, N. Y. Gen. Sess. Nov. 1822, 1 Wheel. Cr. Cas. 81, 84.

The falsity of pretences on which goods are obtained may also be inferred from circumstances. *Lazarus' case*, bef. Radcliff, mayor, N. Y. Gen. Sess. June, 1816, 1 C. H. Rec. 88.

On the other hand, in cases of counterfeit bills, circumstances considered favorable to the prisoner are, his receiving the counterfeit bills as good in the regular course of business; (*People v. Bryan*, before Riker, recorder, N. Y. Gen. Sess. Sept. 1822, 1 Wheel. Cr. Cas. 21, 2;) passing the note to an acquaintance, and giving a true statement of the prisoner's business. So having been in the state prison before, he might have offered money to procure his escape, though innocent, he knowing the impression to be against him. So no other spurious bill being found upon him; and since he was discharged from the state prison, so conducting as to be thought trust-worthy by his employers. *The People v. Quackenboss*, *supra*.

In charges for knowingly receiving stolen goods, the following circumstances have been recognized as favorable to the prisoner: going out to sell the goods in the day time, stating that he had other goods of the like kind; and offering to be present at an auction sale of them; leaving the original marks on most of the goods; and after being arrested, aiding in the arrest of the thief, who refuses to answer on examination. (*People v. Cochrane*, *supra*.) So part of the goods being found in the prisoner's store, open to the view of those who called in; the original letters on a stolen dressing box being allowed to remain, by which the owner could identify it; with good character as to honesty. *People v. Teal*, *supra*.

cannot be procured; and it is often as satisfactory as direct and positive evidence.

It is also adopted as confirmatory evidence, even where there is direct and positive evidence of the offence committed, in order to induce the jury to yield a more ready credence to the direct and positive evidence. In larceny, for instance, after proving that the goods were taken or stolen, proof that they were found in the possession of the prisoner shortly afterwards, and that he did not give any satisfactory account of the manner in which he came by them, is deemed good presumptive evidence of the prisoner having stolen them;(a) and if to this be added evidence that the goods, when found, were concealed or disguised, or that the prisoner, when charged with the offence, absconded, it will very much strengthen the presumption. On the other hand, if the goods be not found for a considerable time after they were stolen, the presumption is proportionally weakened.

And in larceny, even where there is direct and positive evidence of the prisoner's guilt, if at the same time there be any doubt whatever of the jury believing the witnesses, it is usual in practice to add evidence of all circumstances the case furnishes, from which the jury may infer the guilt of the prisoner, and that the witnesses are speaking the truth; as for instance, that the prisoner, was seen in the neighborhood of the place from whence the goods were stolen, shortly before they were missed, or about the time when it is probable they were stolen; that shortly afterwards they were found in his possession, or that he pawned or sold them; that he gave a false name in doing so; that he sold them very much under their value; that he gave a false or unsatisfactory account of the manner in which he came by them;—or the like.

Upon an indictment against any person exercising an office, profession, or employment, for a criminal act done by him as such officer, &c., proof that he acted as such officer, &c., will raise the presumption that he was duly appointed, and his appointment therefore need not be proved.(b) And as to offences against officers:—By stat. 8 & 9 Vict. c. 87, (for the prevention of smuggling) it is enacted by sect. 132, that if upon any trial a question shall arise whether any person is an officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay,—or an officer of customs or excise,—evidence of his having acted as such, shall be deemed sufficient, and such person shall not be required to produce his commission or deputation, unless sufficient proof should be given to the contrary.

So in the case of peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters, [\*136] without \*producing their appointment; and that even in the

(a) See *Post*, tit. "Larceny."

Buller, J., 1 Stark. 405. Peake, 236.

(b) See 6 T. R. 535 n; 4 T. R. 366, per

case of murder.(a) And the same in other cases, where it becomes a question whether a person acting as a public officer, was so at the time. Therefore, upon an indictment against an officer under government, for malversation in his office, a letter of instructions, signed by three of the lords of the treasury, was allowed to be read in evidence, without producing the commission by which they were appointed;(b) for it is a general presumption of law, that a person acting in a public capacity, is duly authorized to do so.(c) For the same reason, upon an indictment for perjury, in an oath taken before a surrogate in the Ecclesiastical Court, the fact of the person who administered the oath, having acted as a surrogate, was holden sufficient evidence of his being so, without producing his appointment.(d)[1]

As to the presumptive proof of intent, the wilful doing of an act, malice, and guilty knowledge;(e)

(e) *Best evidence.*

Whatever is not confessed, and cannot be presumed, must be proved by direct and positive evidence. This evidence is of two kinds,—written evidence, and the parol testimony of witnesses,—both of which shall be treated of in the next two sections.

I shall in this place merely notice the general rule, which is applicable to criminal cases as well as to civil, namely, that the best evidence the nature of the case will admit of, must be produced, if it be possible to be had; but if not possible, then the next best evidence that can be had, shall be allowed.(g) For if it be found that there is any better evidence existing than that which is produced, the very non-production of it creates a presumption that it would have detected some falsehood, which at present is concealed.(h) Within the meaning of this rule, written evidence is better than parol evidence; and, therefore, if a deed

(a) Per Buller, J., *Berriman v. Wise*, 4 T. R. 366.

(b) *R. v. Jones*, 2 Camp. 131.

(c) Per Ld. Ellenborough, C. J., 3 Camp. 433, 432.

(d) *R. v. Verelet*, 3 Camp. 432.

(e) See *Ante*, pp. 119–122.

(g) Arch. Pl. & Ev. Civ. Act. 372.

(h) 3 Bl. Com. 368; Gilb. Ev. 16; 1 Show. 397; Carth. 220; 3 East, 192.

[1] It has been held in Connecticut that a clergyman, in the administration of marriage, is a public officer; and his acts, as such, in the celebration of marriage, are admitted as prima facie proof of his qualification, without higher evidence. *Goshen v. Stonington*, 4 Conn. Rep. 209.

Proof that an individual had executed and returned a writ directed to him as coroner, has been held sufficient evidence of his being commissioned as such, without proof of his commission. *Young v. Com.*, 6 Binn. Rep. 88.

The collector and trustees of a school district may be proved such by their acts and reputation. *M' Coy v. Curtice*, 9 Wend. 17. And persons acting publicly as officers of a corporation, are presumed rightfully in office. See *United States v. Danbridge*, 12 Wheat. 70; also *All Saints Church v. Lovett*, 1 Hall's Rep. N. Y. S. C. 191.



or other private written instrument is to be proved, nothing else but the deed or instrument itself shall be admitted in evidence, unless it be proved to have been destroyed or lost, or be in the hands of the opposite party; (a) but in the case of records and other public instruments which cannot or ought not to be removed, they are proved by examined copies or certificates, as we shall see hereafter. Upon an indictment for the forgery of a written instrument, the forged instrument must be produced, unless it have been destroyed by the defendant, or unless \*it be in his possession, and he refuse to produce it after notice. (b) But upon an indictment for stealing a written instrument, or destroying a will, or the like, no notice to produce it is necessary, but secondary evidence of the instrument is admissible without it. (c) [1]

(a) Arch. Pl. & Ev. Civ. Act. 372.

(c) *R. v. Aickles*, 1 Leach, 330.

(b) See *Post*, p. 138.

[1] And the reason of the rule limits the extent of its application; consequently it does not operate where the law itself obviates the presumption of fraud, which would otherwise arise. Hence, in general, to prove that a person is a public officer, it is sufficient to show that he acted as such; for, then, in the absence of evidence to the contrary, it is to be presumed that he was duly and legally appointed. 3 Starkie's Ev. 392, 3. So, where a document is of a public nature, a copy is sometimes admitted; for the production of the original is dispensed with, on account of the inconvenience resulting from the frequent removal of such papers, and therefore the absence of the original affords no presumption of fraud. 3 Starkie's Ev. 393. And in a variety of cases where the opposite party has admitted the facts sought to be established, or by his conduct precluded himself from denying them, primary evidence is dispensed with. Indeed, the whole doctrine as to secondary evidence of written instruments, when applied to the common instance of the best evidence being proved to be unattainable, rests upon much the same principle; all presumption of fraud is there of course repelled, and the rule, after first disarming the parties of the means of imposition, suffers itself to be relaxed as circumstances in justice shall require, by the admission of the next best evidence. Per Haywood, J., *Ingram v. Hall*, 1 Hayw. Rep. 193, 206; see also 9 Petersd. Abr. 157, note; per Thompson, J., *Milnor v. Tillotson*, 7 Peters, 99, 101; *U. S. v. Reyburn*, 6 id. 352.

The secondary evidence, however, must in all cases be in itself competent; for the rule is never so far relaxed as to allow evidence to be given intrinsically illegal, as hearsay, for instance, merely because a party happens to be so unfortunately situated, that it is the best of which his case is susceptible. 2 Ev. Poth. 147; 3 Chitty's Bl. 368, note; *Pentland v. Somers*, 2 Serg. & Rawle, 23; and see *Johnson v. Chase*, 1 Tyl. Rep. 449; *Bonnet's lessee v. Davenport*, 3 Binn. 175.

And on the other hand, the rule is not to be extended to such a rigorous extreme, as to debar a party from justice, because he originally neglected to furnish himself with the highest possible assurance of the disputed facts. For then two witnesses would be better than one; one hundred better than two, and so on progressively; a writing would be better than a parol contract, a deed better than either, and a record better than all. Per Haywood, J., *Ingram v. Hall*, 1 Hayw. Rep. 193, 206; see also 2 Ev. Poth. 148.

Nor does the rule operate in any case to *exclude* evidence, merely because it is not all, nor the most satisfactory which might be adduced, when the evidence offered and that which is withheld is all of the same general quality or grade, (3 Starkie's Ev. 391; *Leibman v. Pooley*, 1 Starkie's Rep. 167; *Macnally's Ev.* 342; 9 Petersd. Abr. 155, note; 1 Chit. Cr. L.

As to parol evidence, there is no distinction between one kind and another; all kinds are of equal degree in the eye of the law; you can-

567;) but in such case, it in general goes no farther than to forbid, that evidence which is in its nature merely circumstantial, shall be received, when direct and conclusive evidence may be had. *Com. v. James*, 1 Pick. 375; 1 Big. Dig. 322, sec. 11. This is forcibly illustrated by *Governor v. Roberts*, (2 Hawk's Rep. 26.) There, the secretary of state was called as a witness, to produce certain papers belonging to the office of the comptroller; it appeared that the comptroller was absent on a visit, and before his departure, he had deposited the keys of the office with the secretary, requesting him to attend to any applications at the office during the absence of the former; the comptroller had not been summoned to attend court, and the secretary testified that he attended as the agent, or on behalf of the comptroller, with the papers. Under these circumstances, it was held, that though the testimony of the comptroller would be more satisfactory than that of the secretary, yet both being oral, and both therefore of the same *grade*, either was competent to be submitted to the jury. "If," as is well observed by Henderson, J., who delivered the opinion of the court in the above case, "the rule was, that the most full and satisfactory evidence should be produced, it would follow that where it appeared there were others present, they should be also produced; or where a person, from his situation, had a better view of the transaction, one who had a less favorable position should not be received; or where it appeared that another could give a more detailed account of the affair, one who could not give so full a one should be excluded, although there may be no doubt as to his knowledge of the facts to which he deposes."

It should be observed here, however, that wherever written evidence exists of the facts sought to be proved by parol, whether the existence of such evidence appear on the direct or cross-examination of the witness introduced, makes no difference. Its disclosure, at any period of the trial, brings its importance into view as the best evidence. Hence, though a party may conduct his examination so as to prove the contents of a writing and keep its existence out of sight, if it turn out that it is the highest evidence, and should have been produced by him; whenever its existence appears, the inferior evidence given, will be excluded altogether. *Boone v. Dyke's legatees*, 3 Monroe, 529, 531; *Rex v. The Inhabitants of Padstow*, 4 Barn. & Adol. 208, S. P. So, though the writing be not the foundation of the action, but comes in question collaterally, the highest evidence of its execution must be produced. *Roberts v. Tennell*, 3 Monroe, 247, 250. And the original in such cases, as in others, must be shown or its non-production legally excused. *Cope v. Arberry*, 2 J. J. Marsh. 296.

The following decisions may, perhaps, be most appropriately introduced by way of concluding this note. Upon an information for passing a counterfeit sixteen penny piece, it was held, that before any evidence of its want of genuineness could be received, the piece itself must be produced. *State v. Osborn*, 1 Root's Rep. 152. So in ordinary cases of a writing charged to be a forgery. *State v. Blodget*, id. 534. But where the information was for counterfeiting only, and the prosecutor had never been able to get hold of the money, he was allowed to prove the defendant's confession respecting his having made counterfeit pieces of the denomination specified in the information, without producing them. *State v. Phelps*, 2 Root's Rep. 87.

In a case before Lord Kenyon, at nisi prius, a witness was asked whether the plaintiff's bushel measure had not been tried and found to correspond with the public Belford bushel. But his lordship was of opinion that the question could not be asked, inasmuch as "the best evidence the case would admit of was a production of both measures in court, and a comparison of them before the jury." *Chenier v. Watson*, Peake's Addi. Cas. 123.

In Massachusetts, where, upon an indictment for having in possession a counterfeit bank note, it appeared that the note was passed to one P., who suffered it to remain out of his hands for a long time, during which it was lodged with a magistrate, who might have been produced as a witness; held, that the testimony of P. and his wife, who swore positively to the note from certain accidental marks upon it, was improperly received, unless they had

not object to a fact being proved by one witness, because another could have proved it much better; it may be matter of observation to the jury; but if the witness be competent, it is not matter of legal objection to him.

(f) *Secondary evidence.*

If the written instrument be destroyed or lost, then upon proof of its destruction, or on proof of search for it in every place where it was likely to be found, without effect, the party will be allowed to give secondary evidence of it; that is to say, he will be allowed to give in evidence a counterpart or examined copy of it, or to give even parol evidence of its contents.(a)[2]

(a) Arch. Pl. & Ev. Civ. Act. 378; 1 Arch. N. P. 21.

made a private artificial mark upon it; and also, that the testimony of the magistrate was indispensable, upon the general principle requiring the best evidence. *Com. v. Kinnison*, 4 Mass. Rep. 646. Upon an indictment, however, against a miller for stealing, where it appeared that P. sent barilla to the defendant's mill, and after it was ground, a mixture of three-fourths barilla and one-fourth of plaster of paris, was returned by the same truckman who took the barilla to the mill, it was held that the government need not produce the truckman to prove that it was not adulterated in the transportation, although there was merely circumstantial evidence of its having been done by the miller. *Com. v. James*, 1 Pick. 375.

[2] In general, where the best evidence is unattainable, a party may resort to secondary evidence. If a paper be on file in a public office under such circumstances that the party can neither obtain it, or compel its production, and it is not made the duty of any person to give out certified copies to be used as evidence, parol testimony will be received. *Semble, Denton v. Hill* 4 Hayw. Rep. 73. See *Butler v. The State*, 5 Gill & John. Rep. 511, 519. But, if the paper is one that might be withdrawn from the files, on application for that purpose, such application should appear to have been made. Even if the application is refused, it will not always be a matter of course to admit secondary proof. Where the liability of the defendants, in an action on a note, had been tried on the merits, in a former action on the same note, brought against them in the name of the plaintiff's agent, and the note had been put upon the clerk's files, the court refused to allow the note to be taken from the files, or to admit secondary evidence of its contents. They said, that it was always matter of discretion with the court to allow a paper to be withdrawn from the files; that the liability of the defendant's had been thoroughly tried in the former suit, upon the merits, and under circumstances favorable for the plaintiff; and, that it would be improper to grant him an opportunity to try the question over again. They also held it to be no answer to say, that the defendants could avail themselves of the judgment in that suit as a defence to the present action. *Rogerson v. Neal*, 16 Pick. Rep. 370. In a suit in chancery, where it appeared that an instrument, by which the defendant transferred to the complainants the benefit of a certain judgment, had been filed in a suit at law between the parties, and the defendant produced a transcript of the record in such a suit containing a copy of the instrument, which the plaintiff was willing should be read if the transcript was introduced along with it; held, that the defendant refusing to accept these terms, the copy could not be received. The appellate court, in their opinion in this case, after adverting to the general rule excluding copies till the originals shall have been accounted for, observe: "The manner of accounting for the absence of the original in the present instance, was, by showing that it had been filed in the suit at law, and this was attempted to be manifested by the record produced. But why have they thus disposed of the original? It must have been there lodged for some pur-

Where in order to account for the non-production of an indenture of apprenticeship, a witness stated that hearing it was in the possession

pose; and its custody have been retained through the operation of law. If it had been the subject of litigation, and its claim settled between the parties in a suit for that purpose, it ought not to have been again introduced as a set-off against the demand of the complainant, or as imposing another defence to its claim. To understand, therefore, fully the cause of its absence, and the effect which had thereby been produced the court, (*a quo*,) we think, properly required that the record should be read, or the copy not admitted. *Handley's ex'r v. Fitzhugh*, 1 Marsh. Ken. Rep. 24. So, the court may refuse to receive inferior proof upon principles of public policy. Accordingly, in Pennsylvania, where an action was brought for a libel upon the plaintiff, an officer, consisting of certain charges preferred against him to the governor; though the governor had declined delivering the libellous paper to the plaintiff, and the court had refused a *subpoena duces tecum*, (which can only issue there on special application) yet, parol evidence of the contents was held inadmissible. *Gray v. Pentland*, 2 Sergeant & Rawle, 23. See *Yoler v. Sanno*, 6 Watts' Rep. 166.

The question has occasionally arisen, whether proof that a paper is out of the state will, of itself, be sufficient to lay the foundation for introducing secondary evidence of its contents, without further evidence showing an effort to obtain it. In Connecticut, it has been held that it will not. *Townsend v. Atwater*, 5 Day's Rep. 298, 306. So also, in Louisiana. *Lewis v. Beatty*, 8 Mart. Lou. Rep. N. S., 287, 288, 289. Otherwise, however, in Kentucky; and the court liken it to the case of a subscribing witness, absent from the state. *Boone v. Dyke's legatees*, 3 Monroe 532. See also *Eaton v. Campbell*, 7 Pick. 10. A written contract deposited by the parties with a witness in a neighboring state, was allowed to be proved by a deposition on commission, it being out of the jurisdiction of the court. *Bailey v. Johnson*, 9 Cowen's Rep. 115. See further, what is said by Safford, J., in *May's adm'r v. May*, 1 Porter's Rep. 131.

Where the defendant had placed a deed in the hands of M., his agent, who had gone to another state, and carried it with him, and some unsuccessful attempts, the nature of which was not explained, had been made to obtain it; held that no commission having been sent to examine M. about the deed, or to ascertain what had become of it, and there being some grounds for suspecting a designed suppression of it, parol evidence was inadmissible. *Bunch's adm'r v. Hurst adm'r*, 3 Dess. Eq. Rep. 290, 291. An instrument having been executed at Caraccas, and it appearing that, according to the law of that place, the original was deposited with a notary and kept by him, the parties only being allowed to have certified copies; held, that this was sufficient to account for the non-production of the original. *Mauri v. Heffernan*, 13 Johns. Rep. 58.

If the paper is in the hands of a third person under such circumstances that the law will not compel him to produce it, this is a ground for allowing secondary evidence. For various causes showing this, as also when a paper is privileged so as to be unattainable through a *subpoena duces tecum*, see Philipps on Ev. Cow. & Hill's notes, part 2, page 357. See also, *United States v. Reyburn*, 6 Peters' Rep. 352, 6, 7.

That proof of the loss or destruction of an instrument is sufficient to lay the foundation for introducing secondary evidence of its contents, is, as a general rule, well established. Sometimes the loss or destruction is proved directly, e. g. by the person who destroyed it, swearing to the fact; and sometimes the fact is made out by circumstantial evidence, as by showing that it was deposited in a particular chest, office or house, which was subsequently destroyed by fire, or the ravages of war; (*Jackson, ex dem. Livingston v. Neely*, 10 Johns. Rep. 374; *Franklin v. Creyon*, Harp. Eq. Rep. 243; *Jeffrey's ex'rs v. Parsons*, 2 Verm. Rep. 456; *Jackson, ex dem. Taylor v. Cullum*, 2 Blackf. 228; *Peay v. Pickett*, 3 M'Cord's Rep. 322; *Lorton v. Gore*, 1 Dow & Clark, 190; *Rochell v. Holmes*, 2 Bay's Rep. 487; *Fallis v. Griffeth*, 1 Wright's Rep. 305;) that it was put into the mail, directed to a particular person, and never reached its place of destination; (*Bank of the United States v. Sill*, 5 Conn. Rep. 106; *Champion v. Terry*, 3 Brod. & Bing. 295;) or put into the letter bag of a vessel, which

of the pauper (who was then very ill, and shortly afterwards died,) he called upon him to make inquiries about it, and he told him that when

was chased by a privateer, and the letter bag thrown overboard; (*Anderson v. Robson*, 2 Bay's Rep. 495;) or that it has been diligently sought for, and cannot be found; (*Proprietors of Braintree v. Battles*, 6 Verm. Rep. 399; *Renner v. Bank of Columbia*, 9 Wheat Rep. 581; *Hall v. Hall*, 6 Gill & Johns. 386; *Taunton Bank v. Richards*, 5 Pick. Rep. 436; *Benjamin v. Garee*, 1 Wright's Rep. 449, 450; *M'Mullen v. Brown*, 1 Harp. Rep. 76.) The like principles apply in criminal cases. See *Rex v. Chadwick*, 6 Carr & Payne, 181; *Commonwealth v. Snell*, 3 Mass. Rep. 82; *United States v. Doebler*, 1 Bald. Rep. 619.

It is not by any means a matter of course, to let a party in to give secondary evidence, even where he produces direct proof of the fact of destruction. If the destruction was accidental, and occurred without his agency or assent; or even if it was voluntary, and his own act, but yet done under a mistake, so as to rebut all idea of contemplated fraud, inferior evidence will usually be allowed. Thus, should a party destroy a paper under the erroneous impression that it could be of no further use, he may afterward, notwithstanding, prove its contents by secondary evidence. *Riggs v. Tayloe*, 9 Wheat. 483. Or should he destroy a note on its being paid in bank bills, he supposing at the time they were genuine, when in truth they were counterfeit, the same result would follow. *Id.* 487. So should he destroy one paper, supposing it to be another. *Id.* See *Dumas v. Powell*, 3 Dev. 103; also *Williams v. Crary*, 5 Cowen's Rep. 368, 370. But a party who under no pretence of mistake or accident, voluntarily destroys primary evidence, to prevent its being used against him, or to create an excuse for its non-production, to injure the opposite party, or for other fraudulent purposes, thereby excludes himself from the benefit of superior evidence. *Riggs v. Tayloe*, 9 Wheat. 483, 487. *Renner v. Bank of Columbia*, *id.* 596, *Bank of U. S. v. Sill*, 5 Con. Rep. 106, 111. Accordingly, where a plaintiff sued to recover certain moneys received by the defendant through a forged endorsement of the plaintiff's name on a note payable to his order, and on the trial it appeared that the plaintiff having shown the note and endorsement to a person, a witness in the cause, afterwards entirely erased and blotted out the endorsement; held, that it not having been done accidentally, or under any mistake, he could not prove the same a forgery by witnesses who could only judge of its genuineness from having it seen before the obliteration. He had by his act deprived the other party of the benefit of witnesses acquainted with his hand writing, and to admit the testimony offered, would be as repugnant to principle as to deny a party the right of cross-examining his adversary's witnesses. *Broadwell v. Stiles*, 3 Halst. Rep. 59. A fraudulent alteration of a note by the promisee will prevent him from recovering either on the note itself or the original consideration. *Martendale v. Follet*, 1 N. Hamp. Rep. 95. See also, *S. P. Clute v. Small*, 17 Wend. Rep. 238, 242. Otherwise, as to an alteration or destruction, originating in an honest mistake of fact. *Id.* And see *Atkinson v. Hawdon*, 2 Adol. & Ellis, 628. Where a note sued upon was shown to have been voluntarily burnt up by the plaintiff a short time before it fell due, the court held he was bound to explain the act so as to make it appear honest and justifiable, or he could not recover. For it would be a violation of all the principles upon which secondary evidence is tolerated, to allow a party the benefit of it, who has wilfully destroyed the higher and better testimony. *Blade v. Noland*, 12 Wend. 173, 4, 5. Even a pretended negligent destruction or loss of an instrument, if the negligence is such as to awaken a suspicion of design, will be followed by the like result. *Semble, id.* See *Livingston v. Rogers*, 2 Johns. Cas. 488. In *Farrar v. Farrar*, (4 N. Hamp. Rep. 191,) it was held, that where a grantee cancelled a deed, with intent to revest the title, though it would not have this effect directly, yet the destruction being voluntary, he could not give it in evidence; and so, indirectly, it should work the consequence intended. See *Tomson v. Ward*, 1 New Hamp. Rep. 9; *Commonwealth v. Dudley*, 10 Mass. Rep. 403. And it has been held, that a fraudulent alteration, made by the grantee, will operate the like result. *Chesby v. Frost*, 1 New Hamp. Rep. 145; but see *Barrett v. Thorndike*, 1 Greenl. Rep. 73; *Hatch v. Hatch*, 9 Mass. Rep. 311.

the indenture expired, it was given up to him, and he burnt it; it was proved also that inquiry was made of the executrix of the master, who

It has been held, as matter of practice, that a party may prove the existence of the instrument, first, or its loss, as suits him. Thus, when he intends to show that it was consumed in a particular office destroyed by fire, he may begin by proving the destruction of the office. *Denn v. Pond*, 1 Coxe's Rep. 379. In *Kimball v. Morrell*, 4 Greenl. 368 370, it was laid down that the party must first show the existence or due execution of the instrument, second its loss, and then, and not till then, he may enquire specifically as to the contents. Such has been said in another case, to be the natural order. Per Burnet, J., in *Allen's Lessee v. Parish*, 3 Hamm. Rep. 107, 8. *M'Creedy v. Schuylkill Nav. Co.*, 3 Whart. Rep. 424. But these facts are so intimately blended together, and have such a mutual relation to, and dependence upon each other, that it is difficult and many times impossible to separate the proof one part from the other. *Id.* And see per Sherman, J., *id.* p. 121, 2. *M'Laurin v. Talbot*, 2 Hill's Rep. 526, per Harper, J.

It is quite clear, however, that unless proof is adduced of the loss or destruction, satisfactory to the court, the evidence as to the execution and contents cannot be submitted to the jury. *Jackson, ex dem. Livingston, v. Frier*, 16 Johns. Rep. 193, 196. *Rees v. Lawless*, 4 Litt. Rep. 218, 219, 220. *De Haven v. Henderson*, 1 Dall. Rep. 424. *Dorsey v. Dorsey's Heirs*, 3 Harr. & John. 219. *Showders v. Harper*, 1 Harring. Rep. 444.

The proof of loss or destruction must generally be by witnesses testifying under oath. Accordingly, where a justice of the peace acted upon his own personal knowledge of the fact of the loss of a note, left with him at the time of joining issue in the cause, held erroneous, and good ground for reversing his judgment upon certiorari. *Cary v. Campbell*, 10 John. Rep. 363.

The loss may be proved by the declarations of the adverse party; (*Bristol v. Wait*, 6 Carr. & Payne, 591; *Taunton and South Boston Bank v. Whiting*, 10 Mass. Rep. 332; *North v. Drayton*, Harp. Eq. Rep. 34;) or of those under whom he claims title; (*Corbin v. Jackson, ex dem. Garnsey*, 14 Wend. Rep. 619;) and this, as to the latter, even though they might be called as witnesses. *Id.* *Stanley v. Addison*, 8 Lou. Rep. (Curry,) 207. In respect to the admission of one joint tenant or tenant in common, to prove loss, &c., as against the other, see Phillips on Ev., Cow. & Hill's Notes, part 1, p. 397, *et seq.*

In general, the declaration of a person who might be brought to testify on the subject is mere hearsay and inadmissible. *The Governor v. Barkley*, 4 Hawks' Rep. 20. *Rex v. Denio*, 7 Barnw. & Cressw. 620; S. C., 1 Mann. & Ryl. 294. *Taunton Bank v. Richardson*, 5 Pick. 441. *Mitchell v. Mitchell*, 3 Stew. & Porter, 81, 84. Nor can you rely upon the naked declarations of a deceased person as to his having had the paper and destroyed it, without showing search. *Rex v. Rawden*, 2 Adol. & Ellis, 156. Rumors of the destruction of an instrument stand, of course, upon the same ground. *Angel v. Felton*, 8 John. Rep. 149.

Parties and persons interested are recognized as competent witnesses in respect to the facts and circumstances necessary to lay a foundation for secondary evidence. This exception to the general rule rests upon the ground that the point is preliminary and incidental, addressed solely to the court, and not affecting the issue to be tried by the jury. See per Marshall, C. J., in *Taylor v. Riggs*, 1 Pet. Rep. 591, 596, 7; *Jackson, ex dem. Livingston v. Frier*, 16 Johns. Rep. 193, 195, 6; 8 Amer. Jurist, 28, 9. The doctrine has been held as to proof of search, loss, &c., in Kentucky; (*Grimes v. Talbot*, 1 Marsh. Ky. Rep. 205, 6;) in the Supreme Court of the United States; (*Taylor v. Riggs*, 1 Pet. Rep. 591; see also *Riggs v. Taylor*, 9 Wheat. 485, 6;) Pennsylvania; (see *De Haven v. Henderson*, 1 Dall. Rep. 454;) South Carolina, (*Smith v. Wilson*, 1 Dev. & Batt. 40, 41;) and Massachusetts; (see *Poignard v. Smith*, 8 Pick. 278; *Donelson v. Taylor*, *id.* 390; (but parties and persons having an interest cannot be allowed to speak in respect to the contents of the instrument. *Adams v. Leland*, 7 Pick. 62; *Donelson v. Taylor*, 8 *id.* 390. See *Seekright v. Bogan*, 1 Hayw. Rep. 178, note. The doctrine as to the competency of parties, &c., on questions preliminary to the introduction of secondary evidence has been held in Virginia, North Carolina, and New Hampshire. So, *semble*, in Maine. 8 Amer. Jurist, 29, note 1. In New York, also. See

said she knew nothing about it; but it did not appear that any search had been made for it among the papers of the master or of the pauper: the court held this to be sufficient; it was not, perhaps, sufficient as

*Blade v. Noland*, 12 Wend. 173; *Jackson, ex dem. Brown v. Betts*, 6 Cow. Rep. 200. And in the latter state, where one party is sworn to prove the loss, the opposite party may be examined to disprove it and account for the instrument. 2 R. S. 406, § 74. In Delaware, parties are competent to prove loss, and the other party may produce witnesses to impeach the credit of his adversary thus sworn, before secondary evidence is given to the jury. This is upon the principle that the court must be satisfied as to the fact of loss by *credible* testimony. *Shrowders v. Harper*, 1 Harringt. Rep. 444.

In some cases it has been held, that the party *must* testify in order to rebut the suspicion that he is endeavoring to substitute inferior for primary evidence in order to defraud; as, where he is presumed, from the circumstances, to be in possession of the instrument. *Taylor v. Riggs*, 1 Pet. Rep. 591; *Blanton v. Miller*, 1 Hayw. 4; *Poignard v. Smith*, 8 Pick. 278; *De Haven v. Henderson*, 1 Dall. 424; *Park v. Cochran*, 1 Hayw. 410; *Givens v. Manns*, 6 Munf. Rep. 201; *Smith v. Martin*, 2 Tenn. Rep. (Overt.) 208.

But in Connecticut, the loss of a specialty upon which the suit is founded cannot be proved by a party; for in that case the fact of loss is a material and traversable one, to be determined by the jury. *Coleman v. Wolcott*, 4 Day's Rep. 388. So semble, in actions upon lost simple contracts, as notes, &c. *Swift v. Stevens*, 8 Conn. Rep. 431. Such is the doctrine in South Carolina; (*Sims v. Sims*, 2 Rep. Const. Ct. So. Car. 215; *Davis v. Benbow*, 2 Bail. Rep. 427;) and in Vermont; (*Wright v. Jacobs*, 1 Aik. Rep. 394; *Penfield v. Cook*, id. 96.) As to the rule in New Hampshire and North Carolina, see *M'Neil v. M'Clintock*, 5 N. Hamp. Rep. 355, 358; *Cotton v. Beasley*, 1 N. Car. Law. Repos. 239. The doctrine has been held otherwise in New York, Massachusetts, Pennsylvania, and Louisiana; and there, in actions upon lost notes, parties, &c., are competent witnesses to prove the fact of the loss. *Chamberlain v. Gorham*, 20 Johns. Rep. 144; *Blade v. Noland*, 12 Wend. 173; *Meeker v. Jackson*, 3 Yeates' Rep. 442; *Donelson v. Taylor*, 8 Pick. 890; *Page v. Page*, 15 id. 399; *Miller v. Webb*, 8 Lou. Rep. (Curry,) 516. So in Delaware, in an action on a lost deed. *Shrowders v. Harper*, 1 Harringt. Rep. 444. But they cannot be allowed to testify to the jury. *Donelson v. Taylor*, supra. See *Jones v. Fales*, 5 Mass. Rep. 101, and *Forbes v. Wale*, 1 W. Black. 532.

In respect to the form of the oath to be administered where a party or person interested is sworn to prove loss, &c. see Phillipp's on Ev., Cow. & Hill's Notes, part 2, p. 695, *et seq.*

In several cases the party's affidavit has been recognized as competent on the question of loss. See *Givens v. Manns*, 6 Munf. 201; *Tuunkon Bank v. Richardson*, 5 Pick. 436; *Poignard v. Smith*, 8 id. 278; *Taylor v. Riggs*, 1 Peters' Rep. 591; *Smith v. Wilson*, 1 Dev. & Batt. 40, 41; *Donelson v. Taylor*, 8 Pick. Rep. 390; *Patterson v. Winn*, 5 Peters' Rep. 240; *Riggs v. Taylor*, 9 Wheat. 486; *Smith v. Martin*, 2 Tenn. Rep. Overt. 208; *Page v. Page*, 15 Pick. Rep. 374, 5. But a person competent to testify generally in the cause, must testify in the ordinary way, that the advantage of a cross-examination may be preserved. *Poignard v. Smith*, 8 Pick. 272, 278. See, however, *Smith v. Martin*, 2 Tenn. Rep. (Overt.) 208.

Where a paper has been deposited in a public office, an official certificate of the officer is sometimes made evidence of the loss by statute. See *Jackson, ex dem. Swartwout v. Cole*, 4 Cowen's Rep. 589. But unless there be a statute, authorizing the certificate, it cannot be made evidence. See *Hammond v. Norris*, 2 Harr. & John. 130. A surrogate's certificate as to ineffectual search for a will deposited in his office, is not admissible independent of a statute rendering it so. *Jackson, ex dem. Schuyler v. Russell*, 4 Wend. 547. And even where this certificate is made evidence, the party is not obliged to resort to it, but may still prove search to have been made in any other regular mode. Id. Or, he may show that the opposite party obtained it surreptitiously, and thus supersede the necessity of getting the certificate of the officer, which might otherwise be requisite. *Davis v. Spooner*, 3 Pick. Rep. 287, 8.

proof of the actual destruction of the indenture by the pauper, but it was sufficient to discharge the party of laches in not making further inquiry.(a) And in a case in a note in East's Reports,(b) Lord Ellenborough, C. J., said, "I remember an indictment tried before the late Mr. Justice Buller, against a man, I think, of the name of Spragg, for forging a note, which he afterwards got possession of and swallowed; and parol evidence was permitted to be given of the contents of the note, though no notice to produce it had been given; but then, indeed it might be said that such a notice would be nugatory, as the thing itself was destroyed."

Where the document is lost, the proof of the search for it must be by persons who actually at one time had the custody of the original, or by the persons legally entitled to the custody of it,(c) and must be such as to satisfy the court that sufficient diligence has been used in the search.(d)

\*So, if the deed or other instrument be in the hands of the [138] opposite party, and he refuse, on notice, to produce it at the trial, you may give secondary evidence of its contents.(e)

So, if a witness served with a *subpoena duces tecum* to produce a deed or other writing, appear at the trial, but refuse to produce the document required of him, for a reason which the judge may deem sufficient,—as if it be a deed, and he claim title under it,(g) or if he be an attorney, and claim a lien upon it,(h) or object that it is the title deed of his client,(i)—the judge upon application will allow the party to give secondary evidence of its contents. And where a witness, who had been subpoenaed to produce a letter, stated in his examination at the trial, that after action brought he gave it to the opposite party, who said that he wished to give it to his attorney; upon this the attorney was called upon to produce the letter, and not doing so, Ld. Kenyon allowed the other party to give parol evidence of its contents.(k)[1]

(a) *R. v. Morton*, 4 M. & S. 48.

(b) *How v. Hall*, 14 East, 276 n.

(c) See *R. v. Castleton*, 6 T. R. 236. *R. v. Piddlehinton*, 3 B. & A. 460. *R. v. Stourbridge*, 8 B. & C. 96.

(d) See *R. v. East Farleigh*, 6 D. & R. 147.

(e) See *infra*.

(g) *Doe v. Owen*, 8 Car. & P. 110.

(h) *Doe v. Ross*, 7 Mees. & W. 102. *R. v.*

*Hankins*, 2 Car. & K. 823.

(i) *Mills v. Oddy*, 6 Car. & P. 730. *Ditcher v. Kendrick*, 1 Car. & P. 161.

(k) *Leeds v. Cook*, 4 Esp. 256.

[1] The writings required must, in some way or other, be shown in the party's possession or power, before it can be said that he is in fault for not producing them, and consequently before secondary evidence of their contents is received, or any inference made against him from their non-production. See per Sutherland, J., in *Life & Fire Ins. Co. v. The Mechanic's Fire Ins. Co.*, 7 Wend. 34. Per Taylor, C. J., in *Nicholson v. Hilliard*, 1 N. Car. Law Repos. 254. Per Johnson, J., in *Reid v. Colcock*, 1 Nott & M'Cord, 592, 604. *M'Killip v. M'Ilhenny*, 4 Watts' Rep. 318, 319.

Some cases as to the mode of proving the fact of possession, will be found in Phil-



(g) *Notice to produce.*

If you wish to prove a document, which is in the hands of the opposite party, or of his agent or deputy, (a) or of his banker, (b) you may

- (a) *Baldney v. Ritchie*, 1 Stark, 338. *Sinclair v. Stephenson*, 2 Bing. 514, 1 Car. & P. 582. *Tuplin v. Atty*, 3 Bing. 164. (b) *Partridge v. Coates*, Ry. & M. 156. *Burton v. Payne*, 2 Car. & P. 520.

lips on Evidence, Cowen & Hill's Notes, part 2, p. 411. It cannot be made out as against one defendant by the declaration of his co-defendants, unless a joint liability in all be first shown. *Birbeck v. Tucker*, 2 Hall's Rep. N. Y. S. C., 121.

But possession is frequently presumed from the nature of the paper, as well as other circumstances, indicative of its place of custody. The inquiry, in the first instance, may generally be determined by ascertaining to whom the possession rightfully belongs; for in the absence of proof to the contrary, the law will presume that the person entitled holds the custody. Thus an appointment of an officer as overseer was presumed to be in his possession. *Rex v. Leicester*, 1 Barn. & Ald. 173. On the general question as to the person to whose possession title deeds belong, see Lord Buckhurst's case, 1 Coke's Rep. 1.

In some of the states, where a prima facie case of possession is made out against a party notified to produce a paper, he may be sworn to prove the contrary. Such is the law in Pennsylvania. *Wood v. Connell*, 2 Whart. Rep. 532. But a party sworn to this purpose, cannot be allowed to testify generally as to the very gist of the cause. *Id.* In the circuit court of the U. States, held, that though the party might purge himself by swearing that he had not the paper in his possession, or had diligently searched but could not find it, yet he could not be obliged to answer whether he had not received such a paper. *Vassoe v. Miffelin*, 4 Wash. C. C. Rep. 519. Nor is he obliged to testify at all, but he generally does so in order to avoid the inferences which might otherwise be made against him. *Wood v. Connell*, 2 Whart. Rep. 562, 3. As to this doctrine in New York, see *Hammond v. Hopping*, 13 Wend. 505. But the attorney of the party may be compelled to testify. See *Rhoades' lessee v. Selin*, 4 Wash. C. C. Rep. 715, 718.

The operation of a notice to produce cannot be defeated, by the party subsequently transferring the custody of the paper to another person; for such conduct, if sanctioned, might compel the opposite party to call a most unwilling witness. Per Best, C. J., in *Best v. Osborne*, 1 Carr. & Payne, 632. *Knight v. Martin*, 1 Gow. 26. Even where the party, in good faith, lets the paper go out of his hands after notice, he ought to apprise the other party of it, so that he may know where to find it. *Jackson ex dem. Burr v. Shearman*, 6 John. Rep. 18, 21. Where notice had been given to the party, and upon a second trial, was served upon the attorney, who informed the party serving it, that the instrument had been assigned, without his privity to some one he did not know; held that the notice was insufficient without further inquiry from the party. *Leeds v. Cook*, 4 Esp. Rep. 256. See *Fury v. Smith*, 1 Hud. & Brooke, 735, 738, 9.

The party who has a written instrument in his possession and has been required to produce it, may always prevent his adversary from resorting to secondary evidence, by producing it, when wanted, on the trial. *Dean v. Carnahan*, 7 Mart. Lou. Rep. N. S. 258. But, after he has availed himself of the chance that his adversary would be unable to produce secondary evidence, and finds that his artifice has failed him, he cannot, by brining forward the instrument, exclude the use of such secondary evidence as may have been given, unless he proves the instrument himself. *Semble, Jackson v. Allen*, 3 Stark. Rep. 74.

And a party refusing, on notice, to produce a paper in his possession or under his control, and thus obliging his adversary to resort to parol or secondary evidence of its contents, cannot be allowed to contradict the secondary evidence thus given, without producing the paper itself. *Bogart v. Brown*, 5 Pick. 18. Indeed, it has been held, that a party refusing to produce a paper in his possession, called for under a notice to produce, cannot be allowed afterwards to retract and put in the paper.

give him or his attorney notice to produce it; and if when called upon at the trial, he refuse to produce it, then upon proof of the notice, and that the document is in the possession of the party or his agent, &c., (a) you may give secondary evidence of its contents. [2]

Where, upon a bill of indictment for the forgery of a deed being preferred, the grand jury stated to the judge that they were informed that the deed alleged to be forged was in the possession of the defendant, and asked whether they could return a true bill, if the deed were not produced before them; the judge (Parke, J.) told them, that if the deed, from being in the possession of the prisoner, or from any other sufficient cause, could not be produced before them, they might receive secondary evidence of its contents. (b) The case was tried at the following assizes, and upon that occasion due notice was given to the prisoner to produce the deed; it was proved that his attorney had given it in evidence in an ejectment, as part of the prisoner's title, and had afterwards received it back; and Vaughan, B., held, that on the prisoner's counsel refusing to produce the deed, this was sufficient to let in secondary evidence of its contents. (c) \*Where, upon an in- [\*139] dictment for forging a deed, it was proposed to give secondary evidence of it, upon the ground that it was in possession of the prisoner, and that he had notice to produce it; but it appearing that the notice was given since the commencement of the assizes, Parke, J., held that the notice was not sufficient, as it ought to have been given a reasonable time before the assizes; it was then proved that the prisoner, on an examination on oath upon another occasion as a witness before a magistrate, stated, that he had had the deed in question, but that thinking it of no value he burnt it; the admission of this examination in evi-

(a) See *Robb v. Starkey*, 2 Car. & K. 143.

(c) *R. v. Hunter*, 4 Car. & P. 128.

(b) *R. v. Hunter*, 3 Car. & P. 591.

[2] The rule on this subject, generally, is the same in criminal as in civil cases. See *Rex v. Watson*, 2 T. R. 201, per Buller J.; *M'Nally's Ev.* 236, 7, 8, 9; *Roscoe's Cr. Ev.* 9, et seq; *The People v. Holbrook*, 13 Johns. Rep. 90; *United States v. Britton*, 2 Mason, 464, et seq; *State v. Kinbrough*, 2 Dev. Rep. 431, 436; *State v. Gustin*, 2 South. Rep. 744, 746; *State v. Potts*, 4 Halst. 26, 28, 9, et seq.

The general rule, that where one party wishes to avail himself of a written instrument, in possession of his adversary, he must give notice to produce it as recognized in the following cases, as well as in many others cited in our succeeding notes under this head. *Waring v. Warren*, 1 John. Rep. 340. *Rogers v. Van Hoesen*, 12 id. 221. *Nicholson v. Hillard*, 1 N. Car. Law Repos. 253. *Dobbin v. Watkins*, Col. Cas. 33. *Pickering v. Meyers*, 2 Bail. Rep. 113. *Blood v. Harrington*, 8 Pick. 552. *Smith v. Morrow*, 7 Monroe's Rep. 234. *Thayer v. Middlesex Mutual Fire Ins. Co.*, 10 Pick. 326. *M'Clean v. Hertog*, 6 Serg. & Rawle, 154. *Alexander v. Coulter*, 2 id. 494, 476. *Kennedy v. Fowke*, 5 Harr. & John. 63. *Campbell v. Wallace*, 3 Yates' Rep. 271. *Jackson, ex dem. Livingston v. Frier*, 16 John Rep. 193. *Boyes v. Foster*, 1 Bail. Rep. 540. *Fraux v. Fraux*, 1 Penning Rep. 166, 7. *State v. Kimbrough*, 2 Dev. Rep. 431. *Thornton v. Moody*, 2 Fairf. Rep. 255, 6. *M'Kelly v. M'Ilhenny*, 4 Watts' Rep. 317.

dence was objected to, as being on oath, but as the prisoner at the time was not charged with this offence, Parke, J., admitted it, and held that the prosecutor was entitled to give secondary evidence of the deed: the secondary evidence offered was a copy of the deed; but as the person who made this copy said that he had never examined it with the original, Parke, J., said, that under these circumstances there could hardly be a satisfactory conviction; and the prisoner was accordingly acquitted.(a)[1]

There are some cases, however, in which a notice to produce is not necessary: first, a notice to produce a notice is not necessary in any case;(b) secondly, in larceny of a written instrument, secondary evidence of it may be given at the trial, without giving the prisoner a notice to produce the original;(c) in the same manner as in civil cases, in trover for a written instrument, the nature of the instrument may be proved, without giving notice to produce the original.(d)

The following may be the form of a

*Notice to Produce.*

Yorkshire Summer assizes, [or *Midsummer sessions for the East Riding of the county of York,*] 1852.

*The Queen against A. B.*

Take notice, that you are hereby required to produce to the court

(a) *R. v. Haworth*, 4 Car. & P. 254.

(b) See Arch. Pl. & Ev. Civ. Act. 383.

(c) *R. v. Aickles*, 1 Leach, 330.

(d) *Bucher et al. v. Jarratt*, 3 B. & P. 143.

*Hew et al. v. Hall*, 14 East, 274. Per Gibbs,

J., in *Scott et al. v. Jones*, 4 Taunt. 868.

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[1] In England, a notice to produce may be either parol or written; and if both a parol and written notice has been given, proof of either is sufficient *Smith v. Young*, 1 Camp. 440. Rosc. Ev. 4. Rosc. Cr. Ev. 10. 2 Russ. on Cr. 629, Phil. ed. 1836. But see 3 Chitty's Gen. Prac. 835.

In New York, however, a notice to produce is required, by the rules of the supreme court, to be in writing.

In most of the United States, persons interested, and even parties to the record, are competent witnesses to prove the service of notice to produce. *Jordan v. Cooper*, 3 Ser. & Rawle, 575. *Smith v. Wilson*, 1 Dev. & Batt. 40. The plaintiff was held a competent witness to prove the service of notice of the cause of action, required, by statute, to be given to a justice of the peace, thirty days before process issued. *Kidd v. Riddle*, 2 Yeates Rep. 442.

Where a notice or demand, not required to be in writing, is served upon a party by reading it from a paper, it may be proved by the person who read it without producing the writing or excusing its absence. *Blake v. Ray*, 1 Dev. & Batt. 334.

On the general question as to what notices should be in writing, it has been held, that where a statute requires reasonable notice, and prescribes no form, it need not be in writing. *Rez v. Surry*, 5 Barn. & Ald. 539. A statute directing notice to be left at a particular place, contemplates written notice. *Semble, Gilbert v. The Columbia Turnpike Co.* 3 John. Cas. 107, 109. "A notice in legal proceedings means a written notice." Said id. p. 109. See the dissenting opinion of Bronson J., 15 Wend. 428, 9, 430.

and jury, upon the trial of this indictment [*a certain, &c., describing the instrument; or if it be an alleged forgery, say, a certain paper writing, purporting to be, &c.,*] and all other letters, books, papers, and writings whatsoever, relating to the matters in question in this prosecution.

Yours, &c.,

G. H., the [*prosecutor's attorney.*]

To [*A. B. the above-named defendant.*][2]

\*This notice should be served such a reasonable time before [\*140] the trial, as will allow of the party's searching for the instrument, for the purpose of producing it;(a) and in country cases, for the assizes, it ought to be served before the commission day,(b) unless it appear that the party actually has it in the assize town at the time. Afterwards at the trial, the party giving the notice may call for the instrument or not, at his option.[1]

(a) *Simms v. Kitchen*, 5 Esp. 46. *Houseman v. Roberts*, 5 Car. & P. 394. *Hargest v. Fothergill*, Id. 303.

(b) *R. v. Haworth*, 4 Car. & P. 254. *Trist v. Johnson*, 1 Mo. & R. 259. *George v. Thompson*, 4 Dowl. 656.

[2] As to the form of the notice, it should be sufficiently specific in its terms fairly to apprise the party of the paper which he is required to bring forward. On this subject the rule applicable to notices generally, would seem to apply. See *Graham's N. Y. Prac.* 529. A notice not describing the paper sought, but in broad terms requiring the party to produce all papers relating to the bill or debt in question, has been held too vague. *France v. Lucy*, Ry. & Mood. 341. *Jones v. Edwards*, 1 McClel. & Younge, 139. See 3 Chitty's Gen. Prac. 835, 6. Conceding, however, that a notice in general terms, to produce all papers in the party's possession or under his control, relating to the matter in suit, would be held of no force or effect, yet, although the notice does not give a minute description of the paper sought, if it apprise the party that this paper is the one wanted, the object of the notice is answered, and it will be held sufficient. See per Sutherland, J., delivering the opinion of the court in *Walden v. Davison*, 11 Wend. 65, 67. Accordingly, notice to the attorney to produce a certain letter, written by the plaintiff to the defendant, concerning an execution produced on a former trial of the same cause, "and all other papers in your custody or power, relating to the matter in controversy in this cause," was adjudged sufficiently explicit to notify the attorney that the execution was one of the papers required; especially where it was shown that, on such former trial, the letter and execution were produced by the attorney himself, and he did not attempt to excuse himself from its production on the second trial, except on the ground of its not being in his possession. *Walden v. Davison*, supra.

[1] The notice must be reasonable in point of time; and whether it is so, or not, is a question exclusively for the court, upon which they are to exercise a sound legal discretion in reference to the circumstances of each particular case. Per Savage C. J. in *Utica Ins. Co. v. Caldwell*, 3 Wend. 296; per Woodworth, J., in *Gorham v. Gale*, 7 Cowen's Rep. 639. See also *M'Pherson v. Rathbone*, 7 Wend. 216; *Hammond v. Hopping*, 13 Wend. 505, 508, 9, per Sutherland, J.

In *Drabble v. Donner*, (Ry. & Mood. N. P. Rep. 47,) a notice to produce letters written by the plaintiff to the defendant, who was a foreigner, was held sufficient when served four days before the trial, though the defendant had come into the country only seven months before, not designing to change his residence, and though the letters were written eighteen years back, and were addressed to the defendant at his foreign domicile. The court did not pretend that the notice was sufficient to enable the party to obtain the papers from his resi-

*(h) By Dying Declarations.*

In trials for murder or manslaughter, the dying declaration of the deceased, as to the prisoner's guilt, the infliction of the injury, &c. made at a time when he was perfectly aware of his danger, and entertained no hope of his recovery, is receivable in evidence in proof of the indictment,—the consciousness of the near approach of death being deemed equivalent to the sanction of an oath. Therefore, as a foundation for such evidence, expressions or actions of the deceased, indicating the sense he entertained of his danger,<sup>(a)</sup> or circumstances from which the same may be collected<sup>(b)</sup> must first be proved, in order that the court may judge whether the deceased, at the time he made the declaration, was in that awful state of certainty as to his approaching dissolution, which the law treats as equivalent to the solemn sanction of an oath. And it is for the court to judge of this, not the jury; for it is the court that has to decide whether the evidence is receivable.<sup>(c)</sup>[2]

(a) *Tinkler's case*, 1 East, P. C. 354. 358.

(b) 1 East, P. C. 354. *John's case*, Id. 357, (c) *John's case*, *supra*.

dence, but went upon considerations of the inconvenience and delay which would be occasioned, unless inferior evidence were received under such circumstances. S. C. 1 Carr. & Payne, 188. The English cases, however, generally require that notices to produce should be served in such season as will afford the other side a reasonable opportunity of obtaining the paper. See *Atkinson v. Carter*, 2 Chitty's Rep. 403. *Brown v. Waters*, 1 Mood. & Malk. 235. *Sims v. Kitchen*, 5 Esp. Rep. 46. *Houseman v. Roberts*, 5 Carr. & Payne, 394. A cause was tried on Wednesday morning at the assizes; on the previous Monday evening the defendant's attorney, being at the assizes town, and nineteen miles from his office, was served with notice to produce a paper, which would probably be at his office; held, that the service was too late. *Harget v. Fothergill*, 5 Carr. & Payne, 303. Notice was given to the attorney, at Billericay, in Essex county, to produce certain deeds, who went to London and obtained them; afterwards, and on Monday preceding the day of trial, which was appointed for Wednesday, a fresh notice was given to the attorney to produce another deed; the attorney stated to the person who served the notice that he had not the deed, but that if the adverse party would pay the expense of sending a messenger for them to London, it should be had: this offer not being complied with, the court held the notice insufficient, and that secondary evidence could not be given. Otherwise, however, it seems, if the party had offered to pay the expense of sending. *Doe, ex dem. Curtis v. Spitty*, 3 Barn. & Adol. 182. A prisoner tried at the assizes on Wednesday for setting fire to his house with intent to defraud an insurance company, was, on the Monday preceding, served at the prison with notice to produce the policy of insurance given him by the company; the prisoner's home was ten miles from the prison; and held, that the prisoner could not be presumed to have the policy in his possession at the prison, and as the trial might have come on at an earlier period, the notice was not sufficient to let in secondary proof. *Rex v. Ellicombe*, 5 Carr. & Payne, 522. And it has been laid down generally, that a notice to produce, served upon a prisoner, after the commencement of the assizes at which he is to be tried for felony, is too late. *Rex v. Howarth*, 4 Carr. & Payne, 254. It should be given a reasonable time before the assizes. Id. When the party does not live at the assize town, it should be served before the commission day. 1 Mood. & Rob. 259. Rosc. Cr. Ev. 11.

[2] The deceased was robbed, and stabbed in several places, one of which was his bowels. He became so weak that he was brought into the city on a litter, where a surgeon dressed

Where an apothecary, upon being called in to a woman, and seeing she was in a dying state, pressed her to say what she had done, for she

his wounds, and he died in a few days after. The surgeon deposed that one of the wounds received by the deceased was such as generally proved mortal. The expressed opinion of the deceased, as to his expectation of death, was not in evidence, nor the opinion of his surgeon, as given to him; yet, from the palpable danger of the case, the court inferred his apprehensions of death, and received his dying declarations, giving an account of the robbery. *State v. Monaguas*, Charl. Rep. 16. But in another case, although the wound was quite dangerous, and plainly so, a large portion of the entrails being out, which were badly cut and wounded, the surgeon believing from the first that the deceased could not live, the court hesitated to receive the declarations of the deceased, till a witness had deposed to his expression of an opinion that he should not live. *King v. Com.*, 2 Virg. Cas. 78, 80, 81. And in another case, where the deceased was wounded, and died the next day, nothing appearing as to his opinion of his own danger before the declarations were made, they were held inadmissible. The court said, "Declarations of a dying man have sometimes been received; but then they must be the declarations of a dying man, of one so near his end that no hope of life remains; for then the solemnity of the occasion is a good security for his speaking the truth, as much so as if he were under the obligation of an oath. But if, at the time of making the declaration, he has reasonable prospects and hope of life, such declarations ought not to be received; for there is room to apprehend he may be actuated by motive of revenge and an irritated mind, to declare what possibly may not be true." *The State v. Moody*, 2 Hayw. 31. In another case, the deposition of the deceased was taken immediately after he had received a dangerous wound; but he did not plainly mention, even to his most intimate friends, that he thought there was no chance for his recovery, till three days after. The court deeming it doubtful, on the testimony, whether, within the three days, he felt morally certain that he must die, refused to hear any of his declarations except those made after that time. *The People v. Anderson*, N. Y. O. & T., Edwards, C. J., presiding, A. D. 1824; 2 Wheel. Cr. Cas. 390, 398. It is put by Evans, that the despair of the deceased may be inferred from his declarations contemporary or previous to the statement proposed as evidence to the jury, or from his situation being such as necessarily to induce that impression. 2 Ev. Poth. 293, 294; and see *Trant's case*, Macnally's Ev. 385.

Before the judge decides, he hears all the deceased said respecting the danger in which he considered himself; and he should be satisfied that the declaration was made under an impression of almost immediate dissolution. It is not enough that the deceased thinks he shall ultimately never recover. Thus, the deceased being operated upon by a quack surgeon with a recum bougie, (May 10th,) by which he received an injury, took to his bed, and died in about a week, (May 17th.) On the evening of the 10th, he had declared to L., a regular surgeon, that he had had such an injury in the bowels that he should never recover. The surgeon endeavored to encourage him, really thinking him not in danger of dying; but he persisted in saying he felt satisfied he should never recover. Hullock, B., rejected the proposed declaration as evidence against the quack, who was indicted and on his trial for manslaughter. *Rex v. Van Butchell*, 3 Carr. & Payne, 629; and see *Rex v. Callaghan*, Macnally's Ev. 385.

On the trial of an indictment for the murder of Jane White, by administering corrosive sublimate, her surgeon testified thus: "I told the deceased she would not recover, and she was perfectly aware of her danger. I told her I understood she had taken something. She said she had, and that damned man had poisoned her. I asked her what man, and she said Crockett. She said she hoped I would do what I could for her, for the sake of her family. I told her there was no chance of her recovery." Bosanquet, J.: "This shows a degree of hope in her mind. To render a declaration of this kind admissible, she must have had the impression on her mind of an almost immediate dissolution." *Rex v. Crockett*, 4 Carr. & Payne, 544.

The surgeon was clear that the deceased was mortally wounded, on first seeing him; and the deceased told the surgeon he thought so, and expressed a consciousness that he should

could not live twenty-four hours unless proper relief was afforded to her, and she then told him what she had taken and who gave it to her ;

not recover to several witnesses, and was constantly at prayer in the intervals of being easier from pain. His declarations, after this proof given, were received against the prisoner, though, to the witness who heard them, the deceased made use of expressions indicating an expectation of surviving; as that if his brother (the prisoner) would go off, where he would never more be heard of, he, the deceased, would forgive him; and the witness thought the deceased then expected to live. The declarations received against the prisoner were made a few hours after the surgeon had dressed the wound and given the deceased his opinion that he would die, and after the deceased had expressed the same opinion to another witness. *Gibson v. Com.*, 2 Virg. Cas. 111, 116, 117.

Immediately, and on the evening after being wounded, which was eleven days before his death, the deceased declared to his nurse that he was robbed and killed, and could not get the better of it, and persevered in these and the like declarations to her till his death, though a surgeon was called to him the evening after the wound, who gave him hopes of life till just before his death: but he told him there was danger. He did not express a consciousness that he must die, to the surgeon. Held, that his declarations as to the facts attending the homicide, made eleven days before his death, after the declarations to the nurse, and his declarations as to the homicide made subsequently, were admissible in evidence, though they were made before the surgeon told him his state was hopeless. *Rez v. Morely*, Ry. & Mood. Cr. Cas. 97.

On the trial of an indictment against Poll, a domestic of S. Skinner, for poisoning him, it was in evidence that he died on Thursday; and his declarations from the Sunday previous, up to his death, were offered in evidence for the state. During that interval, he was evidently sick from the effect of poison, and stated his belief that he should die, though he was occasionally better. He said he was poisoned; and, as he believed, by Poll, who gave him something in his food and drink. His declarations were held admissible, being made at times when he despaired of a recovery. *State v. Poll and Lavina*, 1 Hawks, 442, 518, 519. But the court do not mean to be understood as sanctioning the declaration of *belief* as to the person poisoning, as proper evidence.

In one case, the deceased, though she had not expressly intimated a word of apprehension to her aunt, who attended her, or any other person, yet detailed shocking circumstances concerning a rape which had been committed upon her, and soon after died of the injury. It appearing that she had, previous to this detail, confessed, been absolved, and received extreme unction from a priest, this was considered sufficient evidence that she had given herself up to die soon; and the declarations were received. *Rez v. Minton*, Macnally's Ev. 386.

These declarations, made antecedent to the stroke which caused the death, are of course not admissible. *Maryland v. Ridgley*, 2 Harr. & M'Hen. 120.

Various other questions of competency may doubtless arise, after the court shall have determined favorably upon the witness' condition. If the statement come from the deceased as mere matter of opinion or belief, (*State v. Poll*, *supra*, 2 Ev. Poth. 293; 4 Stark. Ev. 461,) it would be inadmissible. So, if the deceased be disqualified by conviction of an infamous crime, his declarations cannot be heard. Indeed, he is to be treated, not only in respect to competency, but (as we shall see) credibility, the same as a witness proposed to be sworn upon the stand. But it has been held not an unqualified ground for excluding the declarations, that they are answers to leading questions. Where the deceased lay, the greater part of the interval between the wound and his death, unable to speak at all, and when able, only to utter a word or two, he was asked, Did P. V. (the prisoner) strike you first? to which he answered yes, sir; Did P. V. stab you? to which he answered yes, sir; these declarations were held admissible. *Vass v. Com.*, 3 Leigh, 786. He was immediately asked a fourth question, which he was unable to answer; but it not appearing that the other answers were intended to be qualified by him, in which purpose he was interrupted, they were received, though it would have been otherwise, had this appeared. *Id.*

but at that moment she was a good deal relieved from pain, which the apothecary attributed to mortification, and in fact she died in an hour afterwards; the judges thought that it did not sufficiently appear that she was conscious that she was in a dying state when she made this declaration; on the contrary, she seemed to think that if she told what she had taken, she might have relief and recover; they therefore held that the declaration ought not to be received.<sup>(a)</sup> In a similar case, where a surgeon told the deceased that she would not recover, and she was aware of her danger, but said she hoped he would do what he could for her for the sake of her family; from the expression of hope, *\*Bosanquet, J.* held, that a declaration made by her [\*141] at the time, could not be received in evidence; that to make such a declaration evidence, it must appear that the deceased had the impression on her mind of almost immediate dissolution.<sup>(b)</sup> But if the declaration be made under such an impression, the fact of the party afterwards living for some days, will not affect the admissibility of the evidence;<sup>(c)</sup> and on the other hand, if the deceased had not at the time that impression, his declaration is not evidence, although he may have died in an hour after making it.<sup>(d)</sup> Where the deceased was a child of only four years old, *Parke, J.* held her dying declarations not to be evidence, because from her tender age it was impossible she could entertain that idea of a future state, which is necessary to make such a declaration admissible.<sup>(e)</sup>[1]

(a) *Welbourn's case*, 1 East, P. C. 358.

(b) *R. v. Crockett*, 4 Car. & P. 544.

(c) *R. v. Bonner*, 6 Car. & P. 386.

(d) *Welbourn's case*, *supra*.

(e) *R. v. Pike*, 3 Car. & P. 598.

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[1] The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced, by the most powerful considerations to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath, administered in a court of justice. Per *Eyre, C. B.* 1 *Leach*, 202, in *Woodcock's case*.

The subject of dying declarations, and the cases in which they are admissible in evidence, have been already mentioned. As it is necessary that the party making them should not only be in actual danger, but aware of it, and without expectation of recovery, justices visiting persons who have been wounded or beaten so as to endanger their lives, should see that they are made fully aware of their dangerous state, and should impress upon them the solemn and awful nature of their situation, and the religious obligation resting upon them to speak the truth without anger or passion of any kind. *Smythe*, 236. And not only for the purpose of ascertaining the party's sense of his danger, but also the degree of his observation and recollection, the evidence as to which may afterwards materially affect his declaration, the most minute attention will be necessary. The very sense of danger, while it induces an obligation to speak the truth, may agitate and weaken the understanding, and the confusion and surprise connected with the object of the declaration, and the decay of nature necessarily resulting from a mortal injury, tend to impair the distinctness of the memory and perception, and may lead to a statement which, however sincere, may be fatally erroneous. *Pothier*, by *Evans*, 293; *Phil. Ev.* 305.



These dying declarations must not be confounded with the depositions taken by a justice of the peace, in writing, upon oath, in the pre-

A dying declaration is properly taken without oath, even when made before a magistrate; nor, in fact has the magistrate, thus acting, extra-judicially, any authority to administer such an oath. 1 Leach, 503; 4 Black. Com. 137; 1 Nun. & Walsh. 365. The declaration, however is not inadmissible because it was made under the additional, although useless, obligation of an oath thus extra-judicially administered. 2 Stark. Ev. 458, 459; Phil. Ev. 302; 1 Leach, 500.

In taking a dying declaration, the presence of the accused is unnecessary, and the necessity of cross-examination is dispensed with, from the supposed absence of any motive for falsehood, in the party making the declaration. 1 Phil. Ev. 235; 2 Stark. Ev. 461; 1 id. 101. It is no objection in point of law, to a declaration, that it was made in answer to questions; though solicitations naturally weaken the effect of the evidence. 7 Car. & P. 238; 1 Leach, 503; 1 Str. 499.

The declarant should not be bound over to prosecute; for although that may be said to be the act of the magistrate rather than of the party, still his submitting to be bound creates a presumption inconsistent with an expectation of immediate dissolution, on the part of the declarant. 1 Nun. & Walsh. 365; *Rex v. Crawley*, 1 Craw. & Dix. C. C. 243.

It has been already stated that dying declarations need not necessarily be reduced to writing. But as such declarations, when depending on fallible memory, and verbally reported, are liable, as other statements, to be misunderstood or misreported, it is said to be usual, and should never be omitted when circumstances and the situation of the party will permit, to reduce the declaration to writing, for greater precision, and this should be done at the time it is made, and in the very words, or as nearly as possible in the words of the declarant; and it should be read over to him in order to ascertain that it is correct.

The same principles of law are applicable to the contradictory statements of persons in *extremis*, as to those of a witness under examination on oath. *M'Pherson v. State*, 9 Yerger, 279. Where the court below charged the jury, "that if they found that the deceased in her dying declarations made contradictory statements, that they were not to be governed by the rules of evidence in relation to contradictory statements made by a witness," it was held that this charge was erroneous. *Ibid*.

It seems that evidence is admissible, on part of the defence, to impeach the character of the deceased for truth; he standing on the same footing as a witness called into court and there examined; and, in one case, where the dying declarations of the deceased were admitted to show that the defendant, with intent to produce on her an abortion, had administered to her oil of tansy, which was the cause of her death, the defendant was allowed to show that she was considered a woman of loose character and light reputation. *People v. Knapp*, per Edmonds, J., MSS.; see *Carter v. People*, 2 Hill's N. Y. R. 317. It has been held, however, that it is not competent for the prisoner to prove that before the affray the deceased had expressed a violent hatred to him, and a disposition to do him injury, or that he was very hostile to him. *State v. Varney*, 8 Boston Law Reporter, 562.

Where dying declarations, made under the belief of impending death, are inconsistent with each other, it is the duty of the jury to weigh them, and to determine which or whether either is to be believed; and if the charge of the court takes this duty from them, or if the court undertakes to determine these questions, it is error. *Moore v. State*, 12 Ala. 764.

To the principle that, in order to render these declarations *in articulo mortis* admissible, they should come from a witness who would be competent if on the stand, may also be cited the case of *Rex v. Pike*, (3 Carr. & Payne 598.) In this case the declarations were made by a child only four years old to her mother, and held inadmissible because so young a person could not have had that idea of a future state which would render her competent. On the other hand, upon the principle that the wife may testify in respect to violence by her husband committed against her person, if homicide be imputed as the result of such violence, her dying declarations are receivable. *Pennsylvania v. Stoops*, Addis. 381. *Woodcock's case*, Leach, 3rd ed. 503, S. P.

sence of the accused, from a person really in a dying state, and who dies shortly after; for in that case, the deposition is receivable in evi-

After the testimony shall have been received as competent, its credibility is yet fully open to the observations of the counsel and the court, and the consideration of the jury. An Irishman and his wife were seen riding in a wagon, he striking her with a stick. On stopping after a few miles, the wife was taken ill, and died within a few hours, having declared that her husband had, by flogging her, caused her death. She expressed a confidence that she must shortly die, and an anxiety that her husband should be pursued and punished. The declarations of the deceased were received against the husband on the trial, for the murder of his wife, and the jury convicted him. On his case being presented to the governor, (Throop,) and on his excellency conferring with his judicial council, the prisoner's sentence was, on a question of law, commuted for punishment in the state prison, as for manslaughter in the first degree. But the council also expressed themselves dissatisfied with the declarations, as probably indicative of a quarrel, hard feeling, and perhaps malice on the part of the deceased, and would, most likely, have recommended an absolute pardon, had it not been for other strong evidence in the cause, which was nearly able to sustain the conviction of itself. *The People v. Mason*, Saratoga oyer and terminer, Nov. 1831, Cowen, C. Judge, presiding.

In making up their minds on the credibility of these declarations, the jury have been allowed to travel over the same ground which the court had occupied in seeing whether it was competent. *Trant's case*, Macnally's Ev. 385. Sir W. D. Evans, (2 Ev. Poth. 294, supposes that in *John's case*, (1 East's P. O., c. 2, § 24,) the judges meant to deny this right, when they declare that it ought not to be left to the jury to say whether the deceased thought she was dying or not. Perhaps that was said, though the expression is certainly quite general, with a view to the question of competency merely. It was very strong to say that the jury might not finally conclude and the deceased labored under no apprehension of death, when they came to measure her credibility; and we should think, with the learned commentator, (2 Ev. Poth. 295,) that it is without the support of analogy. Though the court should receive a witness as competent in his religious principles, yet he might, it is presumed, be so far impeached as to destroy all credibility, and warrant the jury finally in saying that he was destitute of religious principle. So should the expectation of death appear, on the whole to have been affected for the purpose of revenging a quarrel in the pursuit of the offender, might not the jury make great deductions from credibility, though competency had before been *prima facie* made out? Other considerations are also due to this question of the declarant's credibility. "Strongly as his situation is calculated to induce the sense of obligation, it must also be recollected that it has often a tendency to obliterate the distinctness of his memory and perceptions; and, therefore, whenever the accounts received from him are introduced, the degree of his observation and recollection is a circumstance which it is of the highest importance to ascertain. Sometimes the declaration is of a matter of judgment, of inference and conclusion, which, however sincere, may be fatally erroneous; the circumstances of confusion and surprise, connected with the object of the declaration, are to be considered with the most minute and scrupulous attention; the accordance and consistency of the fact related, with the other facts established by evidence: is to be examined with peculiar circumspection, and the awful consequences of mistake must add their weight to all the other motives for declining to allow an implicit credit to the narrative, on the sole consideration of its being free from the suspicion of wilful misrepresentations." 2 Ev. Poth. 293.

Mr Starkie, after quoting these remarks of Sir Wm. D. Evans, with approbation, adds, "that this seems to be the only instance in which evidence is admissible against a prisoner who has not had the power to cross-examine, an anomaly, which in itself calls for great caution and circumspection in the use and application of such evidence. Finally, it has never been received except in cases of murder, where if the dying person were certain as to the author of the violence; yet in the case of a quarrel and conflict, he might be under a strong temptation to give a partial account of the transaction, although all motives of personal hos-

dence under stat. 11 & 12 Vict. c. 42, s. 17, as the deposition of a deceased witness, and it is wholly immaterial whether the witness, at the time he made it, was aware of his danger, or entertained any apprehension of death.<sup>(a)</sup>

## SECTION II.

### WRITTEN EVIDENCE.

#### *(a) Acts of Parliament.*

Public acts of parliament are never proved, as all judges are bound judicially to take notice of them; and therefore, when we see a copy of a public act of parliament, printed by the Queen's printer, used upon a trial, we must consider it, not as evidence, but used merely to aid the judge's recollection. And the same of all local acts, containing a clause either making them public acts, or directing the judges to notice them judicially.[2]

*(a) See Radbourne's case, 1 East, P. C. 356.*

tility had ceased. In other cases, it is far from improbable that he would attribute the fact to some person whom he suspected to be his enemy, when, if his grounds for supposing so could have been investigated, they might have turned out to be very unsatisfactory."

[2] By the revised statutes of New-York, the state printer is required to publish forthwith, in the state paper, every certified copy of a law which shall be delivered to him by the secretary of state for that purpose. 1 R. S. 183, § 6. The state printer is to furnish a proof of every law so published, to the secretary of state, to be by him revised and corrected. Id. § 7. And every law, so published, may be read in evidence from the paper in which it shall be contained, in all courts of justice in the state, and in all proceedings before any officer, body, or board, in which it shall be thought necessary to refer thereto, until three months after the close of the session in which it became a law. Id. § 8. All laws passed by the legislature, may be read in evidence from the volumes printed by the state printer. Id. 184, § 12. By an act of Dec. 10th, 1828, it is made the duty of the revisors, or any two of them, to certify the revised statutes to have been examined and compared by them with the original acts, and with the acts amending such originals; and to deposit a copy so certified, in the office of the secretary of state, which shall be conclusive evidence of such statutes. 2 R. S. 778, § 13. The certificate is required to be printed in each copy of the revised statutes, under the direction of the revisors; and every copy so printed by the printers employed for that purpose, in which such certificate shall be inserted, is allowed to be read in evidence. Id. § 14. By an act passed April 19th, 1830, (L. N. Y. session 53, p. 285, § 1,) it is provided, that any person or persons in the state, may print and publish the whole, or any part of the revised statutes, but to entitle a copy of a law so published to be read in evidence, there must be contained in the same book or pamphlet, a certificate of the revisors, that such a copy is a correct transcript of the text of the revised statutes, as published, except such typographical errors in the original as may be corrected in such copy, and except such parts as shall have been altered by acts of the legislature; and that with respect to such parts, it conforms to the acts by which such alterations shall have been made. A copy of any of the statutes of

Private acts, or local and personal acts, not containing any such clause may be proved, either by an examined copy of the inrolment,—or by

New-York, certified by the secretary of state, and authenticated by his seal of office, would doubtless be good evidence of the existence of such statute. See 1 R. S. 166, §§ 1, 4.

By the Constitution of the United States it is provided that, "full faith and credit shall be given, in each state, to the public acts, records and judicial proceedings of every other state." And congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." By the acts of congress of 1790 and 1804, this provision is carried into operation.

Legislative acts are to be authenticated by the great seal of the state, and the certificate of the secretary. Judicial records are to be authenticated by the attestation of the clerk, the seal of the court, and the certificate of the presiding judge that the attestation is in due form. All other office records are to be authenticated by the attestation of the keeper thereof, with his official seal, if he have any, and the certificate of the presiding judge of the proper court, or the Governor or secretary of state, that the attestation is in due form of law; which certificate, if given by a judge must be accompanied by the certificate of the clerk, under the seal of the court, that the judge is duly qualified and commissioned; otherwise it must be under the great seal of the state.

By the acts above referred to, congress has declared that they shall have, in every state and territory in the Union, the same faith, credit, form and effect, as they have by law or usage, in the state or territory from which they are taken. By this provision, however, it is not to be understood that the laws of one state are binding in another, unless made so by the latter.

The acts of congress are published, by authority, as directed by law in certain newspapers, printed in different places, throughout the Union; and in pamphlets, issued yearly, containing the laws passed at each preceding session. They are to be found in various compilations and digests published by individuals; and which are admitted as evidence in courts of justice; as Gordon's Digest, Ingersoll's Digest, Story's Digest.

In the several states provision is made by law for publishing the laws of the states respectively, in annual pamphlets, containing the laws enacted in the particular year; in particular newspapers; and, in some of the states in compilations of all the laws of a state, made as prescribed by act of the legislature.

A printed pamphlet containing legislative acts not authenticated by the seal of the state, is not evidence in another state, under the act of congress. 1 Peters' Rep. 352.

When the great seal of a state is affixed to an exemplification of an act of the legislature, the attestation of a public officer is not required, under the act of congress. 4 Dall. 413, 416.

A copy of an Act of Assembly of another state, contained with other acts in a pamphlet, printed by the printers of the commonwealth, was held to be good evidence. 1 Dall. 462; 6 Binn. 321.

Copies of the laws of Pennsylvania, printed under the authority of the legislature, are evidence in this state, whether the laws be public or private. 6 Binn. 321.

The written or statute laws of foreign countries must be proved by the laws themselves, if they can be procured; if not inferior evidence of them may be received. Unwritten laws or usages may be proved by parol evidence, and when proved, it is for the court to construe them, and to decide upon their effect. 1 Peters' Rep. 225, 229; 15 Serg. & R. 87.

And it lies upon the party objecting to parol proof, to show that the law was written. 15 Serg. & R. 87.

In Pennsylvania, a copy of the laws published annually by the authority of the legislature is evidence of the statutes contained in it, whether they be public or private. 2 Watts & Serg. 156.

Printed books professing to be the statute laws of a sister state are admissible as *prima facie* evidence of the laws of that state. 2 Pa. State Rep. 85.

The rule, in New York and Pennsylvania, with respect to foreign laws, is that their exis-

a printed copy, purporting to be printed by the Queen's printer, or the printers of either house of parliament, without further proof.<sup>(a)</sup> So the statutes of Ireland, previous to the union, may be proved in the courts in this country, by the copies printed and published by the Queen's printer.<sup>(b)</sup>[3]

(a) 8 & 9 Vict. c. 113, s. 3.

(b) 41 G. 3, U. K. c. 90, s. 9.

tence is to be proved as other facts; no presumption is to be made in regard to them. In Massachusetts it was decided that an offence at common law was presumed to be against the law of New York. 1 Pick. 415.

The public seal of a state, affixed to the exemplification of a law, proves itself; it is a matter of notoriety, and will be taken notice of as a part of the law of nations acknowledged by all. 7 Shep. 299.

A judicial record can only be proved by itself or a legally certified copy. 4 Pike's Rep. 129.

The legal mode of authenticating a state law is by the state seal. 3 Harring Rep. 77.

The seal of another state affixed to a copy of an act of its legislature, for the purpose of authenticating the same, pursuant to the act of congress prescribing the mode of authenticating the public acts of the several states, proves itself, and imports absolute verity, and it is presumed, until the contrary appears, to have been affixed by the proper officer. Per Bronson, C. J., 1 Denio's Rep. 376; New York.

Printed statute books of another state, purporting to be published by the authority of that state, are *prima facie* evidence of the statutes they contain; in Indiana, 5 Blackf. 375; in Mississippi, 1 How. Miss. Rep. 220; in Missouri, 8 Miss. Rep. 421; in Alabama, 9 Port. 9; in Kentucky, 7 Monr. 576.

The printed Statute laws of other states are not evidence, in Delaware, without other authentications. 2 Harring. 34. So also in North Carolina. 2 Hawks, 441.

A digest of the laws of another state, published by a private person is not admissible as evidence of the law. In Delaware. 3 Harring. 77.

The written laws of a sister state cannot be proved by parol. 5 Blackf. 375.

A volume of statutes, purporting to be the statutes of a sister state, cannot be proved to be such by the testimony of an attorney or counsellor of that state. They must be proved as directed by act of congress, or at least by a sworn copy. 3 Harring Rep. 184. Delaware.

Where a defence is based upon the provisions of a statute of another state, in order to make the defence available, the statute must be produced and proved. 6 Smedes & Marsh. 44. In Mississippi.

The printed copies of the acts of congress, transmitted to the executives of the several states, to be distributed among the people, are proper evidence of the statutes therein contained without other authentication. 5 Leigh. 471.

[3] In Viner's Abr. vol. 12, p. 81, it is stated, that "a private act, printed among the public acts, hath been allowed in evidence." The general rule, however, in England, is the other way, and the usual proof is by means of a copy, proved upon oath to have been examined with the parliament roll. A private act may also be proved by an exemplification under the great seal. 1 Starkie's Ev. 176, 177, 6th Amer. ed. Bull. N. P. 225. Roscoe's Ev. 53.

In Pennsylvania, a printed volume purporting to have been printed by Francis Bailey, under the direction of T. M. Thompson, secretary of the commonwealth, pursuant to a resolution of the legislature, has been held good evidence of a private act. *Biddis v. James*, 6 Binn. Rep. 321. Indeed, the distinction in this respect, between private and public acts, has there been entirely abolished. *Id.* 326, 7. See also *Kean v. Rice*, 12 Serg. & Rawle, 203; *Thompson v. Musser*, 1 Dall. Rep. 462.

(b) *Other records.*

Records of any of the Queen's courts at \*Westminster, may [\*142] be proved by an examined copy, that is to say, by a copy that is sworn to be a true copy by a person who examined it with the original. And where an office copy was thus sworn to be examined with the original, but it appeared to have a number of contractions and abbreviations in it, "pnl este," for personal estate, and the like,—it was holden that it could not be given in evidence as a copy.(a) So, the record of an indictment at the assizes or sessions, may be proved by an examined copy; or the record itself, if in the court, may be produced. And for this purpose the record must be made up; for the indictment itself cannot be given in evidence;(b) nor can you prove the sentence that has been passed upon a party indicted, in any other manner than by the record or an examined copy of it.(c) So, to prove an order of a court of quarter sessions, the record must be made up; and it is then proved by an examined copy, or by the production of the record itself. Where the sessions book was produced in such a case, but the clerk of the peace said he would have made up the record on parchment if it had been bespoken, Parke, J., refused to receive the book as evidence.(d) But on the other hand, where the entry of the order in the sessions book had a regular caption, and was in the present tense, and in every other respect as a record, and it was proved that no other record ever was made up, the court held that the book was legal evidence of the order.(e) So, a conviction before a magistrate is proved by an examined copy;(g) or the conviction may be produced.

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| (a) <i>R. v. Christian</i> , Car. & M. 388.   | (d) <i>R. v. Ward</i> , 6 Car. & P. 366.             |
| (b) <i>R. v. Smith et al.</i> , 8 B. & C. 341. <i>R. v. Thring</i> , Ry. & M. 171, 5 C. & P. 507. | (e) <i>R. v. Yeovley</i> , 8 Law J. 9 m.             |
| (c) <i>R. v. Bourdon</i> , 2 Car. & K. 366.   | (g) See 5 Car. & P. 38. 1 Arch. P. A. 546. 2 Id. 70. |

So, it seems, in the supreme court of the United States; and there, also, a printed volume, purporting to have been printed *by authority*, in Virginia, has been deemed evidence of a private act. *Young v. The Bank of Alexandria*, 4 Cranch, 387, 8. See also *United States v. Johns*, 4 Dallas' Rep. 412; 1 Wash. C. C. Rep. 363, S. C.

Whether such is the doctrine in Vermont, *quere*: (see *Pearl v. Allen*, 1 Tyl. Rep. 311, 313.

In Kentucky, the courts will judicially take notice of private as well as public acts, without their being formally proved in any way. *Halbert v. Skyles*, 1 Marsh. Ken. Rep. 368, 9. *Farmers and Mechanics Bank v. Jarvis*, 1 Monroe, 4, 5.

In Massachusetts, the printed book of the printers to the general court, has been held not admissible as evidence of a private act. An exemplification seems there to be necessary. *The Proprietors of the Kennebeck Purchase v. Call*, 1 Mass. Rep. 483.

In New York, also, the general rule was formerly admitted to be, that the printed statute book could not be used as evidence of private acts. But the rule was held not to apply, where the party against whom the evidence was adduced, was the individual for whose benefit the act was passed. *Duncan v. Dubois*, 3 John. Cas. 125. But now, by statute, *all laws passed by the legislature may be read in evidence from the volumes printed by the state printer.* 1 R. S. 184, § 12.

And if it recite the information, such examined copy or original will be evidence of that also.(a)[1]

(A) 5 Car. & P. 38.

[1] Whether an instrument produced is in truth a record or not, has been held to be always open to inquiry. Thus, in *Brier v. Woodbury*, (1 Pick. Rep. 362,) parol evidence was admitted to show that an execution which was returned and filed, had been fraudulently altered, by inserting a direction to a constable. "It cannot be doubted," says Parker, J., delivering the opinion of the court, "that any thing produced as a record may be shown to be forged or altered; if it were not so, great mischiefs might arise. A record is conclusive evidence, but what is or is not a record is matter of evidence, and may be proved like other facts." *Id.* And if words have been struck out of a record so as to render it erroneous, witnesses may be examined to show such words were improperly struck out; but not to falsify the record by showing that an alteration, whereby the record was made correct, was improperly made. 2 Ev. Poth. 164. *Dickson v. Fisher*, 1 Bl. Rep. 664. 4 Burr. 2267, S. C. *Adams v. Betz*, 1 Watt's Rep. 425, S. P.

A minute book in which an entry is made of the proceedings of the quarter sessions, and from which the roll, containing the record, is subsequently made up, is not a record, nor in the nature of a record, so as to be admissible evidence to prove the facts there stated. *Rex v. Bellamy*, Ryan & Mood. N. P. C. 171. Roscoe's Ev. 54. Roscoe's Crim. Ev. 154. See *Cooke v. Maxwell*, 2 Starkie's N. P. Rep. 183. Where, in order to prove an allegation that an indictment for felony had been preferred, the indictment itself, (which was in another court) indorsed, "a true bill," was produced by the clerk of the peace, together with the minute book of the proceedings at the sessions at which the indictment was found; the king's bench held, that it was inadmissible, though no record had been made up; and that to maintain the allegation, the record should be regularly drawn up, and an examined copy produced. Such, said Lord Tenterden, has always been the practice. And per Bailey, J., the record itself, or an examined copy, is the only legitimate evidence. *Rex v. Smith*, 8 Barnw. & Cress. 341. Roscoe's Ev. 54. Roscoe's Crim. Ev. 154. So, an allegation that the grand jury at the sessions found a true bill, is not proved by the bill itself, with an indorsement upon it, but a record regularly drawn up must be produced, or an examined copy of it. *Porter v. Cooper*, 6 Carr. & Payne, 354. Roscoe's Crim. Ev. 154. On an indictment for perjury, in order to prove the allegation that an appeal came on to be heard at the sessions, the sessions-book was produced by the deputy clerk of the sessions: on objection being made, the deputy clerk was asked, whether, on being applied to, he would have drawn up the record of the appeal on parchment, as if he were making a return to a *certiorari*, to which he answered in the affirmative: it was then stated by the clerk of the assize, that at the assizes, the judgment roll is not the record; but that from it, and from the indictment, a record can be made up. And per Park, J.: "I am of opinion the objection is fatal. There is certainly a great difference between the case of an indictment and that of an appeal; yet still an appeal is a matter before a court of record, and we ought to consider the importance of having the proper evidence: for if it was not heard before a court of competent jurisdiction, perjury cannot be omitted on the hearing of it. The defendant must be acquitted. *Rex v. Ward*, 6 Carr. & Payne, 366. So in *Rex v. Thring*, (5 Carr. & Payne, 507,) the prisoner was indicted for perjury committed at the quarter sessions, and to prove that the proceedings alleged were had before the sessions, the minute book was produced by the officer of the sessions. Gurney, B., inquired if the record was made up on parchment, and was answered in the negative by the counsel for the prosecution, who added, that it was not considered necessary. Gurney, B.: "The minute book of the court of quarter sessions is not evidence. The record should be made up on parchment, and then an examined copy of it would be evidence."

A plea of *autre fois convict* must be proved by the record regularly made up; and the indictment with the finding of the jury, indorsed upon it by the proper officer, is not suffi-

To the above rule, that indictments and convictions must be proved by the record or an examined copy, however, there are the following exceptions:

1. As proof of indictments against a person sentenced to transportation, for being at large before the expiration of his sentence, or against a person for rescuing or attempting to rescue him, it is enacted by stat. 5 G. 4, c. 84, s. 24, that the clerk of the court or other officer having the custody of the records of the court where such sentence or order of transportation shall have been passed or made, shall, at the request of any person on His Majesty's behalf, make and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender, and of the sentence or order for his or her transportation, (not taking

cient. *Rex v. Bowman*, 6 Carr. & Payne, 101. See the case of *The State v. Benham*, 7 Conn. Rep. 414. In *Tboke's case*, (25 How. St. Tr. 446.) the minutes of the court were received to prove the acquittal of Hardy. This case is distinguished by Lord Tenterden from the foregoing, on the ground that the matter proved by the minutes occurred before the same court, sitting under the same commission. *Rex v. Smith*, 8 Barnw. & Cress. 341. When the proceedings of inferior courts are sought to be proved, inasmuch as their proceedings are not usually made up in form, the minutes will be admitted, if they are perfect and omit nothing material. See *Rex v. Smith*, 8 Barn. & Cress. 341, 2. In *Hyer's case*, (6 City Hall Rec. 39,) it was held, that to prove a record of conviction or acquittal, it was necessary that it should be under the seal of the court, signed by the magistrate, before whom the cause was tried: and that it should be produced by the clerk from the files of the court. The record sought to be introduced in this case, was a record of the same court, where the trial in which it was offered took place, and was rejected because it lacked the above requisites.

By statute in New-York, a copy of the minute of any conviction, with the sentence of the court thereon, entered by the clerk of any court, duly certified by the clerk in whose custody such minutes shall be, under his official seal, together with a copy of the indictment on which such conviction shall have been had, certified in the same manner, shall be evidence in all courts and places of such conviction, in all cases in which it shall appear by the certificate of the clerk, or otherwise, that no record of the judgment on such conviction has been signed and filed. 2 R. S. 739, § 10. It is also provided, that within ten days after the adjournment of any court at which any conviction for offences shall have been had, the clerk thereof shall make out and certify a transcript of the entries in his minutes of all such convictions and sentences thereon, and shall transmit the same to the secretary of state. 2 R. S. 738, § 7. The secretary of state is to file such transcripts, and when required by the attorney general or district attorney of any county, he shall furnish an exemplification of such transcripts or a part thereof, which shall be sufficient evidence on the trial of any person for a second or subsequent offence, of the conviction stated in such transcript. Id. § 8. But neither the transcript nor the exemplification thereof, shall in any other case be evidence of such conviction. Id. § 9.

Under a former statute, similar in its provisions to the 7th and 8th sections above cited, (1 R. L. 462, K. & R.) where an objection was made to the competency of a witness on the ground of his having been convicted of an infamous offence, and it was shown that the records of the court where the conviction was had were lost or destroyed, a copy of the transcript required to be sent to the exchequer by the above statute, was held to be the next best evidence to show such conviction, and that parol evidence could not be resorted to till it was shown that such transcript had not been filed. *Hills v. Colwin*, 14 John. Rep. 182.



for the same more than 6s. 8d.,) which certificate shall be sufficient evidence of the conviction \*and sentence or order for the transportation of such offender; and every such certificate, if made by the clerk or officer of any court in Great Britain, shall be received in evidence, upon proof of the signature and official character of the person signing the same; and every such certificate, if made by the clerk or officer of any court out of Great Britain, shall be received in evidence, if verified by the seal of the court, or by the signature of the judge or one of the judges of the court, without further proof.(a)

2. As proof of a former conviction, upon an indictment for a subsequent felony, it is enacted by stat. 7 & 8 G. 4, c. 28, s. 11, that a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, (for which certificate a fee of 6s. 8d. and no more shall be demanded or taken,) shall upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same. Where the certificate under the statute stated that the prisoner had been indicted and convicted, but did not state the judgment, *Creswell, J.*, held it to be insufficient.(b)

3. As proof of a previous acquittal or conviction, it is enacted by stat. 14 & 15 Vict. c. 99, s. 13, that whenever, in any proceeding whatever, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment, or acquittal, as the case may be, omitting the formal parts thereof. It seems therefore that the record for this purpose must be made up, although the formal parts need not be included in the certificate.[1]

(a) See *R. v. Jones*, 2 Car. & K. 524.

(b) *R. v. Actroyd et al.*, 1 Car. & K. 158.

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[1] It is also provided by statute, that whenever any conviction shall be had before any court of special sessions, held in any other county than New York, the magistrates shall make a certificate of such conviction, briefly stating the offence charged, and the conviction and judgment thereon, and if any fine has been collected, the amount thereof, and to whom paid. This certificate is to be filed in the office of the county clerk within twenty days after the conviction; and when so made and filed, such certificate, or a certified copy thereof, is made evidence in all courts and places, of the facts stated therein. 2 R. S. 717, s. 38, 39, 40.

(c) *Matters quasi of record.*

Bill, answer, depositions, and decree in a court of equity, are proved by examined copies.(a) So, libel, answer, depositions and sentence in the ecclesiastical courts, are proved by examined copies.(b) And the same as to proceedings in the Admiralty court.(c)[2]

(a) Gilb. Ev. 49, 50, 56.

(c) Com. Dig. Evidence, C. 1.

(b) Gilb. Ev. 66, 67.

It has been decided that a certificate of conviction in the form directed by the above section of the statute, and which was filed in the clerk's office within the prescribed time, is competent evidence of the facts therein stated; although it does not contain evidence that the court had obtained jurisdiction over the person of the prisoner. *The People v. Powers*, 7 Barb. 462. Such a certificate being made evidence, by statute, of the facts contained in it, cannot be contradicted by parol evidence showing that there was in fact no trial and conviction. Yet, it seems that a party may so far contradict a record of conviction by a court of inferior jurisdiction, as to prove that the court had no jurisdiction of the offence, or of the person of the prisoner. *Ibid.*

[2] An examined or sworn copy, is, in general, to be proved such by one who has compared it with the original. *Kerns v. Swope*, 2 Watts' Rep. 75. Hence the rule, that a mere copy of a copy is not evidence. *Whitacre v. McIlhenny*, 4 Munf. Rep. 310; *Ryves v. Bradwell*, 1 Irish T. R. 184; *United States v. Sherman*, 1 Pet. C. C. Rep. 98; *Norwood v. Green*, 5 Mart. Lou. Rep. N. S. 175. Where, however, a witness testified that a certain record of a power of attorney was a copy of the original made by him, and that the copy produced was a true copy of the record, having been compared with it by himself; held, that this was not the case of a copy simply, but the case of a second copy, verified as a true copy of the original; and therefore, it was admissible as secondary evidence. *Winn v. Patterson*, 9 Peters' Rep. 663. The court said, that in point of evidence, this was precisely the same as if the witness had made two copies at the same time of the original, and had then compared one of them with the original, and the other with the first copy, which he found correct. The mode by which he arrived at the result, that the second copy was a true one of the original, might be more circuitous than that by which he ascertained the first to be correct; but that only furnished matter of observation as to the strength of the proof, and not as to its dignity or degree. *Id.* See *Robertson v. Lynch*, 18 Johns. Rep. 451. Also, *Kerns v. Swope*, 2 Watts' Rep. 75, 80. *Winn v. Patterson*, *supra*, would seem a warrant for saying that no discrimination is to be made between copies, as to the point of competency, on the ground that one is more likely to be correct than another, provided the authentication of both reaches back to the original. So far it goes to sustain the general proposition that there are no degrees of secondary evidence. But *Brewster v. Countryman*, 12 Wend. 446, in some of its *dicta*, at least, seems slightly the other way. There, a sworn copy of an agreement was produced against the defendant, who had himself destroyed the original. The case states that the plaintiff proved he had requested H. to make a copy of the agreement, and the paper in question purported to be a copy in H.'s hand-writing; a witness swore also, that he had seen the original, and that the alleged copy was substantially the same. The court held the copy inadmissible, on the ground that the best evidence was not produced. They say the authenticating testimony was pretty strong, but that H.'s testimony, whose absence was not accounted for, would be stronger; that the evidence produced showed there was better evidence in the power of the party not produced, the very case in which secondary evidence should not be received as sufficient. *Id.* 488, 9. The decision itself, in this case, would seem in principle, to range along with those which forbid a resort to a circumstantial or suspicious evidence, where that which is direct and positive is plainly within the party's reach. See *Den v. McAllister*, 2 Halst. R. 55; *Bank of Utica v. Hillard*, 5 Cow. Rep. 153, 158.

As to evidence of proceedings in the county courts: by stat. [\*144] 9 \* & 10 Vict. c. 95, s. 111, the entries in the clerk's book, or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, shall at all times be admitted in all courts and places whatsoever, as evidence of such entries and of the proceedings referred to by the same, and of the regularity of such proceedings, without further proof.

The proceedings of other inferior courts, such as the court baron, &c., are usually proved, by producing the books in which they are entered, and proving them by the clerk of the court; or it seems, they may be proved by examined copies.(a)[1]

(a) See Gilb. Ev. 74, 20. Com. Dig. Evidence, C. 1.

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[1] Proceedings in courts of law not being records, may be proved by office copies duly certified by the clerk in whose custody they are deposited under the seal of the court. But a seal is not necessary where the paper is to be used in the same court, or before any officer thereof; nor where a certified copy of a rule or order of the Supreme Court is to be used in the Circuit Court. 2 R. S. 500, s. 70, 71.

A judge's order may be proved by the production of the order itself. 4 Campb. 17.

Affidavits made in other states, must be authenticated as follows:—1. They must be certified by some judge of a court having a seal, to have been subscribed and taken before him, specifying the time and place, when and where taken. 2. The genuineness of the signature of such judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court under the seal thereof. 2 R. S. 492, sec. 26.

Proceedings under the insolvent laws may be proved either by the original documents or the records thereof, or transcripts of such records duly authenticated. 2 R. S. 94, s. 19, 20.

Proceedings in surrogates' courts, such as the probate of wills, letters testamentary, and letters of administration, may be proved by the records thereof, or by transcripts from the records, certified by the surrogate under his seal of office. 2 R. S. 145, sec. 72; 4 Wend. 436.

In an action before a justice, his own docket of a judgment, or other proceeding had before him, will be good evidence. 2 R. S. 364, sec. 251.

A transcript from the docket of a justice, of a judgment had before him; of the proceedings in the cause previous to the judgment; of the execution issued thereon, if any; and of the return of such execution, if any, subscribed by the justice; with a certificate (annexed thereto or endorsed thereon,) of the clerk of the county where the justice resides, under the seal of the court of the county, specifying that the person subscribing such transcript, was, at the date of the judgment therein mentioned, a justice of the peace of such county, will be good evidence to prove the facts stated in such transcript. 2 R. S. 364, s. 252, 253.

In preparing the transcript, the justice has only to copy from his docket, and subscribe the same. To this copy may be attached or endorsed, the official certificate of the clerk, thus:

State of New York, Chenango County, Clerk's Office, ss. : I certify that David Long, who subscribed the within (or annexed) transcript, was at the date of the judgment therein mentioned, a justice of the peace of the said county. In testimony whereof, I have hereunto subscribed my name and affixed the seal of said county, the 15th day of June, 1849.

[L. S.]

JAMES DAY, Clerk.

It has been decided that a transcript from a justice's docket, of a judgment had before him, may be made and certified by the justice after the expiration of his office; and that such a transcript is evidence as well for the justice as for the plaintiff in the judgment in an

As to judgments, &c., in foreign courts:—By stat. 14 & 15 Vict. c. 99, s. 7, all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence,—either by examined copies, or by copies purporting either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or if there be

action for selling property by virtue of an execution on such judgment. The certificate of the clerk, in such a case, must be made by the clerk of the county where the justice resided at the time of the rendition of the judgment. 8 Wend. 393.

It may sometimes happen that the justice's docket will not show specifically what demands of the parties were submitted to the court or jury; and in such case, parol evidence is admissible to show the facts. The proceedings in a cause before a justice, may be proved by the oath of the justice; but he must produce the written evidence of his proceedings, as far as in his power. 10 Wend. 525. As a general rule, justices should not be compelled to attend to prove their dockets. One object of the legislature, in prescribing other modes of proof, was to relieve them from attending as witnesses for such purpose. 11 Wend. 636.

If a justice be dead or absent, his proceedings in a cause may be proved (after proving such death or absence,) by producing the original minutes entered in his docket, and proving his handwriting; or they may be proved by copies of such minutes sworn to by a competent witness, as having been composed by him with the original entries, with proof that the original entries are in the handwriting of the justice. 2 R. S. 364, sec. 254.

The justice may state in his docket, the matters which were actually tried before him, and what was submitted to or withdrawn from the consideration of the court or jury, where he shall deem either to be material. The transcript then shows these facts.

So items of evidence may also become a material subject of entry, and be shown in the same manner. 13 J. R. 184.

Transcripts from the dockets of justices of the peace in other states, are governed by the same rules of proof as other transcripts. Laws of 1836, p. 658.

The proceedings of public notaries, relative to the protest of bills of exchange and promissory notes, and the notice of such protest, may be proved by the certificate of the notary under his hand and seal, stating the presentment of the bill or note for acceptance or payment, the protest, and the time and mode of giving notice thereof to the parties. 2 R. S. 382, sec. 53.

The acts of the corporation of a city may be proved by simply producing the original minutes. 6 Wend. 651; 5 Wheat. 420.

Certified copies by town clerks, and other officers having the custody of papers belonging to municipal corporations, are made by the revised statutes, a very common medium of proof.

Sheriffs' sales of real estate may be proved by the original certificates of sale, duly acknowledged, in the manner required by law to entitle deeds to be recorded, or copies of the same, certified by the clerk, in whose office the originals are filed. 2 R. S. 467, sec. 46.

To prove papers which are in the official custody of the clerks of courts, county clerks, and the proper officers of municipal corporations, copies of the papers must be certified by the officers, under his seal of office, if he has one. The following is the form of the officer's certificate:

Chenango County, Town of Oxford, ss.: I hereby certify, that I have compared the above with the original, on file in my office, and the same is a correct transcript therefrom, and of the whole of said original.

WILLIAM STOW, Clerk of said Town.—[*Waterman's Treatise*, p. 148–151.]

more than one judge, by any one of the judges, of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; which copies shall be admitted in evidence, without any proof of the seal or signature, or of the judicial character of the person appearing have made such signature and statement.[2]

[2] By the constitution of the United States, it is declared, that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." And congress is authorized by general laws to prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect thereof. Constitution of the U. S. art. 4. In pursuance of this authority, congress, by act of May 26th, 1790, ch. 11, (2 L. U. States, 102,) after providing for the mode of proof, has declared, that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." By the second section of a supplementary statute, passed March 27th, 1804, the provisions of the act of 1790 are extended to the records and judicial proceedings of the respective territories of the United States, and the countries subject to the jurisdiction of the United States. 3 L. U. States, 621.

With respect to the interpretation of the above mentioned clause of the constitution, there has been some diversity of opinion, particularly as to the words in the latter branch of the section, "and the effect thereof." Some judges have thought that the word "thereof," had reference to the proof or authentication, so as to read "and to prescribe the effect of such proof, or authentication." Others have thought that it referred to the antecedent words, "acts, records, and proceedings" so as to read, "and to prescribe the effect of such acts, records, and proceedings." See *Bissell v. Briggs*, 9 Mass. Rep. 462, 467; *Winchester v. Evans*, Cooke's Rep. 420; *Hitchcock v. Aciken*, 1 Cain. Rep. 460; *Green v. Sarmiento*, 1 Peters' C. C. Rep. 74; *Field v. Gibbs*, ib. 155; *Commonwealth v. Green*, 17 Mass. Rep. 515, 543, 544. "Those who were of opinion that the preceding section of the clause made judgment in one state conclusive in all others, naturally adopted the former opinion; for otherwise the power to declare the effect would be either wholly senseless, or congress would possess the power to repeal, or vary the full faith and credit given by that section. Those who were of opinion that such judgments were not conclusive, but only prima facie evidence, as naturally embraced the other opinion; and supposed, that until congress should by law declare what the effect of such judgment should be, they remained only prima facie evidence." 3 Story's Comm. on the Const. 181, 182.

The former seems the interpretation generally adopted. But it is not practically, of much importance which construction prevails; since each admits of the competency of congress to declare the effect of judgments when duly authenticated; which has been done as we have before noticed. It may be stated, as a principle now uniformly received and sanctioned throughout the United States, that the judgment of one of the state courts, is of the same dignity in every other state, as in the one where it was pronounced; and hence, if, in the courts of the state where the judgment was pronounced, it is conclusive in its operation as evidence, or otherwise, it must be equally so, and to the same extent, in all the courts throughout the union. *Mills v. Duryee*, 7 Cranch 481; *Clark's ex'rs v. Carrington*, 7 id. 308. *Hampton v. M'Connell*, 3 Wheat. Rep. 234; *Mayhew v. Thatcher*, 6 id. 129; *Hoxie v. Wright*, 2 Vermont Rep. 263; *Buford v. Buford*, 4 Muhl. Rep. 241; *Borden v. Fitch*, 15 Johns. Rep. 121; *Andrews v. Montgomery*, 19 id. 162; *Field v. Gibbs*, 1 Peters' C. C. Rep. 155; *Commonwealth v. Green*, 14 Mass. Rep. 515; *Gibbons v. Livingston*, 1 Halst. Rep. 236, 275; *Newell v. Newton*, 10 Pick. Rep. 470, 472; *Hall v. Williams*, 6 Pick. Rep. 232; *Spencer v. Brockway*, 1 Hamm. Rep. 259; *Benton v. Burgot*, 10 Serg. & Rawle, 240; *Mitchell v. Osgood*, 4 Greenl. 124; *Wheeler v. Raymond*, 8 Cowen's Rep. 311; *Shumway v. Stilwell*, 6 Wend. Rep. 447; *Starbuck v. Murray*, 5 id. 148; *Holbrook v. Murray*, 5 id. 161; *Rogers v. Coleman*, Hard. Rep.

As to the documents signed by the judges in this country:—by stat. 8 & 9 Vict. c. 113, s. 2, all courts, judges, justices, masters in chancery,

413; *Scott v. Coleman*, 5 Litt. Rep. 349; *Evans v. Tatem*, 9 Serg. & Rawle, 259, 260; *Kean v. Rice*, 12 Serg. & Rawle, 203; *Gilman v. Houseley*, 5 Martin's Lou. Rep. N. S. 661; *Mackee v. Cairnes*, 2 id. 599; *Clarke's adm'r v. Dwy*, 2 Leigh's Rep. 172; *Hayman's ex'r v. Miller*, 1 Bailey's Rep. 242; *Holt v. Alloway*, 2 Blackf. Rep. 108; *Galick v. Loder*, 1 Green's Rep. 68; *Earthman's adm'r v. Jones*, 2 Yerg. Rep. 484. See also *Jacobs v. Hull*, 12 Mass. Rep. 25; *Wade v. Wade*, Cam. & Norw. 486; *Betts v. Death*, Addison's Rep. 265; *Armstrong v. Carson's ex'rs*, 1 Dall. Rep. 302; *Ben's Guardian*, 2 Bay, 485; *Curtis v. Gibbs*, 1 Penn. Rep. 399; *Kibbe v. Kibbe*, Kirby's Rep. 124; *Smith v. Rhoades*, 1 Day's Rep. 168; *Wernwag v. Pauling*, 5 Gill & Johns. Rep. 500; *Bradshaw v. Heath*, 13 Wend. 407; *McRae v. Mattoon*, 13 Pick. Rep. 53; *Tipton v. Maryfield's ex'rs*, 10 Lou. Rep. (Curry,) 189; *Hinton v. Townes*, 1 Hill's Rep. 439; *Adams v. Rowe*, 2 Fairf. Rep. 89; 1 Baldw. Rep. 617; *Goodrich v. Jenkins*, 1 Wright's (Ohio) Rep. 348; *Hunt v. Lyle*, 8 Yerg. 142; 6 id. 412; *Hall v. Williams*, 1 Fairf. Rep. 278.

All the cases above cited will be found to agree that the judgment of a neighboring state may be wholly impeached by showing that the court rendering it had not jurisdiction; and it makes no difference whether the judgment comes in question directly or incidentally. See *Elliott v. Piersoll*, 1 Peters' Rep. 328, 340; *Thompson v. Tolmie*, 2 id. 157; *Holmes v. Boughton*, 10 Wend. Rep. 75; *Bradshaw v. Heath*, 13 id. 407; *Walker v. Maxwell*, 1 Mass. Rep. 103; *Fisher v. Harnden*, 1 Paine's Rep. 55; see also the next succeeding note, and cases there cited.

And if the judgment is inconclusive, in the state where it was rendered, or if it is inquirable into there during a particular period, and on certain conditions, it will be open to investigation to the same extent every where else. This is an obvious deduction from the foregoing position with regard to the effect of such judgments generally. It is, moreover, directly sanctioned by several well considered cases. See *Green v. Sarmiento*, 1 Peters' C. C. Rep. 74; *Baugh v. Baugh*, 4 Bibb, 556; *Curtis v. Gibbs*, 1 Pennington's Rep. 399, 403, 404; *Rogers v. Coleman*, 1 Hardin's Rep. 420; *Armstrong's ex'rs v. Carson*, 2 Dall. Rep. 392; 1 Story's Comm. on the Const. 183; *Wernwag v. Pauling*, 5 Har. & Johns. Rep. 500; *Spencer v. Sloc*, 8 Lou. Rep. (Curry,) 290.

In New York, the revised statutes provide, that the records and judicial proceedings of any court in a foreign country, shall be admitted in evidence in the courts of this state, upon being authenticated as follows:

1. By the attestation of the clerk of such court, with the seal of such court annexed, or of the officer in whose custody such records are legally kept, with the seal of his office annexed:

2. By a certificate of the chief justice or presiding magistrate of such court, that the person attesting such record, is the clerk of the court, or that he is the officer in whose custody such record is required by law to be kept; and in either case, that the signature of such person is genuine: and,

3. By a certificate of the secretary of state, or other officer of the government under whose authority such court is held, having the custody of the great or principal seal of such government, purporting that such court is duly constituted, specifying generally the nature of its jurisdiction, and verifying the signature of the clerk or other officer, having the custody of such record, and also verifying the signature of the chief justice or presiding magistrate. 2 R. S. 396, § 26.

Copies of such records and proceedings in the courts of a foreign country, may also be admitted in evidence upon due proof,

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of such original:

2. That such original was in the custody of the clerk or other officer, legally having charge of the same: and,

masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial notice, of the signature of any of

3. That such copy is duly attested by a seal, which shall be proved to be the seal of the court in which such record or proceeding shall be. *Id.* § 27.

It is declared, however, that these provisions shall not prevent the proof of any record or judicial proceeding of the courts of any foreign country according to the rules of the common law in any other manner than that pointed out above; nor shall they be construed as declaring the effect of any record or judicial proceeding, authenticated as prescribed in the statute. *Id.* § 28.

The different modes of authenticating foreign judgments, independent of any legislative provision on this subject, have been laid down by Marshall, C. J., as follows: 1. By an exemplification under the great seal. 2. By a copy, proved to be a true copy. 3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated. These he pronounces the usual, if not the only modes of authenticating foreign judgments. *Church v. Hubbard*, 2 Cranch, 187, 238. See also *Mahurin v. Bickford*, 6, N. Hamp. Rep. 567, 670. *Vandervoort v. The Columbian Ins. Co.* 2 Cain Rep. 155, *et seq.*

If these modes of authentication be all beyond the reach of the party, other testimony, inferior in its character, will, it seems, be received. *Church v. Hubbard*, *supra*, per Marshall, C. J. See *Hadfield v. Jameson*, 2 Munf. Rep. 53. *Young v. Gregory*, 3 Call, 446. Also per Washington, J., in *Wood v. Pleasants*, 3 Wash. C. C. Rep. 201, 203.

The public national seal of a kingdom, or sovereign state, is also noticed judicially by the courts of other countries, and is the highest evidence and most solemn sanction of authenticity, in relation to judicial proceedings, known in the intercourse of nations. Per Gould, J., *Griswold v. Pitcairn*, 2 Conn. Rep. 90. Per Swift, Ch. J., *id.* 89. Anonymous, 9 Mod. 66. *United States v. Johns*, 4 Dall. 416. *Church v. Hubbard*, 2 Cranch, 187. Story's Conf. of Laws, 530. *Lincoln v. Battelle*, 6 Wend. 475, 484. *Dunlap v. Waldo*, 6 N. Hamp. Rep. 453. *Ex parte Povall*, 3 Leigh 816. *State v. Carr*, 5 N. Hamp. Rep. 369, 370. Accordingly, in Connecticut, a record of the supreme court of Copenhagen was allowed as evidence where there was no certificate that it was a copy; but only the signature of *Colbjørnsen*, below the great seal of Denmark, without any addition showing his official character. And Swift, C. J., delivering the opinion, said, "this court does not know the form of making up, attesting or certifying their record. If it appear to be a judicial proceeding under the great seal, it is to be presumed that all the formalities required by their law have been complied with. This appears to be the record of a judgment rendered in a court of the kingdom of Denmark, under the great seal of the king. This seal proves itself, and the court is bound to take judicial notice of it." *Griswold v. Pitcairn*, 2 Conn. Rep. 85, 89, 90. The annexation of the great seal will be presumed to have been done by a person having custody thereof, and competent authority to do the act. See *United States v. Amedy*, 11 Wheat. Rep. 406, 7; *United States v. Johns*, 4 Dall. 415, 416; also, 1 Bald. Rep. 613, 614.

But when a civil war rages in a foreign nation, and one part separates itself from the old established government and forms itself into a distinct government, the courts of the respective United States must view such newly constituted government as it is viewed by the legislative and executive departments of our general government; and before it is recognized by them as an independent government, its seal cannot be allowed to prove itself; but it may be proved by such testimony as the nature of the case admits. *United States v. Palmer et al.* 3 Wheat. Rep. 610. *The Estrella*, 4 Wheat. Rep. 298. See S. P., *United States v. Hutchings*, 2 Wheel. Crim. Cas. 543. 1 Bald. Rep. 616.

Proceedings in St. Domingo, during the short period in which the possession of the island had passed from France to England, were, under the particular circumstances of the case, held sufficiently authenticated by the private seal of the governor. *Hadfield v. Jameson*, 2 Munf. R. 53. What is sufficient to authenticate, in the courts of this country, the sentence or act of a foreign tribunal or government, after a destruction of such government by revolution or conquest, see *id.*

The proceedings of a foreign court may be proved by a sworn copy. *Lincoln v. Battelle*,

the equity or common law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document.

All copies of the journals of either house of parliament, purporting to be printed by the printers of the crown, or by the printers to either house of parliament, shall be admitted as evidence thereof, by all courts, judges, justices, and others, without any proof being given that such copies were so printed.(a)[3]

(a) 8 & 9 Vict. c. 113, s. 3.

6 Wend. 475. *Hill v. Packard*, 5 id. 387, per Allen, senator. Id. p. 391, per Beardsley, senator. See also id. p. 385, per Walworth, Ch.; 1 Stark. Ev. 191, 6th Am. ed.; per Lord Ellenborough in *Collins v. Matthew*, 5 East, 475; *Baldwin v. Hale*, 17 John. Rep. 272, 3. But not by an office copy. See *Appleton v. Lord Braybrooke*, 6 Maule & Sel. 34; 2 Starkie's Rep. 6, 7, S. C.

How far a copy of foreign judicial proceedings may be said to be authenticated by the acts and conduct of the party against whom it is sought to be used, has been sometimes made a question. In an action on a policy of insurance, a paper purporting to be a copy of a decree of the English court of appeals in prize causes condemning the property insured as prize, was offered by the plaintiffs as evidence generally for the jury. The document was not under seal, but was one of the papers exhibited by the agent of the plaintiffs to the defendant's broker, as one of the preliminary proofs of loss. At the time it was so exhibited an endorsement was made upon it, stating the day of its exhibition, and that it was the decree of condemnation. Held, that it was not evidence of any thing contained in it; but that it might be used to show the fact of its exhibition to the underwriter, when such fact should become material. *Thurston v. Murray*, 3 Binn. Rep. 326. In *Delafield v. Hand*, (3 John. Rep. 310,) the plaintiff offered in evidence a translation of the proceedings of a tribunal at Havre; he showed that the same translation had been put into the hands of F., a broker, by L., in certain suits brought by L. against him on policies of insurance on the same vessel, for the same voyage, in order to enable F. to adjust the loss in those cases. The suits by L. were for himself and the present defendant, who was master and owner of one third; and the present suit was for moneys which the plaintiff had been compelled to pay in the former, and which, as was contended, the present defendant was himself responsible for. The court held that the putting of the document into F.'s hands by L., as above mentioned, did not preclude the present defendant from objecting to its authenticity. "It does not appear from the testimony," say the court, "that such a privity exists between L. and the defendant, as to conclude him from making the objection, L. was not his authorized agent; besides, if that were the case, I cannot discern why a delivery of a paper in one cause should be deemed to conclude a person from objecting to its authenticity in another action." Id. 314, 315. Further as to when the conduct of the party or his agent, in respect to papers, shall be said to conclude him from objecting to their authenticity, see *Senat v. Porter*, 7 T. R. 158; *Gorton v. Dyson*, 3 Moore, 558.

[3] The printed journals of congress have been allowed to be read, in Pennsylvania, without other proof of their authenticity. *Commonwealth v. De Longchamps*, Oyer and Term. Phil. 1784, MS. Whart. Dig. 280, pl. 112, 2d ed.

The votes of assembly in that state, have been admitted to prove the time of the notification of the repeal of an act of assembly by the king and council; but not answering the purpose fully, the minutes of the council were sent for, and read without opposition. *Albertson's lessee v. Robeson*, 1 Dall. Rep. 9.

In New-York, the senate, journals, proved by the clerk to have been printed by the printer to the senate, and laid upon the tables of members, have been received as *prima facie* evidence. *Root v. King*, 7 Cowen's Rep. 613, 636.



As to proceedings in the court of bankruptcy:—by stat. 12 & 13 Vict. c. 106, s. 236, any fiat, petition for adjudication of bankruptcy, petition for arrangement between a debtor and his creditors, assignment, appointment of assignees, certificate, deposition, or other proceeding or order in bankruptcy, or \*under any such petition for arrangement, appearing to be sealed with the seal of the court,—or any writing purporting to be a copy of any such document and purporting to be so sealed,—shall at all times and on behalf of all persons, and whether for the purposes of this Act or otherwise, be admitted in all courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, and be deemed respectively records of the court, without any other proof thereof. And by sect. 237, all courts, judges, justices, and persons judicially acting, and other officers, shall take judicial notice of the signature of any commissioner or register of the court, and of the seal of the court, subscribed or attached to any judicial or official proceeding or document to be made or signed under the provisions of this Act.

Proceedings in the insolvent court, (petition, schedule, order of adjudication, &c.) may be proved by an office copy, purporting to be signed by the officer in whose custody the proceedings are, and to be sealed with the seal of the court, without other proof.(a)

(d) *Other Public Documents.*

Inquisitions may be proved by examined copies, or the originals may be produced.(b)

The *Gazette*, printed and published by the Queen's printer, is evidence of all acts of state.(c)

Royal proclamations purporting to be printed by the printers to the crown, or by the printers to either house of parliament, shall be admitted as evidence thereof by all the courts, judges, justices, and others, without any proof being given that such copies were so printed.(d)

So, the articles of war may be proved by the copy printed and published by the Queen's printer.(e)

As to the rules of the poor law commissioners:—by stat. 7 & 8 Vict. c. 101, s. 71, a copy of any rule, order, or regulation made by the said commissioners, printed by the Queen's printer, shall, after the lapse of

(a) 1 & 2 Vict. c. 110, s. 105.

(d) 8 & 9 Vict. c. 113, s. 3.

(b) See Arch. Pl. & Ev. Civ. Act. 408, 409.

(e) 5 T. R. 442, 446. See 4 B. & C. 304.

(c) 5 T. R. 436.

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And a printed copy of public documents, proved to have been transmitted to congress by the president of the United States, and printed by the printer to congress, has been holden admissible without other authentication. *Radcliffe v. The United States Ins. Co.* 7 John. Rep. 38, 50.

fourteen days from the date thereof, be received in evidence, and judicially taken notice of, and shall, until the contrary be shown, be deemed sufficient proof, that such order was duly made, and is in force.

Registers of baptisms, marriages and burials, may be proved by the register itself, or by an examined copy of it.(a)[1]

(a) Gilb. Ev. 72.

[1] A bishop's register is, in England, evidence of facts stated in it. *Arnold v. The Bishop of Bath*, 5 Bing. 316. S. C., 2 Moore & Payne, 559. But a register of burials kept by the Wesleyan Chapel, has been there repudiated as incompetent. *Whittuck v. Waters*, 4 Carr. & Payne. 375. See as to registers of dissenting chapels, Phillips on Ev. Cow. & Hill's notes, part 1, p. 234. A register of the births of dissenter's children, kept at a public library, is not evidence. Ex parte Taylor, 1 Jac. & Walk. 463.

A sworn copy from the register book of the burials in Christ Church, (Philadelphia,) has been received in evidence to show the fact of the death of a person and the time. *Lewis v. Marshall*, 5 Peters' Rep. 470, 475, 6.

In Louisiana, the register of baptisms and births, is evidence, and, it seems, when shown to exist, precludes parol testimony. *Duplessis v. Kennedy*, 6 Lou. Rep. (Curry) 231, 242. *Fletcher v. Cavalier*, 4 Mill Lou. Rep. 267. An alteration in such baptismal register, by erasing the word "natural," and writing over it the word "legitimate," has no effect in preventing the registry from being used to establish the period of birth, though the alteration be not accounted for. Otherwise, however, if the document were offered to establish the legitimacy of the person named. *Fletcher v. Cavalier*, *supra*. A register of burials is also evidence there; and where a register of baptisms proved that a child was christened by the name of "Francisco Antonio," and a register of burials attested the interment of a person named "Francisco," and no question was raised in the inferior court on the point of variance; held, that on appeal, the appellate court must consider the one whose death was attempted to be proved, to be the person whose death, according to the pleadings, it was important to establish. *Celis v. Oriol*, 6 Lou. Rep. (Curry,) 403.

In Pennsylvania, a copy of the register of marriages, baptisms, and burials, kept in a parish in the island of Barbadoes, certified to be a true copy by the rector of the parish, and proved by the oath of a witness, taken before the deputy secretary of the island and notary public, (his hand-writing and office being proved,) has been received as good evidence of pedigree. *Kingston v. Lesley*, 10 Sér. & Rawle, 383. And a copy of a register of births and deaths of the people called Quakers, kept in England, proved to be a true one before the lord mayor of London, has also been allowed as evidence in Pennsylvania, to prove the death of a person. *Ilyam v. Edwards*, 1 Dall. Rep. 2. By a statute in that state, the register kept by any religious society of births, marriages and deaths, is declared good evidence. The act is silent as to the mode of proof; and therefore the common law mode, which is by a sworn copy, or the production of the original, must be resorted to. A certified copy under the seal of the corporation or religious society, is not admissible. *Stoeper v. Whitman's lessee*, 6 Binn. 416.

In Maine, a book was produced by a town clerk, which had been received by him from his predecessor in office as an official record; it purported to contain a record of births and marriages in such town, but contained no title or attestation of its character, nor any certificate showing by whom the entries in it were made; and held, that it was proper *prima facie* evidence to prove the age of person named in it. *The Inhabitants of Sumner v. The Inhabitants of Sebec*, 3 Greenl. 223. See *Martin v. Gumby*, 2 Harr. & John. 248. A copy from the records of the town is there admissible. *Wedgwood's case*, 8 Greenl. 75.

In New-York, sworn copies of such registers, when the original is of a public nature, have been held admissible. See *Jackson, ex dem. Bogert v. King*, 5 Cowen's Rep. 237. See also *Jackson, ex dem. Miner v. Boneham*, 15 John. Rep. 226. See, as to records of marriages, in New-York, Phillips on Ev. Cow. and Hill's notes, part 2, p. 237, *et seq.*

As to ship's registers:—by stat. 14 & 15 Vict. c. 99, s. 12, every register of a vessel kept under any of the Acts relating to the registry of British vessels, may be proved in any court of justice, or before any person having by law or by consent of parties authority to [\*146] hear, receive, and examine evidence,—\*either by the production of the original,—or by an examined copy thereof,—or by a copy thereof purporting to be certified under the hand of the person having the charge of the original, and which person is hereby required to furnish such certified copy to any person applying at a reasonable time for the same, upon payment of the sum of one shilling; and every such register or copy,—and also every certificate of registry, granted under any of the acts relating to the registry of British vessels, and purporting to be signed as required by law,—shall be received in evidence in any court of justice, &c., as *prima facie* proof of all the matters contained or recited in such register, and of all the matters contained or recited in or endorsed on such certificate of registry, respectively.[1]

In North Carolina, a registry of births, marriages, and burials, kept pursuant to the statute, is legal evidence of marriages, births, &c., especially on questions of pedigree. And the court lay it down as a general rule, that a book kept by public authority is necessarily evidence of the facts recorded in it. *Jacock's lessee v. Gilliam*, 3 Murph. Rep. 47, 52.

[1] A succinct statement of the law of congress, relative to the registry of vessels, will be seen by reference to 3 Kent's Com. 141, et seq., together with an able commentary upon it.

The register is not a document required by the law of nations, as expressive of a ship's character, (*Cheminant v. Pearson*, 4 Taunt. Rep. 367;) but is of local or municipal regulation, and the object of it has been said to be, to show the character of the vessel, and entitle her to the advantages secured by law to the vessels of our own country. *Sharp v. The United Ins. Co.*, 14 John. Rep. 204, per Spencer, J.

Transfers of ships, it seems, in England, are declared void unless certain formalities prescribed by the registry acts are pursued. But there is no corresponding provision in the act of congress. *Colson v. Bonzey*, 6 Greenl. 474, 477; see also *Bisley v. The Franklin Ins. Co.*, 8 Pick. 86, 88, 89; *Birbeck v. Tucker*, 2 Hall's Rep. N. Y. S. C. 121; *Ring v. Franklin*, id. 1; *Wendover v. Hogeboom*, 7 John. Rep. 308.

The effect and competency of the register of a vessel as evidence, has been considered in several cases in the courts of this country. Our laws recognize the possibility of the register's existing in one name while the ownership is in another. The ownership and character of a vessel are matters *in pais*. The register is not an exclusive test of either. Hence, on an indictment for piracy, the character of the vessel plundered may be shown without any effort to produce her certificate of registry. *United States v. Furlong*, 5 Wheat. 184, 199. In an action to recover back a premium of insurance on the ground that the plaintiff had no interest in the vessel at the time of insurance, the register which was in the name of the other persons, was held not even *prima facie* evidence to prove that the plaintiff was not owner. *Sharp v. The United Ins. Co.*, 14 John. Rep. 201. So where a person purchased a vessel, and took immediate possession, but it was agreed that no bill of sale was to be executed till the purchase-money was all paid, held that the vendor was not liable for repairs made to the vessel by direction of the master on the credit of the purchaser; and this, though the register still stood in the name of the vendor. That circumstance the court say did not in any manner determine the ownership. *Leonard v. Huntington*, 15 John. Rep. 298. And so, in Massachusetts, where the register was relied on by underwriters in an action on a policy of insurance for the purpose of showing that two of the insured had no legal or insurable interest in the vessel. *Bisley v. The Franklin Ins. Co.*, 8 Pick. Rep. 86. In Connecti-

As to proceedings of corporations or public companies:—by stat. 8 & 9 Vict. c. 113, s. 1, after reciting that it is provided by many statutes

cut, however, though the register of a vessel is not conclusive of ownership, yet, where a person by such a register made on his own oath appears to be the unconditional owner, held, by four judges against three, that it must be considered as a declaration to the world that he is owner; and he becomes liable, of course, for necessary disbursements in repairs and supplies, procured by the master during the voyage. *Starr v. Knox*, 2 Conn. Rep. 215. The register cannot be rendered evidence of ownership in favor of the person who procured it to be made, though it may be against him. *Ligon v. Orleans Navigation Co.*, 7 Mart. Lou. Rep. N. S. 682.

In an action against owners of a vessel for a violation of a contract made by the plaintiffs for the transportation and delivery of goods with the master, a copy of the register, which purported to have been made on the oath of all the defendants that they were the owners, was held good evidence of their being such; and this on proof merely that the copy was a copy of the record in the custom-house, though the witness could not say whether the record was the original or a copy. *Hacker v. Young*, 6 N. Hamp. Rep. 95. It is prima facie evidence in these and similar cases, but is not conclusive. *Colson v. Bonzey*, 6 Greenl. Rep. 474; *Cox v. Reid*, 1 Carr. & Payne, 602; *Hussey v. Allen*, 6 Mass. Rep. 163. The register is used as evidence in showing a fulfilment of warranty as to the character of the property in actions upon policies of insurance. *Callett v. The Pacific Ins. Co.*, 1 Wend. 561. And in such cases it has been said, that proof that there was a register, is prima facie evidence of its being on board during the voyage. *Id.* 578; See *Ludlow v. The Union Ins. Co.*, 3 Serg. & Rawle, 133.

The register may be proved by a sworn copy. *Coolidge v. The N. Y. Firem. Ins. Co.*, 14 John. Rep. 308, 315; *U. S. v. Johns*, 4 Dall. Rep. 415; *Hacker v. Young*, 6 N. Hamp. Rep. 95. A copy certified by the collector in whose office it is recorded, is not evidence. He is not authorized to certify, nor entrusted to give out copies. *Coolidge v. The N. Y. Firem. Ins. Co.*, 14 John. Rep. 308; see *U. S. v. Johns*, 4 Dall. 415; *Woods v. Courter*, 1 id. 141. A copy produced from the treasury department of the United States, (where the original is required to be filed after a vessel is condemned,) certified by the register of the department, whose official character was attested by the secretary of the treasury, under the seal of the department, has been held competent evidence in the case of a condemned vessel. *Callett v. The Pacific Ins. Co.*, 1 Wend. 561.

The commission of a vessel or person, granted by a foreign government, may be proved by the commission itself under the seal of such government. See *The Estrella*, 4 Wheat. 298. The seal in general proves itself; but otherwise as to the seal of a new government, unacknowledged by the United States. *Id.* The fact that the person or vessel was in the employ of such unacknowledged government may be shown without proving the seal. *Id.*; *U. S. v. Palmer*, 3 id. 634, 635. Where the commission has been lost, its previous existence on board may be shown by parol evidence. *The Estrella*, 4 Wheat. 298. See *Rundle v. Beaumont*, 4 Bing. 537; *S. C.*, 1 Moore & Payne, 396.

The log-book of certain vessels is, in the United States, made evidence by act of congress, of the desertion by a seaman. See Ing. Abr. 612, sec. 2. It is, however, never conclusive, but only prima facie evidence, and may be rebutted. *Jones v. The Brig Phoenix*, 1 Peters' Adm. Dec. 201.; *Malone v. The Mary*, id. 140; *Thompson v. The Ship Philadelphia*, id. 210; *Douglass v. Eyre*, 1 Gilpin's Rep. 147, 152, 153, 154; *Orne v. Townsend*, 4 Mason's Rep. 541. The log-book, in general, ought not to be admitted to establish any facts save such as are contemplated by the act of congress. *Jones v. The Brig Phoenix*, *supra*. It is in no sense, *per se*, evidence, except in certain cases provided for by statute. It does not import legal verity; and in every other case is mere hearsay not under oath. It may be used against persons, however, to whom it should be brought home as having a concern in writing or directing what should be contained therein, to contradict their statements or their defence. But it cannot be received as evidence for such persons, or others, except by force of a statute rendering it so. Per Story, J., in *U. S. v. Gilbert*, 2 Sumn. Rep. 77, 78.

that various certificates, official and public documents, documents and proceedings of corporations and of joint stock and other companies, and certified copies of documents, bye laws, entries in registers, and other books, shall be receivable in evidence of certain particulars in courts of justice, provided they be respectively authenticated in the manner prescribed by such statutes; and that the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine; and that it is expedient to facilitate the admission in evidence of such and the like documents:—it is enacted that whenever by any Act now in force or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, bye-law, entry in any register, or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either house of parliament, or any committee of either house, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature,

On an indictment of several seamen for a revolt, and confining the master, they defended on the ground (among others) that the master was insane. To rebut this, the prosecutor offered the log-book, kept by the master during the period of his alleged derangement, in which, as he said, he made entries every night; held, that it was inadmissible. *U. S. v. Sharp*, 1 Peters' C. C. Rep. 118, 119.

An entry in the log-book is indispensable evidence of the fact of desertion, when a forfeiture of wages is insisted on; it is necessary, in order to show that no consent was given, and no release was intended by receiving the delinquent again on board, as well as to ascertain the fact of desertion generally with greater accuracy. *Malone v. The Mary*, 1 Peters' Adm. Decis. 140; *Phæbe v. Dignum*, 1 Wash. C. C. Rep. 48; *Douglass v. Eyre*, 1 Gilpin's Rep. 147. Whether the entry in the log-book, in order to be evidence, must have been made (according to the letter of the act of congress) *on the very day* on which the alleged desertion took place, does not appear to be as yet authoritatively settled. In *Phæbe v. Dignum*, *supra*, the court seem strongly to favor the notion that it must. But Hopkinson, J., in *Douglass v. Eyre*, *supra*, contends that it need not, under all circumstances; for in some cases it would be impossible. At any rate, the entry purporting to have been made on the day, is *prima facie* evidence that it was so made, and it lies on the opposite party to show the contrary. *Id.* 152, 153.

Where the log-book is offered, it must be identified; and where the party offering it called a sailor belonging to the vessel, who deposed to the hand-writing of the mate in several parts of it, and that during the voyage he saw him marking the words "Log-book," &c. on the cover; held, notwithstanding this testimony, that as the book may not have been kept on the voyage, but might afterwards have been made up by the mate to suit the purposes of the cause, it was not sufficiently identified. And this, though the opposite party had given notice to produce the log-book. *U. S. v. Mitchell*, 2 Wash. C. C. Rep. 478, 479. See further as to a log-book as evidence, *Bixby v. The Franklin Ins. Co.*, 8 Pick. Rep. 89; *Smallwood v. Mitchell*, 2 Hayw. Rep. 145, 146.

or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence.[2]

And by stat. 14 & 15 Vict. c. 99, s. 10, every document, which by any law now in force or hereafter to be in force, is or shall be admissible in evidence of any particular in any court of justice in Ireland, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official \*character of the person [\*147] appearing to have signed the same,—shall be admitted in evidence to the same extent, and for the same purposes, in any court of justice in England or Wales, or before any person having in England or Wales by law or by consent of parties, authority to hear, receive, and examine evidence,—without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

And lastly, the entries in corporation books, and in the books of

[2] The seals of private courts or of private persons are not evidence of themselves; there must be proof of their credibility. It cannot be presumed that they are universally known, and consequently they must be attested by the oath of some one acquainted with them. The seals themselves, and the proof of their genuineness, must go together to the jury. *Denn v. Freelandt, infra. Church v. Hubbard*, 2 Cranch, 239.

See S. P. with respect to the seal of a banking corporation, (*Leazure v. Hillegas*, 7 Serg. & Rawle, 313;) a public incorporated hospital, (*Jackson v. Pratt*, 10 John. Rep. 381, 387;) an incorporated church, (*Denn v. Freelandt*, 2 Halst. Rep. 352;) so in Pennsylvania as to the seal of the corporation of Belfast, Ireland, (*Foster v. Shaw*, 7 Serg. & Rawle, 156;) of the city of London, (*Chew v. Keck*, 4 Rawle's Rep. 163;) and indeed of all foreign corporations. See *Foster v. Shaw*, and *Chew v. Keck, supra*.

The seal of a corporation may be impressed directly on the paper; wax or wafer is not necessary. *Beardsley v. Knight*, 4 Verm. Rep. 479.

We have seen that these seals do not prove themselves, but are to be identified by some person who saw them affixed, or who knows them from their impression. See *Ang. & Ames on Cor.* 115, 116.

It is not necessary that a corporation deed should say, "sealed with our common seal," or the like. *Ang. & Ames on Corp.* 115. But it must purport to be a deed of the corporation. And, where a corporation authorized its president to execute a deed of lands belonging to the corporation, and he executed one, naming the corporation as grantors, but attested it thus: "In witness whereof, I, O. Spencer, president, have hereunto set my hand and seal," &c., signing his own name as president, opposite the seal, which exhibited no impression; held, that it was to be considered as the individual deed of the president, and not that of the corporation. *Hatch's lessee v. Barr*, 1 Hamm. Rep. 390, 394.

In general, proof of the seal in any way as the seal of the corporation, the instrument being in possession of the party, will prove the delivery. *Ang. & Ames on Corp.* 116. And its being affixed to the deed, is presumptive evidence that it was done by proper authority. *Darnell v. Dickens*, 4 Yerg. 7, 9. See also *The President, Managers & Company of the Berks & Dauphin Turnp. Co. v. Myers*, 6 Ser. & Rawle, 15. The latter case establishes that the affixing to the seal, when done by less than a legal quorum of the board for the transaction of business, binds the corporation, provided the act was authorized or directed by a legal quorum; and whether such authority existed is a question for the jury, under all the circumstances. The seal appearing, is *prima facie* evidence of its having been regularly affixed, but not conclusive. See *id.* 16. *St Mary's Church*, 7 id 630, per Tilghman, C. J.

public offices and companies, such as the books of the Custom House, Bank, East India Company, South Sea Company, and the like, relating to matters public and general, may be proved by examined copies.<sup>(a)</sup> And this is now fully confirmed by stat. 14 and 15 Vict. c. 99, s. 14, by which it is enacted that whenever any book or other document is of such a public nature, as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy,—any copy thereof or extract therefrom, shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive and examine evidence,—provided it be proved to be an examined copy or extract,—or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.[1]

(a) 1 Str. 93, 307. 2 Id. 954, 1005. Hardw. Peake, 43. 4 Taunt. 787. 128. 2 Ld. Raym. 851. 2 Doug. 593, n. 3.

[1] The general rule is, that corporation books are evidence in disputes between members, but not against strangers. *Commonwealth v. Woelper*, 3 Serg. & Rawle, 29. *Fleming v. Wallace*, 2 Yates' Rep. 154. *Highland Turnpike Co. v. McKean*, 10 John. Rep. 154. And when evidence, if there is nothing on their face to raise a suspicion that the corporate proceedings have been irregular, they will be treated and referred to as evidence of the legality of the proceedings. In a contest among the members of a church as to the validity of a bye-law, which required two-thirds of the members to pass it, where it was stated in the minutes of the corporation that on *due invitation the corporators met*, held that this amounted to evidence of two-thirds being present. *Commonwealth v. Woelper*, 3 Serg. & Rawle, 29. See *Grays v. Turnpike Co.* 4 Rand. 578. *Wood v. The Jefferson Co. Bank*, 9 Cow. 194, 205.

The books of a corporation are not evidence to prove a usage, by entries of acts of submission by particular persons to the exercise of rights insisted on, without proof aliunde of the situation of those persons, and their relative position in reference to the corporation. *Davies v. Morgan*, 1 Price's P. C. 77, cited 2 Harr. Dig. 1081. See S. C. 1 Tyr. 457, 1 Crom. & Jer. 587. Where the plaintiff claimed land under a lease from a corporation, and the defendant set up that the corporation had re-entered for rent and then demised to him; held, that the books of the trustees of the corporation could not be used to prove such re-entry. *Jackson, ex dem. Donnelly v. Walsh*, 3 John. Rep. 226.

But in an action by a turnpike company to recover the amount of stock subscribed by a person, the books of the company are admissible evidence to show that they have pursued the course pointed out by their charter. *Grays v. Turnpike Company*, 4 Rand. Rep. 578. *The Highland Bank v. McKean*, 10 John. Rep. 154.

The books of a banking corporation have been held evidence in a suit on a note brought by the bank against the endorser, a stranger, to prove the election of its officers; and this was adjudged sufficient, *prima facie*, to show that the bank had complied with the previous requisitions of their charter, and that it had a legal existence. *Wood v. The Jefferson Co. Bank*, 9 Cow. Rep. 194, 205. See *The State v. Buchanan*, 1 Wright's Rep. 233.

The books of a corporation, a bank for instance, have been allowed as evidence for them, in suits against strangers, in aid of the testimony of a witness who had made an entry

*(e) Depositions of witnesses deceased or unable to travel.*

By stat. 11 & 12 Vict. c. 42, s. 17, after directing justices to take the statement on oath or affirmation of the witnesses, against a person

therein, the truth of which was in question. *Farmers & Mechanics Bank v. Boraef*, 1 Rawle, 152. This seems, however, to have been upon the principle which allows memorandums, made of a transaction at the time, to go to the jury, under certain circumstances, along with the testimony of the person who made it. The court slightly advert also, in support of their decision, to the doctrine allowing previous consistent declarations of a witness to be given in evidence in corroboration of his oath. In this respect the entries in the books of a corporation would obviously stand upon the same footing as a similar entry in a tradesman's book. And there are many cases where the entries in the books of banks, have been both admitted, and rejected, upon grounds which are as well applicable to books of individuals.

And it may be well to observe here, that these books of incorporated banks, &c., stand upon a different footing, generally, in this country, from the books of the bank of England. The former are not public books, in the sense in which that term is understood by the courts, except as among the members of the corporation. In other cases, the rules of admissibility in regard to them, as well as the mode of authenticating entries in them, are not essentially variant from those which relate to books of a mere private nature. See *Ridgway v. Farmers Bank of Bucks County*, 12 Serg. & Rawle, 256, 263; *The Philadelphia Bank v. Officer*, 12 Serg. & Rawle, 49; *Courtney v. The Commonwealth*, 5 Rand. 66; Angell & Ames on Corp. 406, 7, 8, 9.

The corporation of a city, and municipal corporations generally, differ from a private corporation, in respect to the matters we are considering. An agent of the corporation of the city of New-York, for instance, sued for acts done by order of the corporation, in removing obstructions in a street, may, in his *individual capacity*, avail himself of the minutes and books of the corporation in his defence. "It" (the corporation of the city) "more nearly resembles," say the court, adverting to the distinction noticed, "the legislature of an independent state, acting under a constitution prescribing its powers. The acts of this corporation concern the rights of the inhabitants of the city; it exercises a delegated power, not for its own emolument, but for the interests of its constituents; and while it keeps within the limits of its authority, the constituents are bound by the acts of the corporation. When the citizen wishes to show those acts, he must resort to the authentic record of them, which is the original minutes of the corporation." This, it seems, is the best evidence. *Denning v. Rooms*, 6 Wend. 651.

The official tax books of the corporation of the city of Washington, made up by the register, from the original returns of the assessors laid before the board of appeals, are evidence to show the tax assessed upon an individual; the assessor's original returns need not be produced. *Ronkendorf v. Taylor's Lessee*, 4 Peters' Rep. 349. "The book was made out by an officer in pursuance of a duty expressly enjoined by law. This not only makes the tax book evidence, but the best evidence which can be given of the facts it contains." *Id.* In Kentucky, the minutes of the trustees of Louisville, and other towns in the commonwealth, are competent evidence on trials as to town property. But there is no provision authorizing their verification by the clerk's certificate. It would seem to follow then, say the court, that they ought to be verified by oath, and proved to be true copies from the real book of the trustees kept by the proper officer and recognized by the board as such. *Dudley v. Grayson*, 6 Monroe, 259. But on writ of error, unless the objection to the admissibility in the court below was distinctly on the ground that the paper was not sufficiently authenticated, the court will not notice it, but will only regard the objection as one of relevancy or competence. *Id.*

The Virginia legislature, by statute, vested certain trustees with 100 acres of land to be appropriated partly as a present to settlers and partly for the benefit of the proprietors; held, that the books and other records of the trustees, (called in the case a corporation,) being



charged before them with an indictable offence, as mentioned *ante*, p. 35,—it is enacted, that if afterwards upon the trial of the person ac-

first shown to be in the hand-writing of the proper officers of the board, were admissible in evidence. The court said the trustees were established for public purposes; and their books were the best evidence of their acts and proceedings. *Owings v. Speed*, 5 Wheat. 420. And in Massachusetts, a proprietary book of ancient date has been held admissible, without proving the entries by the clerk of the proprietors who made them. *The Proprietors of Monumoi v. Rogers*, 1 Mass. Rep. 159. See *Pitts v. Temple*, 2 id. 538. The sales book of the proprietors of Cincinnati, has been admitted as to early sales. *William's Lessee v. Burnett*, 1 Wright's Rep. 53. An ancient book of records of the town of Boston, entitled the book of possessions, which, although not regularly authenticated, had been preserved among the records of the town, was held competent and sufficient evidence to establish ancient titles under allotments from the town. *Rust v. The Boston Mill Corporation*, 6 Pick. 158. A book of the proprietors of common lands, was allowed in evidence in tracing title, on a witness stating that it had been formerly in the possession of his grand-father, whose executor had it thirty years, and then delivered it to the witness; the presumption from lapse of time being, say the court, that the witness had the lawful custody of it, and there being no evidence of the present existence of the proprietary with a clerk to keep the books and records; and there being no place appointed by law for the deposit of such books when a proprietary becomes extinct. *Tolman v. Emerson*, 4 Pick. 160, 163.

The town record books in New Hampshire, may be used by selectmen in justifying their doings as such, to show their appointment by a meeting of the inhabitants; and also to show a tax voted at such meeting. *Bishop v. Cone*, 3 N. H. R. 513. See *McFadden v. Kingsbury*, 11 Wend. 669. The record of the appointment, and proof that the selectmen had acted under it, was held in this case proper evidence to be submitted to the jury, as in favor of the selectmen, from which to infer that the meeting, at which the selectmen were appointed, was a legal one in all respects. *Bishop v. Cone*, *supra*. It seems that a record like the above, when erroneous, may be amended by the clerk so as to conform to the truth, by motion to the court on behalf of the selectmen. *Id.* See *Wells v. Battelle*, 11 Mass. Rep. 477; *Taylor v. Henry*, 2 Pick. 397.

The chest of an incorporated company, kept by their clerk for the time being, is the proper custody for old documents relative to the admission of freemen and other acts of the company; but the private house of a former deceased clerk, is not the proper custody for a convention dated in the reign of Ed. 4, between the then Prince of Wales and the corporation. *Shrewsbury v. Hart*, 1 Carr. & Payne, 114.

Several cases relating to the mode of authenticating these books were introduced *ante*. The book of a corporation must in general be identified; and it must be shown that the book was kept and the entries were made by the proper officer, or some other person in his necessary absence. *Highland Turnpike Company v. McKean*, 10 John. Rep. 154. *Gaines v. The Tombeckbee Bank*, 1 Alab. Rep. 50. It is not enough that the book is in the hand writing of a person stated therein to be secretary, and that the witness producing it received it from such person. *Highland Turnpike Co. v. McKean*, *supra*. Nor is it sufficient merely that the book is proved by a former secretary or clerk to have been handed down to him as the corporation book. *Martin v. Gunby*, 2 Harr. & John. 248.

As to the admissibility of bank-books, see *ante*. In England, mere sworn copies of the books of the bank of England are evidence. It is otherwise as a general rule in respect to the books of banks in the United States. In assumpsit against a bank on a bill drawn by its president, his authority to draw was denied. To prove one item in his case, the plaintiff offered examined copies from the discount book of the bank of Pennsylvania, a third person. Held, inadmissible; as the original should be produced. The court denied that this came within the rule, that where an original is of a public nature and admissible in evidence, an examined copy is evidence, *per se*. To make it admissible, if so at all, there must be proof that the original was made by an officer of the bank; the officer himself to prove this, if to be found, and if not, his handwriting to be proved. The court admitted the con-

cused, it shall be proved, by the oath or affirmation of any credible witness, "that any person whose deposition shall have been so taken as

trary rule as to the bank of England; but said that their books are truly of a public nature. But to give that name to the books of the bank of Pennsylvania, and on the same principle to those of incorporated insurance companies, &c., with which the country has been inundated, might produce serious consequences. "We know," say the court, "that these books are often badly kept; and it would be dangerous to admit copies in evidence when the originals may be easily had; nor should the originals be admitted without proof by whom the entries were made." *Ridgway v. Farmers Bank of Bucks County*, 12 Serg. & Rawle, 256, 263.

In Philadelphia (*Bank v. Officer*, 12 Serg. & Rawle, 49,) it was held, that the entries in a book of an incorporated bank, were not admissible, as between third persons, to show a deposit of money, unless it be first proved that the clerk who made the entries was dead, or beyond the reach of process; and this, though it was admitted that the entries in question were made by J. M., who was clerk at the time. The rule has subsequently been laid down thus: "I take it to be a general and established principle, that neither copies of the books of an incorporate bank, nor the books themselves, are admissible against any other than the bank, or without proof being first made by whom the entries in the book were made; and that the proper witnesses to make such proof are the clerks by whom the entries were made, if to be found within the jurisdiction of the court, but if dead or out of the jurisdiction of the court, proof may be made of their hand-writing." *Gochenauer v. Good*, 3 Pennsylv. Rep. 274, 280, by the court, Kennedy, J., delivering the opinion. It seems, however, that where a bank is located at a great distance from the place of trial, or where the books are required to be in different places at the same time, an examined copy from the books, with proof that the original entries were made by an officer of the bank, (proved by himself to be found, and if not, with proof of his hand writing,) would be competent evidence. *Id.* 280, 1.

Mere certified copies would not be admissible unless rendered so by statute. *Hallowell & Augusta Bank v. Hamlin*, 14 Mass. Rep. 178.

In Massachusetts it has been said, that clerks of religious and other corporations, and other recording officers, may certify copies of their records; and in doing so, act under the obligation of an oath of office, and their certificates are evidence. *Oakes v. Hill*, 14 Pick. Rep. 442. See *Sawyer v. Baldwin*, 11 Pick. Rep. 494; *Stebbins v. Jennings*, 10 id. 188. The general rule, however, is otherwise, and, unless through the intervention of a statute, mere certified copies of corporation records and minutes are inadmissible. See *Dudley v. Grayson*, 6 Monroe, 259. Also *The Hallowell & Augusta Bank v. Hamlin*, 14 Mass. Rep. 178, *supra*. And note; the proceedings of churches and ecclesiastical bodies, generally, may be proved by parol, though minutes be kept of them by their clerks. *Charleston v. Allen*, 6 Verm. Rep. 633, 639. *Dow v. Hinesman*, 2 Aik. Rep. 18. See *Riddle v. Stevens*, 2 Serg. & Rawle, 537, where the minutes of a presbytery were held evidence to prove certain facts; e. g. the suspension of a minister, on due complaint made; but not to show the facts upon which it was founded.

The record of a certificate of incorporation of a religious society, is not evidence of the fact of incorporation. The certificate itself must be produced. *Jackson, ex dem. Wallon, v. Leggett*, 7 Wend. 377.

Where it was referred to the court to determine whether a book produced was the record of a church: it appearing that during the whole time it was kept, the ministers of the parish and pastor of the church kept it wholly or principally, he being the proper officer to keep such a record; and being kept in form of a record, and containing a regular statement of the admission of members, the choice of officers, and the transaction of the regular business of the church; held that such book was to be considered the record book of the church. *Sawyer v. Baldwin*, 11 Pick. Rep. 492.

As to the effect of lapse of time in dispensing with proof of the hand writing of the entries in corporation books, see *Davies v. Morgan*, 1 Price's P. C. 77, cited 2 Harr. Dig. 1081. S. C. 1 Tyr. 457; 1 Crom. & Jer. 587. See also *ante*, where some cases were introduced bear-

aforesaid, is dead, or so ill as not to be able to travel,—and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness,—then, if such deposition purport to be signed by the justice, by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice [\*148] purporting to sign \*the same.” And it may be read before the grand jury, for the purpose of finding the bill, as well as before the petty jury at the trial.(a)[1]

(a) *R. v. Clements*, 20 Law J. 193 m.

ing on this subject. In an action for tolls claimed by the lessee of a corporation, an ancient schedule, produced from among the muniments of the corporation, copies of which had been delivered to the lessee and acted upon by him, were held admissible evidence for the lessee. *Breet v. Beales*, 1 Mood. & Malk. 419.

[1] The statutes of New York make ample provision for securing testimony which could only be received *viva voce* at the common law. It may be reduced to writing out of court, on examination, at various stages of the litigation.

1. *In perpetuam rei memoriam*, and *de bene esse*. In any suit commenced, or yet to be brought in a court of record, the testimony may be perpetuated by either party according to the statute. 2 R. S. 398 to 400, pt. 3, ch. 7, tit. 3, art. 5. Tillinghast's Forms, 639, 640.

For this purpose draw up an affidavit or affidavits. See forms, Tillingh. 254, 255, and Att's N. Y. Pr. 209; Cain. Pr. 441, 2. In this, as in other statute forms, follow as nearly as may be the words of the statute. It need not show the probable inability of the witness. *Jackson, ex dem. Ten Eyck v. Perkins*, 2 Wend. 308. The technical expressions of, “as this deponent is advised by counsel and verily believes,” may be omitted in respect to the witness' materiality; (Cain. Pr. 442;) though clearly they would not vitiate. Present the proof to a justice of the Supreme Court, or a commissioner authorized to perform his duties at chambers, (which includes circuit judges, (2 R. S. 201,) supreme court commissioners, (id. 279, 280,) recorders, judges of the county court of the degree of counsel in the Supreme Court and judges of the superior court of law in the city of New York; (id. 281;) or to the first judge of the county court, or to a master in chancery. The affidavit may be taken before either of these officers, or any judge of any court of record, or commissioner of deeds, (id. 284.) What are courts of record, vid. id. 276, viz.: court of errors, chancery, supreme and circuit courts, courts of oyer and terminer, common pleas, general sessions and mayor's courts. Though the opposite party be infants, the testimony may be taken in this form, if the suit be actually pending. Remark of the Revisers. So in case of a suit yet to be brought, where the party applying is an infant. Id. The officer then appoints the place and time of examination. The former must be within the county where the witness resides; and the latter not less than 14 days from the date of the order. The order should mention the time. If not, 14 days will be taken as intended. 2 Wend. 308. See form, Tillingh. 273, § 12; Att's N. Y. Pr. 299; Cain. Pr. 443. Serve the order on the opposite party, or the anticipated party, at least 10 days before the time of hearing, (exclude the day of service and include the day of hearing, Rule 62, Supreme Court, Oct. term. 1829,) by showing the original order and delivering a copy, (Cain. Pr. 20, 21, 22, 444,) of which an affidavit should be produced to the officer on the day of hearing. See form, Cain. Pr. 21. Vary it for the party, instead of the attorney, as there. The officer will also, on application, at the time of the order or after, issue a summons for the witness, returnable on the day of examination. See form, Tillingh. 274. For the manner of service, vid. 2 R. S. 401. If he do not appear at

The statutes relating to the examination of witnesses against a prisoner before a justice of the peace, previously in force,<sup>(a)</sup> contained no

(a) 1 & 2 Ph. & M. c. 13; 2 & 3 Ph. & M. c. 10, and 7 Geo. 4, c. 64.

the time, draw up an affidavit of service, (see form. Tillingh. 255, and Cain. Pr. 447;) and the officer will grant a warrant to bring him (see form. Tillingh. 641, and Cain. Pr. 450,) on the same day, or at some future time to which the officer may adjourn. If the witness appear on the summons, you may proceed *ex parte*, after waiting half an hour, (the usual time of attending on a judge's order, (Cain. Pr. 20,) upon producing the affidavit of duly serving the order. Then, or whenever the witness and opposite party appear, you proceed to the examination, prosecuting it on that day and other days to which the officer may adjourn till it be closed, as directed by the statute. Appearance and cross-examination waives notice. *Jackson, ex dem. Ten Eyck v. Perkins*, 2 Wend. 308. The deposition is to be captioned, (vid. form, Tillingh. 641, Cain. Pr. 444, 446, Att's Comp. 210,) and the testimony reduced to writing with great care, (Cain. Pr. 444,) when it is to be read, subscribed and certified, (vid. Tillingh. 641, Cain. Pr. 445, Att's Comp. 210,) as directed by the statute, and filed as therein directed, with the original order, affidavits and proof of service. In prosecuting the deposition, after the caption, begin on a new line thus: "The above named A. B., aged — years, being duly sworn, deposeth and saith," &c. Cain. Pr. 445. The following may be the form of the oath: "You will," (if on the Evangelist,) or, if the witness desires it, "You do swear, in the presence of the ever living God, that you will," or, if scrupulous of taking an oath, "You do solemnly, sincerely and truly declare and affirm, that you will," (vid. 2 R. S. 497,) "true answers make to such questions as I shall put or permit to be put to you touching the matter now officially before me." If there be a cause actually pending, add, "and depending between John Doe, plaintiff, and Richard Roe, defendant." Mr. Caines says, as to the old statute, that the examination must be conducted as in other cases of *viva voce* examination in court. Cain. Pr. 445. The examination on the part of the producer being finished, the cross-examination, if any be intended, commences, prefacing it as follows: "The aforesaid A. B. being cross-examined, says," &c. When the whole deposition is thus taken, it should be read over to the witness, who may then explain any part of his testimony, which he conceives to be improperly stated, or he may correct any part on a better recollection of the facts. Cain. Pr. 445. If the witness refuse to testify or answer any proper question, he may be committed. For the general form of a commitment, (vid. Cain. Pr. 451.) If the witness be wrongfully committed, relief must be sought by a *habeas corpus*. *Id.* 454, 2 R. S. 563. On the trial, the inability to obtain the *viva voce* testimony of the witness must be shown from one of the causes mentioned in the 39th section of the statute, or it cannot be received; and by the next section, the competency and admissibility of the witness or his testimony are to be tested by the same rules as if he were examined in open court. The inability to attend must be proved; and the party cannot rely upon the presumption of this, arising merely from the advanced age of the witness. *Jackson ex dem. Montessor v. Rice*, 3 Wend. Rep. 180. But proof by one that a witness is 74 years of age, and by another that from his knowledge of her situation and infirmities, he believed she could not endure the fatigues of the journey, without seriously hazarding her health, is sufficient. *Jackson ex dem. Ten Eyck v. Perkins*, 2 Wend. 308. Pending the proceedings before one officer, he may by the 41st section transfer the examination to another officer residing in the same county with the witness. This may be by order, endorsed on the original thus: "Ordered that the within mentioned examination be had before E. C., circuit judge, residing in the county of Saratoga. The latter then takes the place of the first officer with the same powers, all the papers of course being transferred to him.

By § 39, an examination *in perpetuam rei memoriam* may be used in the case of witnesses disabled to attend and give evidence by reason of *death, insanity, old age, sickness, or settled infirmity*. In such case, the deposition, or a certified copy, is evidence between the parties or those claiming under him.

such enactment as the above; and yet it was determined in many cases, and well recognized as a rule of the common law, that in all cases of

2. *De bene esse*. Another mode of securing oral testimony is by the 2 R. S. 391, pt. 3, ch. 7, tit. 3, art. 1. Tillingh. Forms, 642. This mode is given where the witness in a suit already commenced by actually serving process, is *about to depart from this state*, or so sick and infirm as to afford reasonable ground for apprehension that he will not be able to attend the trial. It will be perceived that the latter cause is completely covered by the proceeding *in perpetuam*, &c., but not the probable departure. The proceedings and their effects are so similar in all respects to that under the statute to perpetuate, &c., that they need not be particularly considered here. Instructions upon one statute will guide as to the other. The difference will readily be suggested by the statutes themselves. This is a proceeding which constituted a part of the common law of New York. *Mumford v. Church*, 1 John. Cas. 147; *Sandford v. Burrell*, Anth. N. P. Rep. 184; *Jackson ex dem. Green v. Kent*, 7 Cowen's Rep. 59, 63; *Wait v. Whitney*, id. 69; *Packard v. Hill*, id. 489. The forms of proceedings to take testimony previous to the statute are given in 7 Cowen's Rep. 60 to 63; and in Cain. Pr. 433 to 438. And the revisers, in their note reporting the statute, declare that the details are taken from the above cases, and from the act to perpetuate testimony in certain case. 1 R. L. 455, by Woodw. & Van Ness. The act seems to be declaratory of the common law, so far as power or jurisdiction may be in question; and there can be little doubt that it does not mean to take away the old right of the courts to interfere wherever the party shall appear to be in danger of losing the evidence; as if the suit be commenced *without process*, or the witness be a prisoner of war, &c., &c. But in the cases mentioned by the statute, the proceedings must be in strict conformity with its provisions; otherwise the evidence will be inadmissible; and so where it shall appear that the notice to attend was insufficient, or that the examination was not in all respects fair. 2 R. S. 393, § 8. The following suggestions are applicable to all examinations of this character; "The witness must be interrogated as on a trial. His deposition on interrogatories before administered, or on a detail of facts before related and reduced to writing, cannot be taken to the judge, then sworn to, and the witness interrogated to the facts of such deposition. But, to every fact to be deposed to, the witness must be interrogated, and his answer to each taken down in writing as it is made; for it would be dangerous in the extreme to admit of a deposition antecedently prepared, in the phraseology of the person who put it to paper. This point was ruled by Mr. Justice Livingston, in a case where the defendant's attorney attended with an affidavit ready drawn up, in which every fact making for the defendant was fully sworn to. But on a *viva voce* examination, the witness totally destroyed his testimony in writing; and the suit was almost immediately settled." *Murray v. The — Ins. Co.*, Cain. Pr. 437. The same doctrine is sanctioned under the statute of the U. S. *Richardson v. Golden*, 3 Wash. C. C. Rep. 109. And vid. *U. S. v. Smith*, 4 Day's Rep. 121, S. P. and *Bell v. Morrison*, 1 Peters' S. C. Rep. 351, 355. If the witness be a transient person, then that he said at his examination he was going to leave the state, and had not since been seen by the witness who proves the declaration, is sufficient to let in the deposition. *Guyon v. Lewis*, 7 Wend. 26. It was formerly doubted how the preliminary steps to the examination should be shown upon the trial. *Jackson, ex dem. Green v. Kent*, 7 Cowen's Rep. 59. But the papers on file are now sufficient, unless impeached. 2 R. S. 392, 3, § 7, 8.

3. The above examination can be had in those cases only, where the witnesses to be examined within the state. Another ancient and usual proceeding, is to examine witnesses residing or being without the state under the statute, (2 R. S. 393 to 396, pt. 3, ch. 7, tit. 3, art. 2; Tillingh. Forms, 632;) upon commission or *dedimus potestatem*. All the requisite forms under this head will be found collected or referred to in Tillingh. Forms, 632 to 638. The forms of proceedings upon the former statute on the same subject may be seen in Att. Comp. 206 to 208, and Cain. Pr. 400 to 426. The words of the present statute are, "any witness not residing within this state," (§ 11;) of the old statute, (1 R. L. Woodw. & Van Ness 519, § 11,) "If any witness shall not reside in this state." Upon the latter statute, which is substantially like the former, it was held, (*Pooler v. Maples*, 1 Wend. Rep. 65,) that it extended

examinations of witnesses in cases of felony under those statutes, in the presence of the accused, and where he had the opportunity to cross-examine them, the deposition of a witness might be read against the accused upon his trial, if the witness were then dead,<sup>(a)</sup> or bedridden, and not likely to be ever able to attend at the assizes,<sup>(b)</sup> or unable to travel,<sup>(c)</sup> or had become insane,<sup>(d)</sup> or was kept out of the way by or on behalf of the prisoner.<sup>(e)</sup> And it is probable that although the cases of death and inability to travel from illness alone, are expressly stated in the statute, as those in which the deposition of a witness may be read against a prisoner on his trial, it may be holden that such depositions may also be read in evidence, if the witness be bedridden, though otherwise not in ill health, or if he have become insane, or if he be kept out of the way by the prisoner or by some person on his behalf, at the time of the trial.

Where an objection was made to the admission of a deposition in evidence at the trial, because the caption of it stated no offence in law, it merely stating that the prisoner was charged with obtaining money and other valuable security for money from Mary Rowe, not stating by

(a) 2 Hawk. c. 46, s. 15. *R. v. Smith*, B. & Ry. 339. *R. v. Osborne*, 8 Car. & P. 113.

(b) *R. v. Wilehaw*, Car. & M. 145.

(c) 2 Hawk. c. 46, s. 15.

(d) *R. v. Marshall et al.*, Car. & M. 147.

(e) 2 Hawk. c. 46, s. 15. *R. v. Gutteridges et al.*, Car. & P. 471, per Parke, B.

to a witness whose domicile is in this state, but who is temporarily out of the state engaged in work, e. g. as a contractor in constructing a canal in Pennsylvania. Most of the cases on the old statute will be found collected in 1 Durl. Pr. 543 to 550, 2 John. Dig. Practice, xxiv. and Cowen's Digested Index, tit. Commission to Examine Witnesses and Practice in Criminal Cases, No. 45. Vid. farther, 1 Wend. Rep. 18, 27, 65, 283; 2 id. 64, 242, 627, 646; 6 id. 475, 6, 480, 1; 7 id. 513, 514, 520; 9 id. 444; 2 Hall's Rep. 502. Formerly, the motion for this commission could be made in court only; and this is still so, except as to the Supreme Court. In that court, not only is the proceeding expedited by the monthly terms, but the motion may, in effect, be granted at any time in vacation by a justice of the Supreme Court or a circuit judge. On ten days notice, he makes an order for the commission. 2 R. S. 393, § 12. Most of the books cited apply of course to the old statutes; indeed all except the new statutes, the remarks of the revisers, and Mr. Tillinghast's new book of forms, with a few recent cases in Wendell and Hall. But the older authorities and precedents will be found powerful auxiliaries in practicing under the new statutes. The difference between the old and new statute concerning the taking of testimony by commission, as pointed out by the revisers in their notes, is as follows: "sec. 10, one commissioner sufficient; sec. 12, commission may be ordered in the Supreme Court by a single justice or circuit judge; sec. 18, enlarges the number of cases in which a commission may be received from another besides the agent; sec. 21, agreement (and manner of carrying it into effect,) of the attorneys as to the mode of returning the commission; sec. 23, reserving the right to object to the competency of the witness on the trial; the competency or relevancy of the interrogatory, (vid. 2 Wend. 64, S. P.,) or any answer given; sec. 24, allowing a commission on interlocutory judgment, and allowing the evidence taken thereon to be used in assessing damages."

By the 2 R. S. 731, pt. 4, ch. 2, tit. 4, art. 2, § 73, 74, 75, the provisions of the above statutes relative to taking testimony *de bene esse* and upon commission are applied to issue upon indictments. The right of examination is however confined to defendants.

false pretences, &c.: the judges held that there was nothing in the objection; it was not necessary that there should be a heading or caption to the deposition, to render it admissible in evidence, it was sufficient that it appeared to relate to the charge on which the prisoner was tried.(a)

(f) *Deeds and other private written instruments.*

Deeds, and all other instruments of a private nature, must be proved by the attesting witness, if there be any; or if there be no attesting witness, then by proof of the party's handwriting.(b) But where a deed or other writing is thirty years old, it proves itself.(c) So, if the attesting witness be dead, or have become insane or blind, or be abroad out of the reach of the process of the court, or if, after a *bona* [\*149] *fide* serious, \*and diligent inquiry he cannot be found: in those cases the instrument may be proved, by proving the witness's handwriting.(d)[1]

(a) *R. v. Langbridge*, 2 Car. & K. 975.

(c) Bul. N. P. 255. Gilb. Ev. 94.

(b) Gilb. Ev. 99. 7 T. R. 266. Peake, 198.

(d) Arch. Pl. & Ev. Civ. Act. 421—423.

[1] If the subscribing witness fails to prove the due execution of the instrument, the party may establish the fact by other evidence. *Whitaker v. Salisbury*, 15 Pick. 534, 543, 4. *Sigfried v. Levan*, 6 Serg. & Rawle, 308. *Taylor v. Meekly*, 4 Yeates' Rep. 79. *Patterson v. Tucker*, 4 Halst. Rep. 322. *Miller's estate*, 3 Rawle, 318. *Boxer v. Rabeth*, 1 Gow's Rep. 175. *Boyer v. Norris*, 1 Harringt. Rep. 22, 23. Even should the witness deny his attestation, or give evidence tending to disprove the execution, (which he is competent to do though he confess his signature,) the party may contradict him. *Whitaker v. Salisbury*, 15 Pick. 544. *Sigfried v. Levan*, 6 Serg. & Rawle, 308. *Taylor v. Meekly*, 4 Yeates' Rep. 79. *Hall v. Phelps*, 2 John. Rep. 452. *Handy v. The State*, 7 Harr. & John. 42, 48, 9. *Holloway v. Lawrence*, 1 Hawks' Rep. 49, 50. *Booker v. Bowles*, 2 Blackf. Rep. 90. *Vernon v. Hammet*, 1 Hill's Rep. 269. The witness' hand-writing may be proved, notwithstanding his doubt or denial of it; and this has been called the most usual and direct proof; but, in such case, it ought to be very clear and satisfactory. *Pearson v. Wightman*, 1 Rep. Const. Ct. So. Car. 336. And where the hand-writing is distinctly proved, the instrument is to be read to the jury, and if they find the fact of execution, the court will not disturb the verdict. *Id. Patterson v. Tucker*, 4 Halst. Rep. 322.

The party calling the witness, however, will not be allowed to impeach his character for truth. *Whitaker v. Salisbury*, 15 Pick. 544. *Brown v. Bellows*, 4 id. 194. Though it has been held that he may prove previous contradictory statements of the witness. *Brown v. Bellows*, 4 Pick. Rep. 179, 187, 8, 194. *Cowden v. Reynolds*, 12 Serg. & Rawle, 281. *Sigfried v. Levan*, 6 id. 308, 314. See *Crowell v. Kirk*, 3 Dev. 357, per Ruffin, J. It is difficult, however, to reconcile the latter cases with the general rule which forbids that a party shall be allowed to impeach his own witness. See on this subject, *Whitaker v. Brown*, 15 Pick. 544, 5.

Sometimes a subscribing witness when called on can recollect nothing of the execution, not even the act of signing by the party, independant of the fact of finding his (the witness') name attached to the attestation. It seems to be well settled that, in such cases, if the witness, in addition to identifying his signature, can say that he never attested a writing, without seeing it executed, this will amount to very cogent evidence of the execution. It furnishes a presumption ranging in principle, along with those which arise from artificial habits, of which there are many. The attestation of the witness, in these and similar instances, has been likened to a memorandum, used to refresh his recollection; and, in ascer-

The handwriting may be proved by any person who has seen the party write, or who knows his handwriting from having corresponded with him, particularly if he have acted upon the letters he received

taining how far the witness must go in order to allow the point of execution to be submitted to the jury, the reader may be materially aided by several of the cases stated in Cowen & Hill's Notes to Phillips on Evidence, on the examination of witnesses, where the general subject of memoranda is considered, and several *dicta* bearing directly upon the present inquiry, introduced. See particularly *The State v. Rawles*, and *Collins v. Lemastus*, cited in Cowen & Hill's Notes to Phillips on Ev., part 2, p. 393 *et seq.*; also *Pearson v. Wightman*, 1 Rep. Const. Ct. So. Car. 336; *Dan v. Brown*, 4 Cowen's Rep. 486, 489. If the witness recognizes his signature, and says, that he has no recollection of the fact of its being executed in his presence, but that seeing his signature to it he has no doubt he saw it executed; this has always been received as sufficient proof of execution. Per Bayley, J., in *Maugham v. Hubbard*, 1 Mann. & Ryl. 7. See also *Russell v. Coffin*, 8 Pick. Rep. 143; per Ewing, C. J., in *Den v. Downam*, 1 Green's Rep. 142; *Merrill v. The Ithica & Owego Rail Road Co.* 16 Wend. 598; *Curie v. Donald*, 1 Wash. Rep. 58; *Denn, ex dem. Gaston, v. Mason*, 1 Coxe's Rep. 10, and note at p. 11; *Patterson v. Tucker*, 4 Halst. 322, 332, 3; per Sutherland, J., delivering the opinion, in *Jackson, ex dem. Bowman, v. Christman*, 4 Wend. 277, 282; *Wheeler v. Hatch*, 3 Fairf. 389; *Brown v. Anderson*, 1 Monroe, 198. Accordingly, in *Hall v. Luther*, 13 Wend. 491, a subscribing witness to a bond, given by an under sheriff with sureties, to the sheriff, swore that he remembered the sheriff was, on the day of its date, taking bonds of his deputies, that he recollected seeing some of the obligors at the time, but could not say he saw A. and B., two of them; he however, recognized his own hand-writing, and presumed he saw all the obligors sign or heard them acknowledge it, or he would not have witnessed it; held, *prima facie* sufficient to entitle the instrument to be read in evidence. See *Miller's estate*, 3 Rawle, 312, 317, 318. Where one of two subscribing witnesses to a deed did not recollect witnessing it, but identified his own hand writing, and said he had no doubt he saw it executed, "as he was not in the habit of signing his name to what he did not see executed;" it appearing also, that the other witness was out of the state, and proof being given of his hand writing: Held, sufficient to allow the instrument to go to the jury, unless there was reason to suspect or believe the deed to be a forgery. *Russell v. Coffin*, 8 Pick. Rep. 143. A subscribing witness to a warrant of attorney swore, that from certain memoranda he found, he was at a given place on a particular day, being the day the warrant bore date; that his name subscribed thereto was his own hand-writing; that the seal appeared to have been taken from an engraving then and still in his possession; and that from these circumstances, he was convinced he was present and witnessed the execution of the instrument: This was adjudged enough to authorize a jury to pronounce the instrument duly executed although the witness had not sworn to the person's hand writing who was alleged to have executed it, nor that the same was executed by such person. It is possible, say the court, that the witness may have quibbled, and that he saw the instrument executed by some other person than the party; but this approaches so near to perjury, that it is not to be presumed in respect to a man of unimpeached character. If his character had been proved bad, the jury might have disregarded the evidence. *Pigott v. Holloway*, 1 Binn. Rep. 436. In *Collins v. Lemasters*, 2 Bail. Rep. 141, a witness to a deed recognized his own signature, and was induced to believe from that circumstance, that it was executed in his presence; he remembered the parties to it being together at the time of the supposed execution, but had no recollection of having seen them sign, seal, deliver, or of hearing them acknowledge the deed: And held, that this was enough to authorize the deed to go to the jury. The other subscribing witness was then called by the opposite party, who swore that one of the parties had not signed at the time of the attestation, nor had the witness any recollection of such party being present at the attestation. Upon this testimony the case was submitted to the jury, and they having found in favor of the deed, the court refused to disturb the verdict.



from him.(a) But it cannot be proved by comparing it with other writing of the party.(b)[2]

(a) Arch. Pl. & Ev. Civ. Act. 423, 424.

(b) Id. 424.

[2] In cases proper for resorting to the handwriting of the subscribing witness, the presumption in general is, that what has been attested did take place; and hence, proof of his handwriting will ordinarily make out the execution sufficiently to allow the instrument to be read in evidence. *Sigfried v. Levan*, 6 Serg. & Rawle, 311; *Miler's estate*, 3 Rawle, 317, 318; *Pelletreau v. Jackson*, 11 Wend. 110; *McPherson v. Rathbone*, id. 96; *Lush v. Druse*, 4 id. 313; *Ingram v. Hall*, 1 Hayw. Rep. 207; *Somerville v. Sullivan*, 1 Call's Rep. 560, 561; *Jackson, ex dem. Varick v. Waldron*, 13 Wend. 178; *Carroll v. Norwood*, 1 Harr. & John. 174, 175; *Ross v. Gould*, 5 Greenl. Rep. 204; *Whittemore v. Brooks*, 2 id. 63, note; *Mott v. Doughty*, 1 John. Cas. 230; *Shuby v. Champlin*, 4 id. 461; *Jones v. Brinkley*, 1 Hayw. Rep. 20; *Jones v. Blount*, id. 238; *Lautermilch v. Kneagy*, 3 Serg. & Rawle, 202; *Hamilton v. Marsden*, 6 Binn. Rep. 45; *Smith v. Chamberlain*, 2 N. Hamp. Rep. 440; *Parker's ex'rs v. Fassit*, 1 Harr. & John. 337; *Jackson, ex dem. Bond v. Root*, 18 John. Rep. 60, 66; *Murdock v. Hunter's rep's*, 1 Brock. Rep. 135; *Gilliam's adm'r v. Perkinson's adm'r*, 4 Rand. 325; *Farnsworth v. Briggs*, 6 N. Hamp. Rep. 561; *Clark's lessee v. Courtney*, 5 Peters's Rep. 319; *Den v. Van Houten*, 5 Halst. Rep. 273; *Patterson v. Tucker*, 4 id. 322; *Winn v. Patterson*, 9 Peters' Rep. 674, 675, 676. How far the rule will need to be qualified, as it respects deeds, where the instrument does not purport in the body of it, or in the attestation clause, to have been sealed, and the only evidence of an intent to seal is an ink scroll opposite the party's name, may be gathered from several cases, *post*, in these notes.

Before being allowed to prove the instrument by evidence of the witness' handwriting, the non-production of all the witnesses, if there be more than one, must be duly accounted for. *Jackson, ex dem. Edson v. Gager*, 5 Cowen's Rep. 383; *Davison's lessee v. Bloomer*, 1 Dall. Rep. 123; *Jackson, ex dem. Woodruff v. Cody*, 9 Cowen's Rep. 140; *Jackson, ex dem. Bond v. Root*, 18 John. Rep. 60; *Hautz v. Rough*, 2 Serg. & Rawle, 349; *Whittemore v. Brooks*, 1 Greenl. 57, 59; *Shepherd v. Goss*, 1 Tenn. Rep. 487; 1 Stark. Ev. 328, 6th Am. ed.; *Jackson, ex dem. Bowman v. Christman*, 4 Wend. 277; *Shump v. Hughes*, 5 Hayw. Rep. 93; *Jones v. Coopridier*, 1 Blackf. Rep. 47, 49, note (1); *Booker v. Bowles*, 2 id. 90.

Where all the witnesses to a deed or other instrument are dead, or absent, &c., there being several, proof of the handwriting of one of them will, *prima facie*, suffice to allow the instrument to be read. *Jackson, ex dem. Woodruff v. Cody*, 9 Cowen's Rep. 140; *Fitzbugh v. Croghan*, 2 J. J. Marsh. Rep. 434; *Jackson, ex dem. Livingston v. Eaton*, 11 John. Rep. 64; *Dudley v. Sumner*, 5 Mass. Rep. 444; *Jackson, ex dem. Bond v. Root*, 18 John. Rep. 60; *McFerran v. Powers*, 2 Serg. & Rawle, 44; *Jackson, ex dem. Boyd v. Lewis*, 13 John. Rep. 504; 1 Stark. Ev. 328, 6th Am. ed.; *Jones v. Coopridier*, 1 Blackf. 49, note (1); *Kelly v. Dunlap*, 3 Pennsylv. Rep. 136; see *Mott v. Doughty*, 1 John. Cas. 230; *Hamilton v. McGuire*, 2 Serg. & Rawle, 478; *Kingwood v. Bethlehem*, 1 Green's Rep. 226, 227; *Coulston v. Walton*, 9 Peters' Rep. 62; *Jackson, ex dem. Lansing v. Chamberlain*, 8 Wend. 620. Otherwise, however, in South Carolina, (*Sims v. De Graffenreid*, 4 McCord, 253, and see the cases *infra*, cited from the reports of that state;) in Kentucky, (*semble*, *Robards v. Wolfe*, 1 Dana, 155, stated *infra*;) and Louisiana. See *infra*.

The authentication of an instrument in this way, whether by proof of the handwriting of one or all of the attesting witnesses, though sufficient generally to allow it to go to the jury, is by no means conclusive upon them, (*Somerville v. Sullivan*, 1 Call's Rep. 560;) for if there are suspicious circumstances, casting doubt upon the transaction, they may not be satisfied by the testimony; and hence it is strongly recommended that proof of the handwriting of the party be superadded. See per Tilghman, C. J., in *Clark v. Sanderson*, 3 Binn. Rep. 192, 196, 196; also per Walworth, Chancellor, and Tracy, Senator, in *Jackson, ex dem. Varick v. Waldron*, 13 Wend. 183, 184, 197, 198; *Bell v. Bowgell*, 1 Ashm. Rep. 7; *Hamilton v. Marsden*, 6 Binn. 45; *Lautermilch v. Kneagy*, 2 Serg. & Rawle, 202; *Hamilton v. McGuire*, 2 id.

In larceny of bills of exchange or other valuable securities requiring a stamp, or upon an indictment for obtaining them by false pretences,

487; *Murdock v. Hunter's rep's*, 1 Brock. Rep. 135, 140, *et seq.*; *Spring v. The South Carolina Ins. Co.*, 8 Wheat. 268; *Farnsworth v. Briggs*, 6 N. Hamp. Rep. 561; *Ungles v. Graves*, 2 Blackf. Rep. 191. In Maryland, it is said to be "usual" to add proof of the handwriting of the party to that of the subscribing witnesses. *Handy v. The State*, 7 Harr. & John. 49. Though this seems not indispensable. *Carroll v. Norwood*, 1 id. 174. Where the witness' handwriting cannot be very satisfactorily proved, or where he is a marksman merely, it is then, doubtless, necessary to prove the handwriting of the party, or other circumstances equivalent. See *Nelius v. Brickell's adm'r*, 1 Hayw. Rep. 19; *Engles v. Brunington*, 4 Yeates' Rep. 346; *Gilliam's adm'r v. Perkinson's adm'r*, 4 Rand. 325; *Gregory v. Baugh*, id. 636, per Green, J.

Where there is fair ground for a dispute as to the identity of the party executing, proof beyond that of the handwriting of the subscribing witnesses may become necessary. In a recent case in Kentucky, an action was brought on an injunction-bond, to which the defendant pleaded *non est factum*; the bond was attested by the clerk, and it became a question, whether the attestation of the clerk did not prove the bond: the court held it did not. But even were it otherwise, they said, and the attestation was to be considered so far official as to prove the signature to be genuine, that does not identify the defendant, and prove him the person who executed. For, there may be two men of the same name. The defendant ought not to be required to prove he was not the person who executed, &c. *Robards v. Wolfe*, 1 Dana's Rep. 155. *Quere*, however. Most of the American cases, *supra*, when they have either required or recommended proof beyond the handwriting of the witnesses, have done so upon the ground that it would furnish additional assurance of execution; and not with a view to the identity of the party. Indeed, so far as merely identifying the party was concerned, courts have usually assumed that identity of name was sufficient, in the first instance, as presumptive evidence of identity of person. And so are the majority of the English cases, notwithstanding the opinion of Bayley, J., in *Nelson v. Whittall*, (1 Barn. & Ald. 21.) *Robards v. Wolfe*, *supra*, is the only American case, it is believed, where this has been denied. Nor does the reasoning in the case seem to us at all satisfactory. It is true, there may be two persons of the same name; and that the presumption arising from the identity of name may be erroneous and illusory. And the same objection could be urged against presumptive or circumstantial evidence in various other cases, where it is undeniably admissible, and *prima facie* sufficient. Where the fact is shown that there is another person of the same name with the party who is alleged to have executed the instrument, further evidence might then be required. But until this appears, it is difficult to see why the presumption adverted to should not stand; at least so far as to allow the point to be passed upon by the jury. See *Atkinson v. McCulloch*, 5 Watts' Rep. 13; *Jackson, ex dem. Shultz v. Goes*, 13 John. Rep. 518; *Jackson, ex dem. Woodruff v. Cody*, 9 Cowen's Rep. 140, 149, 150; *Jackson, ex dem. Bogert v. King*, 5 id. 237.

In South Carolina, proof of the handwriting of the party must be added to that of the subscribing witnesses, and, in general, proof of the handwriting of all the witnesses is requisite. *Hopkins v. De Graffenreid*, 2 Bay's Rep. 187; *Oliphant v. Taggart*, 1 id. 255; *Plunket v. Bowman*, 2 McCord's Rep. 138; *Duncan v. Beard*, 2 Nott & McCord, 400; *Young v. Stockdale*, id. 531; *Elwee v. Sutton*, 2 Bail. Rep. 128; *Corneal v. Bickley*, 1 McCord, 166; *Sims v. De Graffenreid*, 4 McCord's Rep. 253; *Townsend v. Covington*, 3 id. 219; *Edgar ads. Brown*, 4 id. 91. But where the maker of a promissory note was a marksman, held, that proof of the handwriting of the subscribing witness was enough. *Burnly ads. Whitaker*, 2 Nott & McCord, 374.

In Louisiana, also, proof of the handwriting of the attesting witness is not sufficient; the maker's signature must be authenticated in some way, and this is not done, it is said, by proving the handwriting of the witness or witnesses. *Dismukes v. Musgrove*, 7 Mart. Lou. Rep. 58, N. S.; *Barfield v. Hewlett*, 4 Mill. Lou. Rep. 118; *Crouse v. Duffield*, 12 Mart. Lou. Rep. 539; *Lynch v. Postlethwaite*, 7 id. 69. But an exception is allowed where the party is a marksman. *Tugiasco v. Molinari's heirs*, 9 Lou. Rep. (Curry) 112.

if it appear in evidence that the bill was not duly stamped, the defendant will be acquitted; for in that case it is not a valuable security within stat. 7 & 8 G. 4, c. 29, s. 5. Therefore where a man was indicted for obtaining an order for the payment of 2*l*. by false pretences, and the order appeared to be an unstamped cheque upon a banker, which from the manner in which it was drawn, required a stamp, the judges held that it was not a valuable security within the meaning of the Act.<sup>(a)</sup> Perhaps a distinction in this respect might be made between those instruments, which the commissioners of land revenue may order to be stamped on the payment of a penalty, and those which they have no authority to stamp after execution. But this point has not as yet been decided. In forgery, however, it is immaterial whether the forged instrument be stamped or not, although the instrument, if genuine, would require a stamp.<sup>(b)</sup>

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### SECTION III.

#### PAROL EVIDENCE.

IN all cases where a fact need not be proved by a record or certificate, or by deed or other written evidence,<sup>(c)</sup> it may be proved by the parol testimony of witnesses. I shall now consider the doctrine of parol testimony, shortly, under the following heads:

1. *Who may be witnesses*, p. 149.
2. *Number of witnesses required*, p. 155.
3. *Witnesses, how compelled to attend*, p. 156.
4. *Witnesses' expenses*, p. 156.

1. *Who may be witnesses.*

#### (a) *Quakers, &c.*

Quakers may now be witnesses in criminal cases, and may make an affirmation instead of an oath;<sup>(d)</sup> and indeed they may now make

(a) *R. v. Yates*, Ry. & M. 170.  
 (b) *R. v. Hawkswood*, 2 T. R. 606.

(c) See *Ante*, p. 136.  
 (d) 9 G. 4, c. 32.

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It seems that, in all cases, where the handwriting of the subscribing witness is resorted to, for the purpose of establishing an instrument, the opposite party may controvert the presumption arising therefrom, by showing statements made by them inconsistent with their attestation.

an affirmation instead \*of an oath in all cases.(a) So may [\*150] Moravians.(b) So may that class of dissenters called Separatists.(c)[1]

The form of the affirmation of a Quaker or Moravian, is thus "I, A. B. being one of the people called Quakers," [or "*one of the persuasion of the people called Quakers,*" or "*one of the United Brethren called Moravians,*" as the case may be,] "do solemnly, sincerely and truly declare and affirm, that," &c.

The affirmation of the Separatists is thus: "I, A. B. do, in the presence of Almighty God, solemnly, sincerely and truly affirm and declare that I am a member of the religious sect called Separatists, and that the taking of any oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect; and I do also, in the same solemn manner, affirm and declare that," &c.

(b) *Jews, Turks, &c.*

Jews may be witnesses, and are sworn upon the Old Testament, or rather upon the five books of Moses.

Turks and Mahomedans of all descriptions, may be witnesses, and sworn upon the Koran.

So, Moors, Gentoos, Chinese, and in fact every person who believes in a God, and in a future state of rewards and punishments, and in the moral obligation of the oath he is about to take, may be witnesses,(d)

(a) 3 & 4 W. 4, c. 49.

(b) 9 G. 4, c. 32. 3 & 4 W. 4, c. 49.

(c) 3 & 4 W. 4, c. 82.

(d) Bul. N. P. 292. Arch. Pl. & Ev. Civ.

Act, 440.

[1] A witness who declines swearing on the New Testament, though he profess christianity, may be allowed to swear on the Old Testament, if he considers that mode binding on his conscience. *Edmonds v. Rowe*, Ry. & Mood. N. P. Rep. 77. In New York the legislature have made the following provisions in regard to the ceremony, or form of administering an oath; 1. The usual mode of administering an oath shall be by the person who swears, laying his hand upon and kissing the Gospels. 2 Rev. Stat. 407, § 82. 2. Every person who shall desire it, may be permitted to swear in the following form: "You do swear in the presence of the ever living God;" and while so swearing, such person may, or may not hold up his hand, at his discretion. id. § 83. 3. Every person who shall declare that he has conscientious scruples against taking any oath, or swearing in any form, shall be permitted to make his solemn declaration or affirmation, in the following form: "You do solemnly, sincerely, and truly, declare and affirm." Id. § 84. 4. Whenever the court is satisfied that the witness has any peculiar mode of swearing, connected with, or in addition to, the laying of his hand upon the gospels, and kissing the same, which is more solemn and obligatory in the opinion of the witness, the court may adopt such mode of swearing him. Id. § 85. 5. Every person believing in any other than the christian religion, shall be sworn according to the peculiar ceremonies of his religion, if there be any such ceremonies, instead of the modes above prescribed. Id. 408, § 86. The court may interrogate the witness as to the form. Id. § 89. See *Vail v. Nickerson*, 6 Mass. Rep. 262, and *United States v. Coolidge*, 2 Gall. Rep. 364.

each to be sworn in such form as he deems obligatory upon his conscience.[2]

But a person who has no religious belief, which he deems binding on his conscience to speak the truth, cannot be a witness.(a)[3]

(a) Bul. N. P. 292.

[2] All witnesses, indeed, must be sworn after a form, the obligation of which they acknowledge; as a Jew on the Pentateuch or Old Testament, with his head covered; (*Gomez Serra v. Munoz*, Stra. 821; see id. 1113, and *Roberly v. Langston*, *supra*.) a Mahomedan on the Koran: (*R. v. Morgan*, 1 Leach, 54,) a Gentoo, by touching with his hand the foot of a Brahmin or priest of his religion; a Brahmin by touching the hand of another such priest; (*Omicund v. Barker*, Wil. 549,) a Chinese, by breaking a china saucer; (*Reg. v. Entreham*, 1 C. & Mar. 248,) a Scotch covenantor, or member of the kirk, by holding up the hand without kissing the book; *R. v. Mildrone*, Leach, 412; *R. v. Walker*, 2 Sid. 6, cited Cowp. 390: *Mee v. Reid*, Peake, C. N. P. 23; 1 Leach, 498, *Dr. Owen's case*.) but if a witness himself declares that he acknowledges the sanction of the oath in the usual form, there seems no just ground for troubling him with further questions. It is certain, that in whatever form he consents to be sworn, e. g. if though Christian he declines to be sworn on the New, but consents to be sworn on the Old Testament, (*Edmonds v. Rowe*, Ry. & M. C. N. P. 77,) he may be afterwards asked whether he hold such oath binding on his conscience; but not whether he considers any other form of oath more binding, for he will be liable, if he gives false testimony, to the penalties of perjury. 2 Br. & B. 284; 3 Br. & B. 232. Wharton's Cr. Law, 305.

It is for the jury to determine what weight is to be given to the testimony of one whose immoral and degraded life shows a want of religious sentiment or a disregard to personal character or reputation. *Bowman v. Smith*, 1 Strobhart, 246.

[3] The test of a witness' competency, at common law, on the ground of his religious principles is, whether he believes in the existence of a God who will punish him if he swears falsely. 2 Cowen, 431. Within this rule are comprehended those who believe future punishment not to be eternal. Cowen & Hill's notes, 62. All persons who believe in the existence of a God, and in future punishments by him, either in this world or in the next are competent witnesses. 2 Cowen, 432, note a; Id. 572; 15 Mass. R. 184. But it is not necessary that a witness should be a Christian or even believe in the Old Testament, in order to render him competent. Thus Christians of all sects and denominations, Turks, Moors, and other Mussulmen, Gentoos and the like, may be witnesses. Arch. Cr. Pl. & Ev. 144. But a man wholly without religion and having no belief in the moral obligation of an oath, shall not be received to give evidence in any case whatever. 1 Atk. 44.

The new constitution of this state, adopted in 1846, declares however, that no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief. Const. art. I, sec. 3. An objection of that sort will therefore, in future, only affect the credibility of the witness.

By the revised statutes every person believing in any other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion, if there be any such, instead of the mode prescribed in ordinary cases. 2 R. S. 408, sec. 86. And the court may inquire of a witness what are the peculiar ceremonies observed by him in swearing. Id. ib. sec. 89.

A witness cannot be compelled to declare his belief in the existence of a Supreme Being, or that he will punish false swearing; but this may be proved by other witnesses. Id. ib. sec. 88; 18 John. 98; 2 Cowen, 431; 4 Day, 51. A person apparently of weak understanding, however, may be examined as to the extent of his religious knowledge. 2 R. S. 408, sec. 89. After the incompetency of the witness from defect of religious belief is satisfactorily established, by proof of his declarations out of court, he will not be permitted to deny or explain such declarations or his opinions, or to state his recantation of them when

(c) *Infants.*

Infants of the age of fourteen may be witnesses; and under that age, if they appear to have competent discretion.(a) Where they are very

(a) 2 Hale, 273.

called to be sworn. But he may be restored to his competency on giving satisfactory proof of a change of opinion before the trial, so as to repel any presumption arising from his previous declarations of infidelity. 18 John. R. 98; 4 Day, 51.

In Massachusetts, it has been said that mere disbelief in a future existence goes only to the credibility. *Hunscom v. Hunscom*, 15 Mass. Rep. 184. In Maine, a belief in the existence of the Supreme Being is rendered sufficient, without any reference to rewards and punishments. Stat. 1833, ch. 58; *Smith v. Coffin*, 6 Shepl. 157. In Virginia a belief in God, and his providence, has been held sufficient. *Jones v. Harris*, 1 Stroblart Rep. 160. In Delaware, a person who disbelieves in a God, and a future state of existence, cannot be a witness. His belief may be proved by evidence of his declarations; and his own assertions of a change, made at the time he is offered as a witness, will not restore him to competency. 2 Harrington, 543. In Pennsylvania, in *Cubbison v. McCreary*, 2 Watts & Serg. Rep. 262, it was held that the true test of the competency of a witness is his belief in the existence of a Supreme Being, who will punish false swearing. And the rule embraces those who believe future punishment not to be eternal. In Ohio, in *U. S. v. Kennedy*, 3 McLean, 175, it was held that a witness's belief that punishments for false swearing are inflicted in this life only, might go to his credibility. In Connecticut, it was formerly held that those who believe in a God, and in rewards and punishments in this world, are not competent witnesses. *Atwood v. Welton*, 7 Conn. Rep. 66. But the Connecticut legislature has since enacted that such persons shall be received as witnesses.

In proving the religious views of a witness, the weight of opinion is that the witness himself cannot be questioned or examined. *Jackson v. Gridley*, 18 Johns. Rep. 98; *Wakefield v. Ross*, 5 Mason, 19; *Curtis v. Strong*, 4 Day, 51; *Smith v. Coffin*, 6 Shepl. 157. And if the witness has changed his opinions, such change must be proved by third persons. In Vermont, however, a contrary rule prevails. *Scott v. Hooper*, 14 Verm. Rep. 535.

A witness cannot be compelled to declare his belief, (2 Revised Statutes of N. Y. 408, § 88,) but this may be proved by other witnesses. *Id. Jackson ex dem. Tuttle v. Gridley*, 18 Johns. Rep. 98; *Butts v. Swartwood*, 2 Cowen's Rep. 431; *Curtis v. Strong*, 4 Day, 51; *Beardsly v. Foot*, 2 Root's Rep. 399; *Bow v. Parsons*, 1 id. 480; *State v. Cooper*, 2 Tenn. Rep. 96. Slight or unguarded expressions will not, however, be sufficient to exclude a witness. *State v. Cooper*, 2 Tenn. Rep. 96. After the incompetency of the witness from defect of religious belief, is satisfactorily established by proof of his declarations out of court, he will not be permitted to deny or explain such declarations or his opinions, or to state his recantation of them, when called to be sworn. But he may be restored to his competency, on giving satisfactory proof of a change of opinion before the trial, so as to repel any presumption arising from his previous declarations of infidelity. *Jackson ex dem. Tuttle v. Gridley*, 18 John. Rep. 98; *Curtis v. Strong*, 4 Day, 51. In *Wakefield v. Ross*, the defendant made out a case of defective religious belief against two witnesses, when the plaintiff's counsel suggested that they might be personally examined; but Story, J. said the defendant's counsel were not bound to rely on the testimony of these persons for proof of incompetency. *Wakefield v. Ross*, 5 Mason, 19, note. The above doctrines are, in substance, adopted by the revised statutes of New York. 2 R. S. 408, § 88. But a person apparently of weak understanding, may be examined as to the extent of his religious knowledge. *Id.* § 89. See Swift's Ev. 49, 50, and Christian's note to 3 Bl. Com. 369.

We have noticed, *ante*, the character of religious belief essential to a witness, and the mode of proof. The courts in New Hampshire cited and adopted the principle of the New York cases, cited in *Norton v. Ladd*, (4 New Hamp. Rep. 444.) It was in proof by third

young, it is usual for the judge to question them as to their belief in God, their belief as to the punishment hereafter for swearing falsely, and the like, before he allows them to be sworn.(a)[4]

(a) See *R. v. Williams*, 7 Car. & P. 320.

persons, that the witness had several times, and shortly before the trial, deliberately disavowed his belief in the existence of a God. He was rejected as incompetent. It was doubted in Ohio, whether a defect in religious belief should go to the competency or merely the credibility of the witness. The objection was raised, and it was shown by third persons that the witness's creed, so far as collectable from his conversations, was as follows: he said he did not believe in the existence of a God; but added that he saw God in trees, bushes, herbage, and every thing he saw; that a man would be punished for falsehood by his conscience, and in this life only; that a man is bound to speak true at all times, and an oath imposes no additional obligation. The court held, that it was unnecessary to inquire whether, in Ohio, the same rule should prevail as in England; for, if it should, the witness was competent. Wright, J. said, the court thought his declaration equivalent to an avowal of belief in the existence of a God. "He sees him in all created nature." *Easterday v. Kilborn*, 1 Wright, 345, 6. A person who does not believe in future rewards and punishments, but that our evil deeds will all be punished in this world, and that we shall exist immortal in a future state, exempted from punishment for deeds done in the body, is a competent witness. *Farnandis v. Henderson*, in chancery before Ch. Desaussure, Aug. 1827; *South Car. Law Journal*, 202.

It seems that an infidel who believes in a God, and that he will reward and punish him in this world, but does not believe in a future state, may be examined upon oath. *Phil. Ev.* 12, note 6 to 8th ed. citing "By Willes, C. J., *Omichund v. Barker*, Willes, 550." For the general doctrine, see *Phebe v. Prince*, Walker's Rep. 131.

The religious faith of a witness is not a subject for argument, or proof, for the purpose of showing that he is entitled to more or less credit on account of his religious faith. 16 Pick. Rep. 153.

[4] There is no particular age at which a witness must have arrived to render him competent to testify; if he appear, on examination by the court, to have a sufficient sense of the wickedness of false swearing, he may be sworn, although of never so tender an age, and the jury are to judge of his credit. *Commonwealth v. Hutchinson*, 10 Mass. Rep. 225. *The King v. Rose Kelly*, Macnally, 154. *Swift's Ev.* 46. In order to test the capacity of infants to give evidence, and their understanding of the nature and obligation of an oath, the court may examine them as to their religious knowledge or belief. *Jackson, ex dem. Tuttle, v. Gridley*, 18 John. Rep. 98. 2 Rev. Stat. of N. Y. 408, § 89. If the witness be fourteen years of age, he is not interrogated respecting his capacity, but is presumed to have sufficient knowledge and discretion to be sworn, unless some circumstances creating suspicion be shown. *Den v. Van Cleave*, 2 South. Rep. 589. *State v. Doherty*, 2 Tenn. Rep. 80. But if he is under that age, it is a subject of discretion in the court to admit him or not. *Van Pelt v. Van Pelt*, 2 Penning. Rep. 657. The testimony of an infant seven years old, corroborated by circumstances, has been held sufficient to justify a conviction for a capital offence. *State v. Le Blanc*, 1 Const. Rep. 354. But a child only four years old cannot have that idea of a future state which would make it a competent witness. *Rez v. Pike*, 3 Carr. & Payne, 598. The credit of a witness, which is greatly impaired by his age, is to be judged of by the jury from his manner of testifying, and other circumstances. *Commonwealth v. Hutchinson*, 10 Mass. Rep. 225. *State v. Doherty*, 2 Tenn. Rep. 80.

In one case, where a child nine years old, though very intelligent, did not understand the nature of an oath nor the moral penalty of false swearing, the court instructed her on the spot, and then allowed her to be sworn. *Jenner's case*, before Radcliff, mayor, 2 O. H. Rec. 147, 8, 9.

A child eight years old being called, it appeared that, to within sixteen weeks of the trial,

*(d) Deaf and dumb persons.*

Deaf and dumb persons may be witnesses, (a) if any person can be found who can interpret their signs to the court and jury upon oath, (b) or if they can write and read writing, so that the questions and answers may be conveyed in writing. [5]

(a) 2 Hawk. c. 46, s. 163.

1 Leach, 408.

(b) *R. v. Pollock*, MS. 1814. *R. v. Ruston*,

she had never heard of a God, or a future state of rewards and punishments; that she never prayed nor knew the nature of an oath; but since, a clergyman had twice visited and instructed her in the nature of an oath. *Patteson, J.*, rejected her, saying he must be satisfied that she felt the binding obligation of an oath from the general course of her religious education; that the effect of an oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath recently communicated for the purpose of the trial. *Re v. Williams*, 7 Carr. & Payne, 320.

Where, on an indictment for rape, the injured person is of sufficient age, though weak understanding, but is unable to talk, and can communicate and receive ideas only by signs, she may yet be sworn as a witness and examined, through the medium of a person who can understand her, who is to be sworn to interpret between her and the court and jury. *The People v. M' Gee*, 1 Denio, 19.

The testimony of an infant of seven years, corroborated by circumstances, held sufficient to justify a conviction of a capital offence. The credibility of such witness is left properly to the jury. *State v. Le Blanc*, 3 Brevard, 339.

A child of any age capable of distinguishing between good and evil, may be examined on oath; and the credit due to his statements, is to be submitted to the consideration of the jury, who should regard the age, the understanding, and the sense of accountability for moral conduct in coming to their conclusion. *State v. Whittier*, 21 Maine, 341.

Before a child is examined the judge must be satisfied that the child feels the binding obligation of an oath from the general course of its religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated to it for the purposes of a trial.

There is no difference in respect of the competency of children between capital cases and misdemeanors. Where the child has appeared not sufficiently to understand the nature and obligation of an oath, judges have often thought it necessary for the purposes of justice to put off the trial of a prisoner, directing that the child in the meantime should be properly instructed.

[5] Thus where a man deaf and dumb from birth, was produced as a witness on a trial for larceny, he was allowed to be examined through the medium of his sister, who was sworn to interpret to the witness, "the questions and demands made by the court to the witness, and the answers made to them." The sister stated, that for a series of years she and her brother had been enabled to understand one another by means of certain arbitrary signs and motions, which time and necessity had invented between them. She was certain that her brother had a perfect knowledge of the tenets of Christianity, and that she could communicate to him notions of the moral and religious nature of an oath, and of the temporal dangers of perjury. *Ruston's case*, 1 Leach, 408. So in Scotland, upon a trial for rape, the woman, who was deaf and dumb, but had been instructed by teachers, by means of signs, with regard to the nature of an oath, of a trial, and of the obligation of speaking the truth, was admitted to be examined. *Martin's case*, 1823, Allison's *Proc. Crim. Law of Scotl.* 486.



(e) *Lunatics.*

Lunatics may be witnesses in their lucid intervals; (a) idiots or insane persons cannot. (b) And when a lunatic is tendered as a [\*151] witness, \*it is for the judge to examine and ascertain whether he is of competent understanding to give evidence, and is aware of the nature and obligation of an oath; if satisfied that he is, the judge should allow him to be sworn and examined. (c) [1]

(f) *Judge or Juror.*

A judge may be a witness. And it is said that he may be so, even although he is the judge to try the cause; (d) but this at present never occurs in practice. A juror, however, may be a witness, either for or against the prisoner, and must be sworn as such; (e) but it is right that he should inform the court of his having evidence to give in the

(a) Com. Dig. Testm. A. 1.

(d) 2 Hawk. c. 46, s. 83.

(b) Co. Lit., 6 b.

(e) Id.

(c) R. v. Hill, 20 Law J. 222 m.

[1] Persons not possessing the use of their understanding, as idiots, madmen, and lunatics, if they are either continually in that condition, or subject to such a frequent recurrence of it, as to render it unsafe to trust to their testimony, are incompetent witnesses. *Livingston v. Kiersted*, 10 Johns. 362.

An idiot is a person who has been *non compos mentis* from his birth, and who has never any lucid intervals, Co. Litt. 247; Bac. Ab. Idiot (A. 1.) and cannot be received as a witness. Com. Dig. Testm. (A. 1.)

A lunatic is a person who enjoys intervals of sound mind, and may be admitted as a witness, *in lucidis intervallis*. Com. Dig. Testm. (A. 1.) He must of course have been in possession of his intellect at the time of the event, to which he testifies, as well as at the time of his examination; and it has been justly observed, that it ought to appear that no serious fit of insanity has intervened, so as to cloud his recollection, and cause him to mistake the illusions of imagination for the events he has witnessed. Allison's Prac. C. La. of Scotl. 436. With regard to those persons who are afflicted with *monomania*, or an aberration of mind on one particular subject (not touching the matter in question,) and whose judgment in other respects is correct, the safest rule appears to be to exclude their testimony, it being impossible to calculate with accuracy the extent and influence of such a state of mind.

*Livingston v. Kiersted*, 10 John. Rep. 362. And if such persons are offered as witnesses, evidence is admissible to show their incompetency. Id. Persons totally deprived of memory or understanding, or who are suffering under a temporary privation of them when produced to be sworn, ought not to be admitted. Thus a person in a state of intoxication ought not to be permitted to testify; and the court before which the witness is produced, may decide from its own view, whether the witness is in such a situation that he ought to be received to testify. *Hartford v. Palmer*, 16 John. Rep. 143.

A witness is not incompetent merely because he has been judicially declared an habitual drunkard, and his estate committed to trustees. *Gebhard v. Shindle*, 15 Serg. & Rawle, 235. It is enough if he be competent at the time of examination. Id. 238. Though, if he be, at the time, insane, an idiot, or a lunatic, he is not competent. *Ellis, J. in Phoebe v. Prince*, Walk. Rep. 131.

case, before he is sworn as a juror, and indeed to decline acting as a juror in the case, if the court will permit him.[2]

(g) *Prosecutor.*

The prosecutor in criminal cases may be, and generally is, a witness, either for the prosecution or for the defendant; even in cases of forgery, the person whose name is forged may now be a witness to sustain the prosecution.(a)

There were some cases formerly, in which the prosecutor was not allowed to be a witness, on account of the interest he had in the result of the prosecution;—in a prosecution for forcible entry on stat. 8 H. 6, c. 9, s. 3, or 21 Jac. 1, c. 15, he was not allowed to be a witness for he was entitled to restitution if the defendant should be convicted; (b) or in cases where the punishment was by fine only, and the prosecutor was to have the whole or a part of it, he could not be a witness; (c)—but now, interest in the event of the prosecution, no longer renders a witness incompetent, by stat. 6 & 7 Vict. c. 85, s. 1, which I am now about to notice more fully.[3]

(a) 9 G. 4, c. 32, s. 2.

(b) *R. v. Williams*, 9 B. & C. 549.

(c) See *R. v. Blackmore*, 1 Esp. 95. *R. v.*

*Cola*, Id. 217.

[2] A juror may give evidence of any fact material to be communicated in the cause of a trial. In a criminal prosecution, the jury may use that general knowledge which any man may bring to the subject matter of the indictment, without being sworn. But if any one of the jurors has a particular knowledge on the subject; as for instance, as to the value of a watch in a case where it is essential to prove what it is worth; he ought to be sworn and examined as a witness. *Rosser's case*, 7 C. & P. 648. *M'Kain v. Love*, 2 Hill S. C. Rep. 506.

A juror is incompetent to prove the misconduct of his fellow jurors, in order to impeach the verdict. *State v. Freeman*, 5 Conn. Rep. 348. So, a grand juror, to prove that a witness, who has been examined before the petit jury, swore differently before the grand jury. *Imlay v. Rogers*, 2 Halsted. 347. But a juror may be admitted to prove improper attempts, by a party, to influence the minds of the jury. *Denn, ex dem. Chews, v. Driver*, Coxe, 166; and in New York, by statute, a grand juror is bound to testify as to any consistency or inconsistency between what a witness swore before a grand and petit jury; and to disclose testimony given before the grand jury, on a complaint against, or trial of a witness for perjury; but is expressly restrained as to the manner in which he or any of his fellows voted, or what were their expressed opinions. 2 R. S. part 4, ch. 2, tit. 4, s. 31, p. 724.

[3] The old English doctrine has been adopted by some of the American courts; *State v. Brunson*, 1 Root, 307. *Same v. Blodget*, id. 535. Swift's Ed. 70; but see Day's note (1,) 2 N. R. 96. *State v. A. W.*, 1 Tyl. 260. *The State v. Hamilton*, 2 Hayw. 288; doubted by others, (*Coe's case*, 1 C. H. Rec. 141;) but a majority have gone the other way. *Fubber v. Hilliard*, 2 N. H. Rep. 481. *Pennsylvania v. Farrel*, Addis, 246. *Commonwealth v. Snell*, 3 Mass. Rep. 82. *Same v. Waite*, 5 id. 261. *State v. Foster*, 3 M'Cord, 442. *Respublica v. Keating*, 1 Dall. 110. *Same v. Ross*, 2 id. 239. *Same v. Wright*, 1 Yeates, 401. *Same v. Ross*, 2 id. 1. An apparent first endorser was received to prove his name a forgery. *Territory v. Barran*, 1 Mart. Lou. Rep. 208. So the alleged drawer of a check, (*People v. Howell*, 4 John. Rep. 296,) and the maker of a note. *People v. Dean*, 6 Cowen's Rep. 27. And see

*(h) Persons interested in the event.*

By stat. 6 & 7 Vict. c. 85, s. 1, no person, offered as a witness, shall be excluded, by reason of incapacity from interest, from giving evidence either in person or by deposition according to the practice of the court on the trial of any issue joined, or of any matter or question or on any inquiry arising in any suit, action or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having by law or by the consent of the parties, authority to hear receive and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such persons may or shall have interest in the matter in

*U. States v. Johns*, 4 Dall. 412. But the instrument must be produced to the party, before he shall be allowed to swear as to its genuineness, (*Commonwealth v. Hutchinson*, 1 Mass. Rep. 7, *Same v. Snell*, 3 id. 82,) unless it has been secreted to protect the offender. *Commonwealth v. Snell*, *supra*.

That persons entitled to a reward on conviction, are competent witnesses for the prosecution, (see M'Nally's Ev. 61, 63, and the cases there cited. *United States v. Wilson*, 1 Baldwin's Rep. 90, S. P.) An attorney who, by arrangement with the trustees of a corporation, was to have 10 per cent. on all fines collected in their behalf, was held incompetent as a witness for the commonwealth, in a prosecution for a fine belonging to the corporation. *Commonwealth v. Moore*, 5 J. J. Marsh. 655, 6.

The party injured is a competent witness for the state, in a criminal prosecution. The cases are generally uniform to this effect, on the ground which prevails in civil causes, that the record cannot be used as evidence either for or against the witness. *State v. Hasset*, 1 Tayl. 55. *Commonwealth v. Oliver*, 3 Bibb, 474. But they are conflicting, as to his competency in those cases where he may, by special provision, derive actual benefit from a conviction.

The rule that he is competent, was applied to a suit *qui tam* for usury. *Banner v. Gregg*, 1 Harringt. 513;) and to a prosecution for playing with false dice. *The King v. Chapman*, stated by M'Kean, C. J., in *Respublica v. Keating*. 1 Dall. 111. The general rule was held not to be altered even by a statute making the prosecutor liable for costs. *Commonwealth v. Shriver*, Whart. Dig. 331, pl. 734, 2d ed. *Quere. Vid. Commonwealth v. Gore*, 3 Dana, 475. Where a statute made him liable only in the event of the prosecution appearing to be frivolous or malicious, he was received as but contingently liable. *The State v. Blennerhassett*, Walker's Rep. 7, and 15, 16. The prosecutor in forcible entry under the statute, is not competent for the state, for he is entitled to restitution. *State v. Fellows*, 2 Hayw. 340. The rule, that the injured party is competent, &c., was applied to the person who owned, and from whom a bank bill was stolen, though a conviction would entitle him to a restitution of the property. *State v. Cassados*, 1 Nott & M'Cord, 91, 99. But this was denied of the party swindled, against the alleged swindler; for a statute gave the former double value, on conviction. *State v. Vaughan*, 1 Bay, 282, 3. So of an informer, who is entitled to a share of the penalty. *City Council v. Haywood*, 2 Nott & M'Cord, 308. *Van Evour v. The State*, id. 309, note (a). But see *State v. Bennett*, 1 Root. 249.

On trial of an indictment for perjury committed by A. on trial of an action against B. and others, B. is not rendered incompetent as a witness for the prosecution, merely on the ground that he has not paid the debt and costs, and has filed a bill in equity. But *semble*, that if B. expect A. will be a witness against him in a similar action, coming on for trial soon after the indictment, that is such an immediate interest in B. as will disqualify him from being a witness. *Rex v. Hulme*, 7 Car. & Payne, 8.

question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding, in which he is offered as a witness. This \*Act contained some exceptions, [\*152] namely,—parties to the suit, action, or proceeding, named in the record,—lessor of plaintiff in ejectment,—tenant of the premises sought to be recovered in ejectment,—the landlord or other person in whose right a defendant in replevin makes cognizance,—persons in whose immediate and individual behalf any action is brought or defended, either wholly or in part,—and the husband or wife of any such person;—all which exceptions, however, have recently been repealed by stat. 14 & 15 Vict. c. 99, s. 1.[1]

By stat. 14 & 15 Vict. c. 99, s. 2, also, parties to suits, actions, or other proceedings in courts of justice, are made competent witnesses, and compellable to give evidence for or against each other. But, by sect. 3, nothing herein contained shall render any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself,—or shall render any person compellable to answer any question tending to criminate himself or herself,—or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.(a)[2]

(i) *Inhabitants.*

The rated inhabitants of parishes were in many instances holden to be incompetent as witnesses for their parish, in any proceedings by or against it, on the ground of interest. But by stat. 54 G. 3, c. 170, s. 9, they were rendered competent in all matters relating to rates, orders of removal, settlements, and bastards; and by stat. 1 Ann, stat. 1, c. 18, s. 13, the inhabitants of a county, riding, or division, were rendered competent, in prosecutions for the non-repair of bridges, and the roads at the ends of them; and by stat. 27 G. 3, c. 29, s. 1, the inhabitants of a parish, township, or place were rendered competent witnesses to prove any offence to have been committed within their parish, &c., where the penalty was applicable to the poor of such parish, or otherwise in aid or exoneration of such parish, &c. But the stat. 6 & 7 Vict. c. 85, already mentioned,(b) has the effect of rendering inhabitants competent witnesses in all cases for their parish, &c., although by stat. 14

(a) *Vide infra.*

(b) *Supra.*

[1] See N. Y. Code of 1851, secs. 398, 399.

[2] See N. Y. Code of 1851, sec. 390.

& 15 Vict. c. 99, s. 3,(a) or at least by the equity of that statute, not competent or compellable to give evidence against it, where the inhabitants generally are indicted.[3]

(j) *Husband and wife.*

A wife cannot be examined as a witness for or against her husband, or a husband as a witness for or against his wife,(b) except in [\*153] \*the case of a personal injury committed by one upon the other, in which case (from necessity) the one may be a witness against the other.(c)[1]

(a) *Supra.*

*R. v. Sills et al.*, 1 Car. & K. 494.

(b) Gilb. Ev. 133, 134. Bac. Abr. Evi- (c) *R. v. Azyre*, 1 Str. 633. 2 Hawk. c. 46, denoe, A. 1. 2 Hawk. c. 46, s. 70, 71. See s. 77. *Lord Audley's case*, 1 St. Tr. 388.

[3] In New York, it is held that the interest arising from being a rateable inhabitant, is too remote to prevent his being a witness for the town, as in actions on bastardy bonds. *Falls v. Belknap*, 1 John. Rep. 486; or for penalties in *qui tam* actions. *Corrocin v. Hames*, 11 John. Rep. 76; *Bloodgood v. Overseers of Jamaica*, 12 John. Rep. 285. *The City Council v. King*, 4 M'Cord 487. It seems that we stand, by common law, very nearly on the footing of England, upon the statute 54 Geo. 3 c. 170, sec. 9, cited in the text.

[1] It is now settled that a kept mistress, who has passed as the party's wife, is competent for him; though it may be otherwise if he habitually allow her to pass as his wife. Several of the judges recognized the opinion of Lord Kenyon, C. J. cited in the text, as sound law; though Best, C. J. thought the wife should be so *de jure*, in order to be excluded. *Bathews v. Galindo*, 4 Bing. 610; 3 Carr. & Payne, 238, S. C. at N. P. 1 Moor. & Payne, 565, S. C. And see *Randall's case*, 5 C. H. Rec. 141, before Colden, mayor, and Jay, recorder. In a case where the woman was sued, a witness who lived with her as her husband was received as competent in her behalf. *Meunier v. Couet*, 2 Mart. Lou. Rep. 56.

Where the husband is a party, the wife cannot be a witness either for or against him. *Fitch v. Hill*, 11 Mass. Rep. 286; *Commonwealth v. Schriever*, Quarter Sessions, Philad. 1820, MS.; *City Bank v. Bangs*, 3 Paige, 36.

She shall not be examined against her husband, on his trial for murder, even by consent of the parties. *Randall's case*, before Van Ness, J., 5 Cit. H. Recorder, 141, 153, 154. Nor can she be examined for the plaintiff, though the defendant married her after the plaintiff had subpoenaed her in the cause. *Pedley v. Wellesly*, 3 Carr. & Payne, 558.

In one case the court refused to hear the husband as a witness, against one indicted for larceny jointly with his wife, though she was not taken, and the district attorney entered a nolle prosequi as to her; for perhaps her husband might disclose enough to require that a bench warrant should issue against her. *The People v. Colbern*, 1 Wheel. Cr. Cas. 479.

See *Fitch v. Hill*, 11 Mass. Rep. 280. On the traverse of an indictment for subornation of perjury, where two witnesses on the part of the prosecution swore that the testimony given by them on a former trial was false, their wives' testimony was held not admissible to impeach that of their husbands, either directly or collaterally. New York Gen. Sessions, before Radcliff, mayor. *Francis and Jones' cases*, 1 Cit. H. Rec. 121. *Quere*. Indeed, it would seem now to be the settled doctrine, both on authority and principle, that husband and wife may be received to contradict or criminate each other in a collateral matter, i. e. in all cases except where one is called to contradict or criminate the other as a party to some cause.

On similar principles, upon the trial of an indictment for fornication and bastardy with a married woman, she was held competent to prove the criminal connection. *Commonwealth*

And this exception is not affected by the general expression in the 3d section of stat. 14 & 15 Vict. c. 99, above mentioned, namely, that nothing in that section shall render a husband competent or compellable to give evidence against his wife, or a wife against her husband,—as that section merely has relation to the other provisions of the same Act.

But in no other cases of relationship are the parties incompetent to give evidence for or against each other : a father may be a witness for or against his son, a son for or against his father, a brother for or against his brother.(a)

(k) *Attorney.*

An attorney cannot disclose any confidential communication made to him, as attorney, by his client, (b) whether made with reference to any suit then depending or in contemplation, or not.(c) And this is the privilege, not of the attorney, but of the client, and the court will not permit him to make the disclosure.(d) The same rule applies to

(a) 2 Hale, 276.

84-86.

(b) Gilb. Ev. 136. Arch. Pl. & Ev. Civ. Act. 474. 1 Arch. Pr. 75. Hawk. c. 46, ss.

(c) *Doe v. Harris*, 5 Car. & P. 592.

(d) 4 T. R. 753.

v. *Wentz*, 1 Ashm. Rep. 269, and the cases cited *infra* from Browne and Binney. But not to prove the non-access of her husband. *Commonwealth v. Miller*, cited 1 Browne, App. lii.; *Commonwealth v. Stricker*, 1 Browne, App. xlvii.; *Commonwealth v. Connelly*, 1 Browne, 284; *Commonwealth v. Shepherd*, 6 Bin. 283. *The King v. M'Lean*, cited 6 Bin. 290. But if the court permit her to be asked a question from the answer to which non-access may be inferred, as "how long it was since she last saw her husband," and afterwards direct the jury that they are not to consider anything which fell from her as evidence of non-access, and there is strong evidence of non-access from other witnesses, the verdict will not be disturbed. *Commonwealth v. Shepherd*, 6 Binn. 283.

During the trial of five defendants, on an indictment for an assault and battery, the counsel for the defendants moved that the wife of one of them might be examined as a witness for the other four; but the court ruled unanimously that she could not be examined. To have had the benefit of her testimony, they should have moved to be tried separately from the husband, which the court would have granted, had this been assigned as a reason for the motion. *Commonwealth v. Eastland et al.*, 1 Mass. R. 15. But *quere* of this; for where they served, it was holden that one was not competent for the other. *The People v. Bill*, 10 John. Rep. 95. It follows that the wife would not be competent. For where Colbern and Elizabeth, the latter being the wife of Weir, were jointly indicted, and Colbern alone was taken and put upon his trial, the husband was held incompetent for the people, because the wife was so within the case of *The People v. Bill*. *The People v. Colbern*, 1 Wheel. Cr. Cas. 479. On this decision being made, the district attorney entered a *nolle prosequi* in her favor, and offered her husband again; but the court still rejected him as incompetent, because his testimony might still affect his wife, the *nolle prosequi* not being final. He might disclose enough to require that the court should issue a bench warrant against her. To warrant the testimony of the husband, she must first have been tried and acquitted by the jury. *Id.* 481. But see *State v. Anthony*, (1 M'Cord, 285,) that the wife may be a witness for one indicted jointly with her husband for murder, but tried separately from him.

barristers; but not to medical men, or other persons.(a) An attorney also cannot be compelled to produce the deeds or documents of his client;(b) but he may be subpoenaed to produce them, and if he refuse to do so, secondary evidence may be given of their contents.(c) If, however, he be the attesting witness to a deed of his client, his privilege does not exempt him from proving its execution.(d)[2]

- (a) Per Buller, J., 4 T. R. 760. 2 Hawk. J. 214, *ex. R. v. Hankins*, 2 Car. & K. 823. c. 46, s. 92. (c) *Coates et al. v. Birch*, 2 Q. B. 252.  
(b) See *Bate v. Kinsey*, 1 Cr. M. & R. 38. (d) *Doe d. Avery v. Roe*, 6 Dowl. 518. 2 *Davies v. Waters*, 1 Dowl. N. C. 651, 11 Law Hawk. c. 46, ss. 87, 89.

[2] The head or confidential clerk in a mercantile establishment is not privileged from being examined as a witness in respect to the affairs of his principal. *Corps v. Robinson*, 2 Wash. C. C. Rep. 388. Nor an attorney's clerk in respect to the private and personal affairs of the latter, though his articles bind him to keep his master's secrets. *Webb v. Smith*, 1 Car. & Payne, 337. So a confidential agent or factor must give evidence of matters confidentially communicated to him: (*Holmes v. Comegys* 1 Dallas, 439;) and a banker of one of the parties is bound to disclose what such party's balance was on a given day. *Lloyd v. Heshfield*, 2 Carr. & Payne, 325.

The privilege does not extend to the clerk or student of the attorney or counsel, and he is bound to testify to facts of which he acquired a knowledge while in the office of the attorney, though such as the attorney himself could not disclose. *Andrews v. Solomon*, 1 Pet. C. C. Rep. 356. But in *Power v. Kent*, (1 Cowen's Rep. 172,) it was decided that the clerk represents the attorney, during his absence, as to all the ordinary proceedings of the office, and has power to bind the attorney by waiving the usual formalities of practice, as entering a rule to amend. It would seem to follow that the clerk should be under the same restrictions in regard to the business of the attorney as the attorney himself; and in *Jackson, ex dem. Haverly v. French*, (3 Wend. 337,) the opinion was intimated by the court that the rule was applicable to the clerk as well as to the attorney. In a late English case, it was ruled at *nisi prius*, by Best, J. that the privilege of not disclosing confidential communications extends to the clerk of the attorney employed in a cause, on the ground that attorneys are under the necessity of employing clerks, before whom such communications must be made. *Taylor v. Forster*, 2 Carr. & Payne, 195; and see *Foot v. Hayne, infra*. And in a still later case, it was held that the clerk of an attorney, who had been employed by a mortgagee to make an abstract of the mortgage deeds, was not a competent witness to prove the contents of the deeds, (the mortgagee having refused to produce them.) Mr. Justice Bayley saying that the clerk stood precisely in the same situation as his master. *The King v. The Inh. of Upper Boddington*, 8 Dowl. & Ry. 726. Otherwise if the deeds form no part of the client's title. *Doe, dem. Courtail v. Thomas*, 9 Barn. & Cress. 288.

The privilege does not extend to other professional men. *Dixon v. Parmelee*, 2 Verm. Rep. 185. A physician is bound to testify to facts which were communicated in confidence to him in his professional capacity. *Sherman v. Sherman*, 1 Root. 486. So confessions made to a protestant divine will be received in evidence. *Smith's case*, 2 N. Y. C. H. Rec. 77. *Gilman's case*, Carr. Suppl. 61, also cited in *Broad v. Pitt*, 3 Carr. & Payne, 518, S. P. So penitential confessions, made in confidence to members of the same church of which the prisoner is a member, are not privileged. *Commonwealth v. Drake*, 15 Mass. Rep. 161. But it was held by Clinton, mayor, in the N. Y. court of general sessions, that confessions made to a Roman Catholic clergyman in confidence, and whose duty it is to receive auricular confessions according to the canons of that church, will not be received in evidence. *Smith's case*, cited *supra*, and note to that case, 2 N. Y. C. H. Rec. 80. *Buller v. Moore*, Macnally, 253, *contra*.

Whether, where a clerk or servant is bound by articles to keep his master's secrets and is

(I) *One of two defendants.*

If one of two defendants plead guilty, and the other be tried, the defendant who pleaded guilty, before sentence is passed upon him, may be a witness for his companion,(a) or against him.(b) And now, by stat. 6 & 7 Vict. c. 85, s. 1, he may be a witness, although judgment have been pronounced upon him.(c) Also, upon an indictment against two or more, the prosecutor may apply to have one of the defendants acquitted, in order to make him a witness for the prosecution; and the other defendants cannot object to it;(d) or, if on the trial there be \*no evidence against him, he may be acquitted, and [\*154] give evidence for the others.(e)[1]

(a) *R. v. George et al.*, Car. & M. 111.(d) *R. v. Rowland et al.*, Ry. & M., N. P. C.(b) *R. v. Hinks et al.*, 2 Car. & K. 462. 1 401.

Den. C. C. 84.

(e) 2 Hawk. c. 46, s. 98.

(c) *Vide infra.*

called on to disclose a communication prejudicial to his master, or a matter expressly confided to him as a secret, he will be holden to testify? Quere. The inclination of Littledale, J. seemed to be that he would not, in *Webb v. Smith*, 1 Carr. & Payne, 337. In *Foot v. Hayne*, id. 545. Scarlett complained that his clerk was compelled to attend on a subpoena *duces tecum* to produce his retainer book, in order to fix the time of his retainer; and Abbott, C. J. seems to have expressed himself very decidedly that the counsel's clerk should not be received to prove such a communication between the counsel and his client. And *vid. Eicks v. Nokes*, 1 Mood. & Malk. 303.

And now, by statute in New York, no minister of the gospel, or priest of any denomination, is allowed to disclose any communication made to him, in his professional character, in the course of discipline enjoined by the rules or practice of his denomination. 2 R. S. 406, § 72. And no practitioner of physic or surgery, duly licensed shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, if the information was necessary to enable him to prescribe for his patient as a physician, or do any act as a surgeon. *Id.* § 73.

A physician consulted by the defendant in an action on the case for seduction, as to the means of producing an abortion is not privileged from testifying, by the New York statute forbidding a disclosure of information received by a physician to enable him to prescribe for a patient. *Hewitt v. Prime*, 21 Wend. R. 79.

Communications made to a confidential friend in confidence are not privileged; and such friend is bound to disclose them when called upon as a witness, although made under an injunction and promise of secrecy. *Mills v. Griswold*, 1 Root. 383; *Calkins v. Lee*, 2 Root. 363. This was once made a grave question. *Bulstrode v. Letchmere*, 2 Freem. 5. So a person in no way connected with the attorney, who is present at a communication made to the attorney by the client, is bound to testify to such communication. *Jackson, ex dem. Haverly v. French*, 3 Wend. Rep. 337; *Gainsford v. Grammar*, 2 Campb. 10, S. P.

But the same reasons which apply to an attorney apply equally to an interpreter between the client and attorney, of whom he is merely the organ. *Andrews v. Solomon*, 1 Pet. C. C. Rep. 356; *Parker v. Carter*, 4 Munf. 273; *Jackson ex dem. Haverly v. French*, 2 Wend. Rep. 337.

In New Hampshire, the privilege is not confined to communications with professional men, but extends to any person employed to manage a cause as counsel. *Bean v. Quimby*, 5 N. H. Rep. 94. The court put this on the construction of a local statute, authorizing a man to manage his cause by agent, whether he be licensed or not. *Id.* 97.

[1] Where several persons are jointly indicted, one is not a competent witness for another,



(m) *Accomplice.*

An accomplice may give evidence against those jointly guilty with him.(a) But although in point of law they may be found guilty on

(a) 2 Hawk. c. 46, ss. 94, 95. *Vide supra.*

without being first acquitted, or convicted; and it makes no difference whether the defendants plead jointly or separately. *The People v. Bill*, 10 John. Rep. 95; *Campbell v. Com.*, 2 Virg. Cas. 314; et vide *The State v. Alexander*, 2 Rep. Const. Ct. So. Ca. 171. Thus, where two being jointly indicted for an assault and battery, pleaded, and were tried separately; and after the testimony for the people against one had closed, he offered to prove his defence by the other, it was held, that the witness offered was incompetent before the trial and acquittal, or conviction. *People v. Bill*, 10 John. Rep. 95. So where two were jointly indicted for larceny, and being separately arraigned, pleaded and were tried separately, it was held that a party in the same indictment cannot be a witness for his co-defendant, until he has been first acquitted, or, in some cases, convicted, whether the defendants be jointly or separately tried. *Campbell v. Com.*, 2 Virg. Cas. 314.

If any evidence is given against one of two jointly tried, the court will not strike his name out of the indictment for the purpose of making him a witness for the other; and where there is no evidence against one of several defendants, it seems that the motion to strike out his name can only be legally granted by consent of the attorney for the state, and by considering it equivalent to a motion on his part for leave to enter a *nolle prosequi* as to such defendant. *State v. Alexander*, 2 Rep. Const. Ct. So. Ca. 171. Accordingly, on trial of an indictment for larceny, the attorney-general not consenting, though no evidence appeared against one of the prisoners, the court refused to swear him as a witness for the others. *State v. Carr*, Cox, 1. But of this, *quere*; for the attorney-general may thus wrongfully withhold evidence from the defendants; and in another case, persons joined in a complaint, against whom there was no evidence, were, on motion in behalf of the other defendants, admitted for them. *State v. Shaw*, 1 Root, 134. But if circumstances are proved from which it is possible for the jury to presume guilt, a co-defendant in an indictment cannot be a witness for the defence. *Pennsylvania v. Leach*, Addis. 352. For the general doctrine, see also *Rex v. Long*, 6 Carr. & Payne, 179.

Where one is indicted jointly with his accomplices, it is in the discretion of the state's attorney to try the prisoners separately, and use the accomplice or not, on trial, as a witness; but the prisoners have no such right of election for such a purpose, because the accomplice jointly indicted is not competent for them though they sever. *State v. Calvin*, R. M. Charl. 151, 169. And it was said generally, that the state may use the accomplice as a witness, but the prisoners not. *Id.* 169. *Quere* of this, independent of their being joined as parties. He is competent for either party, if not indicted. And *quere*, whether the accomplice, so long as he remains on the record as a joint indictor, can be received as a witness for either party, though his associate be tried separately. *Rex v. Rowland*, Ry. & Mood. N. P. Rep. 401, and note.

It seems to have been assumed, in one case, that though an accomplice and his associates be jointly indicted, yet, if the latter be separately tried, the accomplice may be a witness for the state, though not for the prisoners; and it was held, that the state's attorney, but not the prisoners, may elect to try separately with a view to use the accomplice as a witness. *State v. Calvin*, R. M. Charl. 151. But before the state's attorney can in such case use the accomplice as a witness, ought not the attorney to move, and have him acquitted, or at least enter a *nolle prosequi* against him? See *Rex v. Rowland*, Ry. & Mood. N. P. Rep. 401, and the note.

Does not the case come within the general rule, that so long as the witness' name stand on the record, he being thus designated as a joint party and subject to be tried as such, he is incompetent? In respect to the prisoners right to have one jointly indicted with him

his testimony alone,(a) yet in practice it is not usual to convict, on the testimony of an accomplice, or of the wife of an accomplice,(b) unless his or her story be confirmed in some material part, by the testimony of other credible witnesses.(c) And this confirmatory testimony must not merely relate to the manner in which the offence was committed, for that proves only that the accomplice was present at the commission of it;(d) but it must be as to some facts or circumstances, which tend to connect the accused with the offence, or to connect the accused and the accomplice together.(e) And where A. was indicted as principal, and B. as receiver, and A. pleaded guilty, and an accomplice was called to give evidence against B., it was holden that evidence confirming some part of the accomplice's story as to A., was no confirmation of his evidence as it affected B.(g) But where two are on their trial as principals, and an accomplice is admitted to give evidence against them, and his evidence is confirmed as to one of them, but not as to the other, this will warrant the jury in finding both defendants guilty.(h) If, however, two or more accomplices be examined, the evidence of one is not deemed confirmed by that of the other, but the evidence of both requires to be confirmed by other testimony.(i) However, since the passing of stat. 6 & 7 Vict. c. 85, which shall be pre-

- (a) 2 Hawk. c. 46, s. 96. *R. v. Jones*, 2 *Webb*, 6 Id. 595. *R. v. Farler*, 8 Id. 106. *R. Camp.* 131, 132. *R. v. Hastings*, 7 Car. & P. 152. *R. v. Dyke*, 8 Id. 261.  
 (b) *R. v. Neal et al.*, 7 Car. & P. 168.  
 (c) See *R. v. Bernard et al.*, 1 Car. & P. 88.  
 (d) 2 Hawk. c. 46, s. 96.  
 (e) *R. v. Addis*, 6 Car. & P. 388.  
 (f) *R. v. Moores et al.*, 7 Car. & P. 270.  
 (g) *R. v. Dawber et al.*, 3 Stark. 34.  
 (h) *R. v. Noakes*, 5 Car. & P. 326.  
 (i) *R. v. Wilkes*, 7 Car. & P. 272. *R. v.*

sworn as a witness in his behalf, he must in all cases, whether he be tried jointly or separately from the witness, who has not even been arraigned, wait for a conviction or acquittal of the witness. *The People v. Williams*, 19 Wend. 377; *State v. Blennerhassett*, Walker's Rep. 7, 16, 17. If there be no evidence against him, the court may direct an acquittal, or order the defendant to be discharged. 2 R. S. 616, § 19, 2d ed.; *State v. Blennerhassett*, Walker's Rep. 7, 16, 17. But until that be so, the rule of exclusion applies, even where the trials are ordered for different counties. *State v. Mills*, 2 Dev. 420; *Carter's case*, cited id. 422. And it makes no difference that the defendants have pleaded separately. *State v. Mooney*, 1 Yerg. 431.

It is put in the text that, unless acquitted, he should not only be convicted, but fined, before he is competent. The American cases usually put the case of a conviction merely as restoring competency, without its being followed by the sentence of the court. But Ruffin, J., in *State v. Mills*, (2 Dev. 422,) says the practice in North Carolina has accorded with the English strictness.

In Amos and Phillippe' ed. of Phil. Ev. p. 70, note (3), the case of *Rex v. Lafone*, (5 Esp. 160,) is examined, and several arguments urged in favor of receiving one joint indictee as a witness for another, after he has suffered judgment by default. The learned editors urge, what it seems difficult to deny or explain away, that there exists no objection beyond what goes to his credit, any more than in the case of an accomplice. The same reasoning would seem to apply where the witness pleads guilty, especially in all those courts which do not exclude witnesses solely on the ground of their being parties.

sently mentioned, where the unconfirmed testimony of an accomplice is the only evidence against a prisoner, the judge will not withdraw the case on that account from the consideration of the jury; he will leave it to them, however, with a recommendation not to act upon it.(a) It may sometimes also be a question whether the witness was in fact an accomplice, of the defendant, so as to require confirmation; it has been holden, for instance, that a person employed by government, to mix with conspirators, and detect their designs, is not an accomplice, and does not require to have his testimony confirmed.(b)[2]

- (a) *R. v. Skiller*, 9 Shaw's J. P. 314.      see *R. v. Dowling*, Id. 678.  
 (b) *R. v. Mullens*, 12 Shaw's J. P. 776, and

[2] The doctrine of the text in regard to the admissibility of accomplices, has been recognized in several, and, it is presumed, in most of the United States, in its fullest extent. *The People v. Whipple*, 9 Cowen's Rep. 707. *Byrd v. The Commonwealth*, 2 Vir. Cas. 490. *Bean v. Bean*, 12 Mass. Rep. 20. *Churchill v. Sutter*, 4 Mass. Rep. 156. *M'Niff's case*, 1 C. H. Rec. 8. *The State v. Wier*, 1 Dev. 363. *United States v. Henry*, 4 Wash. C. C. Rep. 428. The evidence of accomplices has been at all times admitted, although from a principle of public policy, or from judicial necessity, or from both. They are no doubt requisite as witnesses in particular cases, but it has been well observed, that in a regular system of administrative justice, they are liable to great objections. "The law," says one of the most useful modern writers on criminal jurisprudence, "confesses its weakness, by calling in the aid of those by whom it has been broken. It offers a premium to treachery, and destroys the last virtue which clings to the degraded transgressor. On the other hand, it tends to prevent any extensive agreement among atrocious criminals, makes them perpetually suspicious of each other, and prevents the hopelessness of mercy from rendering them desperate." *People v. Whipple*, 9 Cowen's Rep. 707. As in a criminal case a *particeps criminis* is admitted as a witness, so in a civil case, a *particeps fraudis* may be, either to prove or disprove the fraud. *Churchill v. Suter*, 4 Mass. Rep. 156. *Bean v. Bean*, 12 id. 20. *Major v. Deer*, 4 J. J. Marsh. 586, 7. *Glenn v. Von Kapff*, 2 Gill & John. 132.

But it has been held in Vermont, that on the trial of an indictment for adultery, a *particeps criminis* is not a competent witness, on the ground that no person shall be allowed to testify his own guilt or turpitude, to convict another. *State v. Annice*, N. Chip. Rep. 9. Offenders against the act to prevent duelling are competent (in New York) to testify against any other person offending in the same transaction; indeed are compellable to testify the same as any other witnesses. 2 R. S. 686, § 3. The thief is competent to prove an indictment for buying stolen goods of him. *M'Niff's case*, 1 C. H. Rec. 8. *Hill's case*, id. 57, 59. In the latter case it is asserted that conviction may follow, though the testimony of the accomplice stand uncorroborated. Per Radcliff, mayor, in his charge, id. 50. An accomplice, separately indicted, is competent as a witness for or against another indicted for the same offence. To constitute an accomplice, the person charged as such must have an intention of committing the crime. Mere apparent concurrence is not enough. *United States v. Henry*, 4 Wash. C. C. Rep. 428.

Accomplices are admitted to give evidence under an implied promise of pardon, on condition of their making a full and fair confession of the whole truth; that is, of all the offences about which they might be questioned, and of all their associates in guilt. This implied promise arises from the consideration, that the witness, who is not bound to criminate himself, does so to discover greater offenders; and upon performance of the condition to the satisfaction of the court, he acquires an equitable title to a pardon. *People v. Whipple*, 9 Cowen's Rep. 707.

An accomplice admitted to testify of one crime, may, though he behave well, be prosecuted for another crime, the implied promise of pardon not extending to that; and if it ap-

\*(n) *Persons convicted.*

[\*155]

By stat. 6 & 7 Vict. c. 85, s. 1, no person offered as a witness shall be excluded, by reason of incapacity from crime, from giving evidence either in person or by deposition, according to the practice of the court on the trial of any issue joined, or of any matter or question or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having by law, or by the consent of parties, authority to hear, receive, and examine evidence; but that every person so offered, may and shall be admitted to give evidence on oath, or solemn affirmation in those cases where an affirmation is receivable, notwithstanding that such person may have been previously convicted of any crime or offence. This Act contained a proviso, that it should not extend to render competent any party to any suit, action, or proceeding individually named in the record; but that proviso is repealed by stat. 14 & 15 Vict. c. 99, s. 1; so that now a party convicted, may be a witness against those with whom he is jointly indicted,<sup>(a)</sup> as well as in other cases; his conviction merely affects his credit.[1]

(a) See *R. v. Hinks*, ante, p. 153.

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pear that he is charged with any other felony than that in relation to which the prosecutor moves for his admission as a witness, this fact of itself will be sufficient ground for rejecting him. *People v. Whipple*, 9 Cowen's Rep. 721, note (a), also resolved in several cases, 2 Carr. & Payne, 411.

[1] It is the nature of the crime, and not the punishment, which determines whether a convict is an admissible witness. A conviction of treason, felony, or any of the *crimen falsi*, renders the witness incompetent. *People v. Whipple*, 9 Cowen, 707. *Clark's Lessee, v. Hall*, 2 Har. & M'Hen. 278. *People v. Herrick*, 13 John. 82. *Cushman v. Loker*, 2 Mass. 108. All persons convicted, and adjudged guilty of perjury, or subornation of perjury, are, by statute in New-York, absolutely disqualified from giving testimony, in any matter or cause whatever, until the judgment be reversed. 2 Rev. Stat. 681, § 1, 4. And no person, sentenced upon a conviction for felony, shall be competent to testify in any cause, matter or proceeding, civil or criminal; unless he be pardoned by the governor, or the legislature, except in special cases which are provided by law, but no sentence on a conviction for any offence, other than felony, shall disqualify a witness. Id. 701, § 23. A felony by the same statute, is defined to be an offence for which the offender shall be liable to be punished by death, or by imprisonment in the state prison. Id. 702, § 30. Offenders against the act to prevent duelling, are declared to be competent to testify against any other person offending in the same transaction, and are compellable to testify in the same manner as other persons. Id. 686, § 3. Convicts imprisoned in the state prison are competent to testify against any other convict, for any offence committed whilst the accused and witness are both confined in prison. Id. 774, § 8. It is no objection to the competency of a witness, that he has been convicted of an assault and battery, with intent to commit murder, and has been sentenced to fine and imprisonment. *United States v. Brockins*, 3 Wash. C. C. Rep. 99. Otherwise in New-York; for there it is a felony. 2 R. S. 666, § 39, in connection with id. 702, § 30, cited supra. A person convicted of forgery, or other infamous crime, in one state, was held incompetent in another, within the provisions of the constitution of the United States, and the act of congress declaring the effect of the records of one state in every other. *State*

(o) *Examination on the voire dire.*

In order to ascertain whether a witness is competent or not, the counsel for the opposite party is entitled to examine him upon the subject, before he is examined in chief. This is termed an examination on the *voire dire* (*veritatem dicere*.)

But if the incompetency appear at any period during the trial, the judge will give the party the benefit of it, by striking out the evidence of the witness.

It is a general rule, that where the incompetency of a witness is impeached upon the *voire dire*, it may be restored upon his cross-examination by the party calling him, without producing or proving any written document for that purpose; but if the competency be impeached by other evidence, that evidence must be met and answered by documentary or other evidence, as in other cases.(a)

(a) Per Lord Kenyon, C. J., *Botham v.* 1 Arch. N. P. 33, 34  
*Swingler*, 1 Esp. 164, and see *Id.* 162. See

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*v. Candler*, 3 Hawks, 393. *State v. Ridgely*, 2 Har. & M'Hen. 120. *Clarke's Lessee v. Hall*, id. 378. *Cole's Lessee v. Cole*, 1 Har. & John. 378. But it should appear that the foreign offence would disqualify at common law, or by some statute of the country. *Clarke's Lessee v. Hall*, 2 Har. & M'Hen. 378. The above cases from the Maryland Reports, Har. & M'Hen. and Har. & John., hold the same as to any foreign conviction. A different doctrine prevails in Massachusetts, even as to a neighboring state. *Commonwealth v. Green*, 17 Mass. Rep. 514. At common law, a conviction of petit larceny disqualified; but whether this was so under the peculiar enactments of Ohio in 1832, *quere*. *James v. Bostwick*, 1 Wright. 142, 3. The conviction for an infamous crime, cannot be proved by the witness, on his *voire dire*; he not being bound to answer, nor would his answer be the best evidence of which the case is susceptible. *People v. Herrick*, 13 John. Rep. 82. Nor is parol testimony of the conviction admissible in any case, but the party objecting must have a copy of the record of conviction, ready to produce in court. *Id. Hills v. Colvin*, 14 John. Rep. 182. And it is not only necessary to show the conviction, but also the judgment, in order to disqualify the witness. *People v. Whipple*, 9 Cowen's Rep. 707. *Castallano v. Peillon*, 2 Mart. Lou. Rep. N. S. 466. *Cushman v. Loker*, 2 Mass. Rep. 108. *Skinner v. Perot*, 1 Ashm. Rep. 57. But where a witness admitted on his cross-examination that he had been convicted of a felony, the court charged the jury that if he had not been corroborated, they should reject his evidence entirely. *Orr's case*, before Colden, Mayor, 5 C. H. Rec. 181. It was also held, in Maryland, to be incumbent on the party objecting, to show that the witness did not serve the full term for which he was sentenced, such full service being adjudged to restore his competency. *Cole's Lessee v. Cole*, 1 Har. & John. 572. *State v. Ridgely*, 2 Har. & M'Hen. 120. It should be noted that these decisions have reference to the English statutes cited in the text. The court, in *The State v. Ridgely*, cited *supra*, and in *Clarke's Lessee v. Hall*, (2 Har. & M'Hen. 378,) also determined, that parol evidence was admissible to prove the conviction and sentence, as well as all other circumstances necessary to render the witness incompetent. But a witness, though convicted and attainted, is not incompetent to make an affidavit to resist a motion. *Davis v. Carter*, 2 Salk. 461, or to found a motion, *Skinner v. Perot*, 1 Ashm. Rep. 57. So, it seems, his oath is admissible on a charge of assault and battery, and for surety of the peace, &c., or to hold to bail: or he would be utterly out of the protection of the law. *Skinner v. Perot*, 1 Ashm. Rep. 57.

2. *Number of witnesses required.*

In treason and misprison of treason, the offence must be proved by two witnesses, either both to the same overt act, or one witness, to one overt act and another to another overt act of the same treason; (a) except where an attempt to injure the person of the Queen is laid as an overt act, in which case one witness is sufficient, for by stat. 5 & 6 Vict. c. 51, s. 1, the trial in such a case must be in the same manner as in murder. [2]

In perjury, there must be two witnesses to the same assignment. (b) But the taking of the oath, and the facts deposed to, may be proved by one witness. (c) [156]

In all other cases, there is no certain number of witnesses required. (d) [2]

(a) 7 & 8 W. 3, c. 3, ss. 2, 3.

(c) 2 Hawk. c. 46, s. 10.

(b) 2 Hawk. c. 46, s. 10.

(d) 2 Hawk. c. 46, s. 3. Id. c. 25, s. 129.

[2] "No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." Const. U. S. art 3, § 3. The statute is to the same effect. 2 Laws U. S. 92. "No person shall be convicted upon any indictment for treason, but by the testimony of two lawful witnesses to the same overt act, or one witness to one overt act, and another witness to a different overt act, of the same treason. But if two or more distinct treasons, of divers kinds, be alleged in any indictment, one witness to prove one treason, and another witness to prove a different treason, shall not be deemed two witnesses to the same treason, within the provisions of this section." § 15, 2 R. S. N. Y. 735, § 16. "In trials for treason, no evidence shall be given of an overt act that is not expressly laid in the indictment; and no conviction shall be had upon any indictment for the said offence, unless one or more overt acts be expressly alleged therein."

[1] 1 Nott & McCord Rep. 649; 1 City Hall Rec. 21.

[2] Where there is no difficulty in saying that a witness is unimpeached, the facts sworn to by him being uncontradicted, either directly or indirectly, by any other witness, and there is no intrinsic improbability in his relation, a jury cannot disregard his testimony on the ground, arbitrarily assumed, that they are satisfied, from his manner, he is biased in favor of the party calling him. *Newton v. Pope*, 1 Cowen's Rep. 109. Were this otherwise, all certainty in the result, from oral testimony, must be given up. One credible witness is sufficient even to convict of a crime; and a useless repetition of witnesses is discountenanced by the law. The judge might, by the civil law, in his discretion, stop the multiplication of witnesses to the same matter. Wood's Civ. Law. 317, cites D. 22, 5. 1. 2.; 2 Dom. B. 3, tit. 6. sec. 3, art. 14. And this is not an unusual exercise of discretion in our own courts. See *Beekman v. Bemus*, 7 Cowen's Rep. 29. The judge is constantly in the habit of directing a verdict of the jury, which is taken and entered by the clerk as a matter of course; unless the jury object. *Saville v. Lord Farnham*, 2 Mann. & Ryl. 216; and see *Nichols v. Goldsmith*, 7 Wend. 160. And where a cause is thus stopped, and the party in consequence forbears to go on with his evidence, and the jury find against the judge's direction, a new trial will be granted, even though the direction was contrary to the weight of evidence. *Dunham v. Baxter*, 4 Mass. Rep. 79. Though this was once held otherwise, where the counsel stopped on the mere intimation of the judge. *Beekman v. Bemus*, *supra*. *Quere*. Again; Per Gaselee, J.: "I was requested to nonsuit the plaintiff. I could not do so upon the plaintiff's case, though in similar causes I have occasionally done so after hearing the defendant's case; but when there is any doubt as to the facts, they must be found by the jury." *Davis v.*

3. *Witnesses how compelled to attend.*

We have seen, (a) that the witnesses for the prosecution, who attend before the magistrate at the time the prisoner is committed, are bound over by recognizance to prosecute, or to prosecute and give evidence, or to give evidence, as the case may be; and for non-attendance, their recognizance may be estreated. [3]

All other witnesses, on the one side and the other, may be compelled, if necessary, to attend, by *subpœna* issued from the crown office, or issued by the clerk of assize or clerk of the peace: if it issue from the crown office, the court of Queen's Bench may punish the party by attachment, for non-attendance. If the witness be in custody on civil process, he can only be brought up by writ of *habeas corpus*. See as to the mode of suing out this latter writ, (a) [4]

(a) *Anle*, p. 47.

(b) Arch. Pr. Cr. Off. 348.

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*Russell*, 5 Bing, 354. And per Marcy, J.: where the evidence in favor of the plaintiff is so slight, and that which supports the defence is so strong, that had the jury found for the plaintiff the court would have felt itself called on to set aside their verdict, it will not send the cause back to the jury, because the judge ordered a nonsuit. *Demyer v. Souzor*, 6 Wend. 436, 438; *Ward v. Van Duzer*, 2 Hall's Rep. N. Y. S. C. 162, S. P.

On the other hand, if the fact depend entirely on the testimony of an uncorroborated witness, whose credibility is plainly impeached, the jury are equally bound to disregard his testimony. Where the plaintiff's sole uncorroborated witness (or, in this case, it seems even if he be slightly corroborated) has plainly been guilty of perjury (apparent now on his cross-examination) upon the present or a former trial of the same matter, his testimony must be wholly rejected. *Dunlap v. Patterson*, 5 Cowen's Rep. 243, 246. So, if his testimony be corruptly false in any particular, the whole must be rejected. *State v. Jim*, 1 Dev. 508.

[3] See 2 Rev. Stat. of N. Y., 709, § 21, 22, 23, 24.

By these sections witnesses are to be bound by the examining magistrate, in recognizance, to the next court having cognizance of the offence. He may require security, on proof that the witness will probably disregard his recognizance. Infants and married women are of course to give security if required; and all the witnesses may be compelled to give the recognizance ordered, by imprisonment till they comply. This statute omits to give a similar power of requiring security, to any of the courts; nor have they any such power at the common law, nor by implication from any other statute. *Bickley v. Commonwealth*, 2 J. J. Marsh. 572-4. The magistrate must certify these recognizances to the court at which the witnesses are to appear. 2 R. S. 709, § 26. He may be ruled to make return; and on default, punished as for a contempt. *id.* § 27. These recognizances must be written and subscribed by the cognizors. 2 R. S. 746, § 24. Though when recognizances are taken in open court, by a court of record, it is enough that they are entered in the minutes, and the substance read to the witness. *Id.*

[4] The form of this writ, for the circuit in New York, is thus; "The people of the state of New York, to the sheriff of the county of Saratoga, greeting: We command you, that you have the body of E. F. detained in your prison under your custody, as it is said, under safe and secure conduct, before, &c. (as in the subpoena,) on the thirtieth day of November next, by ten of the clock in the forenoon of the same day, then and there to testify the truth, according to his knowledge in a certain cause now depending in our supreme court of judicature, before our justices thereof, and then and there to be tried between John Doe plaintiff, and Richard Roe, defendant, of a plea of trespass on the case, on the part of the

4. *Witnesses' expenses.*

In a criminal case, a witness cannot refuse to give his testimony, until his expenses have been paid to him, even although subpoenaed

plaintiff. And immediately after the said E. F. shall then and there have given his testimony, before (as in the subpoena) that you return him the said E. F. to our said prison under safe and secure conduct. And have you then there this writ. Witness, John Savage, Esquire," (as in the subpoena.)

The writ may go from any court of record in any suit or proceeding, to bring up any prisoner detained in any jail or prison in this state, to testify, unless under sentence for felony. 2 R. S. 559, § 1. So on the allowance of the chancellor, a justice of the supreme court or commissioner. Id. § 3. The U. States courts have also a statute power to issue this writ. 2 U. S. Rev. Laws, 62, § 14. *Ex parte Ballman & Swartwout*, 4 Cranch, 96. Conkling's Pr. 263. Whether this authority be not confined to the courts in session? *Quære*. Conkling's Pr. 264.

In New York, the affidavit must state the title and nature of the suit or proceeding; and that the testimony of the witness is material and necessary on the trial, as he is advised by counsel and verily believes, except the application for the writ be made by the attorney general or district attorney. They need not swear to advice, &c. 2 R. S. 559, § 2.

The affidavit may be in this form:

"SUPREME COURT. }  
*John Doe v. Richard Roe.* } Saratoga county, ss.

John Doe, the above named plaintiff, maketh oath and saith that E. F. now a prisoner for ———, (any cause except sentence for a felony, 2 R. S. 559,) "in custody of the sheriff of the county of Saratoga, is, and will be a material and necessary witness for this deponent, on the trial of this cause, (which is an action of assumpsit,) as he is advised by counsel and verily believes: and this deponent further saith, that he is advised by counsel and verily believes, that he cannot safely proceed to the trial thereof without the testimony of the said E. F.; and that the said E. F. is ready and willing to attend as a witness, at the trial of the said cause, as this deponent is informed and believes.

Sworn, &c.

JOHN DOE."

This affidavit would seem to be sufficient, even at common law, in the cases specified by the statute, without the clause stating a willingness to attend. Where the party is an actual prisoner, there is no reason why he should not be compelled to attend. 2 Stark. Ev. 113, note (c.) But the clause seems necessary where the witness is not a prisoner; as if he be a seaman on board a man of war; or a soldier in the army; in which cases he should be served with a subpoena. Id. 113 in the text. See further as to the necessity and nature of an affidavit, Cow. & Hill's Notes to Phil. Ev., part 2, p. 656.

No notice is necessary to the opposite party. Conkling's Pr. 264. And the affidavit for the United States courts is the same in substance as that of the state where it sits. Id.

In such a case, and in any other "where it is certain or probable that the personal attendance of the witness cannot be procured at the trial," he may be examined in New York on an order to take his testimony, *de bene esse*; the law and forms of which proceeding may be seen at length in *Jackson ex dem. Green v. Kent*, (7 Cowen's Rep. 59. A similar remedy is now given by statute, (2 R. S. 391,) in case of sickness or intended absence only; but that statute does not negative the common law power to grant the order in all other cases resting on the like principle. See *Mumford v. Church*, 1 John. Cas. 147, and *Wait v. Whitney*. 7 Cowen's Rep. 69. In these cases such an examination was allowed of one witness who came from another state, and another who came from Canada, on request, to be examined. In *Packard v. Hill*, (7 Cowen's Rep. 489,) the court say: "One important object of these examinations is to enable the party to secure evidence at any time in the progress of the cause, to be used on the trial, if the witness shall happen then to be without the jurisdiction of the court, or unable to obey its process."



on the part of the defendant;(a) and the indictment having been removed by *certiorari*; and the trial being of course in the nisi prius court at the assizes, makes no difference.(b) But at the assizes or sessions, if the court upon application grant the prosecutor his expenses, this includes the expenses, of the witnesses who have attended, either upon recognizance or *subpoena*, and the amount is immediately handed over to them.[5]

(a) *R. v. James et al.*, 1 Car. & P. 322.

(b) *R. v. James et al.*, 1 Car. & P. 322.

The revisers admit, in their report, that the provisions of the statute are taken from the cases cited; and from another previous statute.

The case of inability to attend, from imprisonment, is expressly provided for by the 30th section of the judiciary act of the U. S. of Sept. 24th, 1798. 2 U. S. Rev. Laws, 67 to 69.

[5] In New York, when a witness attends the oyer and terminer or general sessions, in behalf of the people, on subpoena, recognizance, or on request of the public prosecutor, from another state or territory, of the U. States or from any foreign country; or, if such witness be poor, on either fact appearing, the court may, by order in its minutes, direct the county treasurer to pay him such sum of money as shall seem reasonable for his expenses; to be paid to the witness, or his order, on producing a certified copy, (which shall be furnished to the witness gratuitously by the clerk,) to the county treasurer. 2 R. S. 753, § 13, 14, 15.

#### ORDER.

"Saratoga County, Oyer and Terminer, }  
Dec. 1, 1830.

"It appearing to this court that E. F. has attended this court, as a witness in behalf of the people of the state of New York, upon the request of the public prosecutor, (or upon subpoena, or by virtue of a recognizance for that purpose;) and that said E. F. has come from the state of Vermont, (or from Lower Canada, &c., or is poor,) ORDERED, that the county treasurer of the county of Saratoga pay him ——— dollars, for his expenses.

Certified,

(A copy.)

"TH. PALMER, Clerk."

Vid. 2 R. S. 752, § 13. *The People v. Dowlle*, Col. Cas. 45. This statute as to *poor* witnesses, comes down from the revisal of Kent and Radcliff, in 1801, (1 vol. 263, § 15;) where the word *poor* is also used. In *ex parte Manning*, (1 Caines' Rep. 59,) the supreme court said the discretion to allow was limited to *persons who are objects of public charity*.

The fees to witnesses in the United States courts are \$1,25 per day, for attendance, and five cents per mile going and returning. Act of Feb. 28th, 1799, § 6, 3 U. S. Rev. L. 135. And fees are allowed to witnesses for the prosecution in criminal cases. *Ex parte Johnson*, 1 Wash. C. C. Rep. 47. In this case a witness for the defendant, being marked on the indictment and sent to the grand jury, was held entitled to his fees from the U. S. In Pennsylvania, it seems fees are allowed on the part of the state in criminal causes. *Commonwealth v. Commissioners of Phil.*, 6 Bin 307.

In New York, the compensation is twenty-five or fifty cents per day, for attendance, accordingly as the witness is summoned to attend in his own, or from a foreign county; and the same fees for travel at thirty miles for a day. [Now fifty cents a day in his own county.] If he reside out of this state, the estimate cannot go beyond the state line. *Holland v. Lenox*, 4 John. Rep. 311. The cabinet officers, or any canal commissioner, clerk or surrogate, attending with official papers, have \$1,25 per day; and every surveyor attending to testify concerning his survey, \$1 per day. 2 R. S. 642, 3, § 33. In Massachusetts, indictées for capital offences are entitled to state process to bring their witnesses at the state expense. *Commonwealth v. Williams*, 13 Mass. Rep. 501. But in all criminal cases in New York, they are bound to attend gratuitously for the people in any prosecution, and against them upon any indictment. 2 R. S. 729, 730, § 65. Before this statute, it was held that witnesses for a person accused of felony were bound to attend gratuitously; but otherwise in case of a

misdeemeanor. *Ex parte Chamberlain*, 4 Cow. Rep. 49. In Pennsylvania, a person accused may have process for his witnesses before indictment; and he is entitled to it in the United States courts. *United States v. Moore*, Wall. Rep. 23. 8 art. amd. Const. U. States. A witness is entitled to pay in a civil cause, if subpoenaed, though not examined; so if examined, though not subpoenaed. *De Benville v. De Benville*, 1 Bin. 46. *A fortiori*, where he has acknowledged the service of a subpoena, (*Brown v. Moore*, 3 J. J. Marsh. 306;) and an action lies to recover his fees of the party who subpoenas him; (*Fuller v. Mattice*, 14 John. Rep. 357;) not however, against the attorney. *Sergeant v. Pettibone*, 1 Aik. 355. But in New York he can recover only his statute fees. *Fuller v. Mattice*, 14 John. Rep. 357. Nor can a witness subpoenaed by the defendant recover his fees of the plaintiff, though the defendant succeed. *Bagley v. Clement*, 2 M'Cord, 244. In North Carolina, it seems witnesses are entitled to fees for attendance in behalf of the state; to be computed from their place of residence in another state, if recognized before they removed there. *State v. Stewart*, 1 N. Car. Law Repos. 524.

## CHAPTER V.

### THE TRIAL, &c.

THE matters I have to discuss in this chapter, I propose to arrange under the following heads :

#### SECTION I. THE JURORS, p. 157.

- (a) *Qualification*, p. 157.
- (b) *Exemptions*, p. 157.
- (c) *Jury de Medietate Linguae*, p. 159.
- (d) *How returned, summoned, &c. in counties*, p. 159.
- (e) *Jurors in boroughs*, p. 160.
- (f) *Grand jury, called, sworn and charged*, p. 161.
- (g) *Petty jury, called and sworn*, p. 161.
- (h) *Challenges of jurors*, p. 163.
- (i) *Petty jury charged*, p. 165.

#### SECTION II. THE TRIAL, p. 166.

- (a) *Case stated and evidence for the prosecution*, p. 167.
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[\*157]

## \*SECTION I.

## THE JURORS.[1]

(a) *Qualification.*

Every man, between the ages of twenty-one and sixty, residing in any county in England, who shall have in his own name or in trust for him within the same county, 10*l.* by the year above reprises in lands or tenements, whether of freehold, copyhold, or customary tenure, or of ancient demesne, or in rents issuing out of any such lands or tenements, or in such lands, tenements, and rents taken together in fee simple, fee tail, or for the life of himself or some other person;—or who shall have within the same county 20*l.* above reprises in lands or tenements, held by lease for an absolute term of twenty-one years or more, or for any term of years determinable on any life or lives;—or who, being a householder, shall be rated or assessed to the poor rate, in Middlesex, on a value not less than 30*l.*, or in any other county on a value not less than 20*l.*;—or who shall occupy a house containing not less than fifteen windows:—shall be qualified and liable to serve on juries for the trial of all issues joined in any of the Queen's courts of record at Westminster, and in the superior courts, both civil and criminal, of the three counties palatine, and in all courts of assize, nisi prius, oyer and terminer and jail delivery, such issues being respectively triable in the county in which every man so qualified respectively shall reside, and shall also be qualified and liable to serve on grand juries in courts of sessions of the peace, and on petty juries for the trial of all issues joined in such courts of sessions of the peace, and triable in the county, riding or division, in which every man so qualified respectively shall reside.(a) In Wales, the qualification is three-fifths of the qualifications above-mentioned.(a)[2]

(a) 6 G. 4, c. 50, s. 1.

(b) 6 G. 4, c. 50, s. 1.

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[1] UNITED STATES.—Jurors in all cases to serve in the courts of the United States, shall be designated by lot or otherwise in each state, respectively according to the mode of forming juries therein now practised, so far as the laws of the same shall render such designation practicable, by the courts or marshals of the United States, and the jurors shall have the same qualifications as they are required to have by the laws of the state of which they are citizens, to serve in the highest courts of law of such state, and shall be returned as there shall be occasion for them, from such parts of the district, from time to time as the court shall direct, so as shall be most favorable to an impartial trial, and so as not to incur any unnecessary expense, or unduly to burthen the citizens of any part of the district with such services. 2 Laws U. S. new ed. 67. See 2 U. States, Stat. at Large (Ed. 1845) 82.

[2] In New York the qualifications of jurors, as fixed by the revised statutes are as follow: They must be males between the ages of twenty-one and sixty, who are assessed for

In all corporations within the Municipal Corporation Act, to which a separate quarter sessions is or shall be granted, every burgess is quali-

personal property belonging to them in their own right, to the amount of \$250, or who have a freehold estate in real property in the county, belonging to them in their own right, or in the right of their wives, to the value of \$150. And they must be in the possession of their natural faculties, and not infirm or decrepid; and free from all legal exceptions, of fair character, of approved integrity, of sound judgment and well informed. 2 R. S. 411, § 13. In certain counties mentioned in the statute, an interest in a contract for the purchase of land, under which improvements have been made to the value of \$150, is a sufficient property qualification. *Id. ib.* § 14.

By the Connecticut statute of 1837, regarding the qualifications of jurors, a freehold qualification is dispensed with in talesmen, as well as other jurors. *Ladd v. Prentice*, 14 Conn. Rep. 109. In Virginia in the trial for a capital felony, it is not necessary that it should be expressly stated in the record that the petty jurors were freeholders. *Stephen's case*, 4 Leigh, 679. One called to serve as a juror in a criminal case, being examined on his *voire dire*, first said that he was not a freeholder, but before the panel was completed, returned into court, and said he was mistaken, and that he was a freeholder. Held that he was a good and lawful juror. *Hendrick's case*, 5 Leigh 707. In Mississippi a juror must be either a freeholder or a householder. *Byrd v. The State*, 1 How. Miss. Rep. 163. But no length of citizenship is required as a qualification of jurors. *Ib.* In Arkansas, a resident in the county, and a citizen of the state, is competent to serve as a juror although his residence has not been of sufficient length to confer upon him political privileges. *Anderson v. The State*, 5 Pike, 444. In Tennessee, a citizen of one county who owns freehold lands in another county, or who is the owner of an occupant right to lands situated in another county, is a good and lawful juror of the county in which he resides. *State v. Bryant*, 10 Yerger, 527. It is not error that a record does not show that jurors were electors and freeholders, in Ohio, if they are not, it is ground of challenge. *Shoemaker v. The State*, 12 Ohio Rep. 43.

In Pennsylvania, persons convicted of arson are incompetent to act as jurors. *Dunlop's Law of Penn.*, 1198, 1199.

In Virginia, no person is qualified to serve upon a petit jury in any proceeding, civil or criminal, unless he is twenty-one years of age, and owns property, real or personal, of the value of one hundred dollars. Code of Virginia, (1849,) Tit 49, chap. 163. But no exception can be allowed against any juror after he is sworn upon the jury, on account of his estate or age, or other legal disability. *Ib.* sec. 4.

In New Jersey, the qualifications of a juror are, that he be a citizen of the state, and resident within the county, above the age of twenty-one, and under the age of sixty-five years, and have a freehold in lands in the county for which he is returned. Rev. Sta. of N. J., Tit. 34, ch. 13, sec. 7.

In Iowa, all qualified electors of good moral character, sound judgment, and in full possession of the senses of seeing and hearing are competent jurors in their respective counties. Code of Iowa, 1851, ch. 96, sec. 1630.

In Mississippi, no person under the age of twenty-one, or of the age of sixty years, nor any person who is not a citizen of the United States (except where a jury *de medietate lingue*, may be directed.) Nor any person who has been convicted of felony, perjury, forgery, or other offence punishable with stripes, pillory or burning in the hand, can serve on a jury for the trial of any cause civil or criminal. Hutchinson's Mississippi Code, p. 879.

In Massachusetts a person convicted of any scandalous crime, or guilty of "any gross immorality," is disqualified from serving as a juror. Rev. Sta. of Mass. ch. 95, sec. 7. So also in Maine. Rev. Sta. of Maine, ch. 135, sec. 6.

In Georgia, no person is capable to serve on a jury for the trial of treason, felony, breach of the peace, or any other cause of a criminal nature, unless he is qualified to vote at elections for members of the legislature. Hotchkiss' Stat. Law of Georgia, 578.

In Maryland, to act as juror, the person must have attained the age of twenty-five years. Dorsey's Laws of Maryland, vol. 1, p. 350.

fied and liable to serve on grand juries in such borough, and also upon juries for the trial of all issues joined in any court of quarter sessions of the peace triable within the borough, of which person shall be a burgess.(a)

If persons serve on a jury, who are not qualified, it is only matter of challenge, and must be objected to, if at all, by way of challenge.(b)

(b) *Exemptions.*

Peers are exempt from serving on juries; so are the judges of the courts of record at Westminster; clergymen in holy orders; priests of the Roman Catholic faith, who have taken and subscribed the [\*158] oaths and declarations required \*by law; persons who teach or preach in a congregation of protestant dissenters, whose place of meeting is registered, and who follow no secular occupation, except that of schoolmaster, producing a certificate of some justice of the peace of their having taken the oaths and subscribed the declaration required by law; serjeants and barristers-at-law actually practicing; members of the society of doctors of law, and advocates of the civil law actually practicing; attornies, solicitors, and proctors actually practicing, and having duly taken out their annual certificates; officers of the courts of law and equity, and the ecclesiastical and admiralty courts; coroners, jailers and keepers of houses of correction; members and licenciates of the royal college of physicians, actually practicing; surgeons, being members of the royal college of surgeons, in London, Dublin, or Edinburgh, and actually practicing; apothecaries, certificated by the Apothecaries' Company, and actually practicing; officers of the navy or army on full pay; pilots licensed by the Trinity House, at Deptford Hall, or Newcastle-upon-Tyne, and masters in the buoy or light service of these corporations, and pilots licensed by the lord warden of the cinque ports, or by statute or charter in any other port; household servants of Her Majesty; officers of customs or excise, sheriff's officers, high constables and parish clerks.(c) The inhabitants of the city and liberty of Westminster also, are exempt from serving on juries at the sessions of the peace for the county of Middlesex.(d)

Aliens are not qualified to be jurors, except upon juries *de medietate linguæ*;(e) but this is mere matter of challenge.(g) Also persons attainted of treason or felony, or convicted of any crime which is infamous, unless they have obtained a free pardon, or persons under outlawry or excommunication, shall not be qualified to serve on juries.(h)

(a) 5 & 6 W. 4, c. 76, s. 121.

4, c. 76, s. 121.

(b) *Semb.* See *R. v. Sutton et al.*, 8 B. & C. 417. *R. v. Sullivan et al.*, 8 Ad. & El. 831.

(d) 6 G. 4, c. 50, s. 49.

(e) 6 G. 4, c. 50, s. 3.

(g) *R. v. Sutton et al.*, 8 B. & C. 417.

(c) 6 G. 4, c. 50, s. 2. And see 5 & 6 W.

(h) 6 G. 4, c. 50, s. 3.

No justice of the peace shall be summoned or impanelled as a juror, to serve at the sessions of the peace for the jurisdiction of which he is a justice.(a)

Besides the exemptions above-mentioned, every member of the council of any borough, every justice assigned to keep the peace therein, and the treasurer and town-clerk thereof, shall be exempt and disqualified from serving on any jury within the borough, and shall be exempt from serving on any other jury within the county in which such borough is situate; and all burgesses of a borough, for which a separate court of quarter sessions shall be holden, shall be exempt from serving on juries for the trial of issues at the sessions of the county.(b)[1]

(a) 6 G. 4, c. 50, s. 48.

(b) 5 & 6 W. 4, c. 76, s. 22.

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[2] In New York, courts of special sessions, as well as other courts are authorized to *discharge* any person from serving on a jury in the following cases:

1. When it satisfactorily appears that such person is not, at the time, the owner, in his own right, or in the right of his wife, of a freehold estate in real property, situated within the county, of the value of \$150, and is not the owner of personal property to the value of \$250; and in the particular counties above alluded to, that such person is not possessed of the property qualification required by the statute:

2. When it appears that such person is under twenty-one years of age, or over sixty years of age; or that he is not in the possession of any of his rational faculties.

3. When there is any legal exception against such person.

4. When such person is a non-commissioned officer, musician, or private of any uniformed company or troop and is duly equipped and uniformed according to law, and claims such exemption.

5. When such person is a member of any company of firemen duly organized according to law.

6. When such person is in the actual employment of any glass, cotton, linen, woollen, or iron manufacturing company, by the year, month or season.

7. When such person is a superintendent, engineer, or collector or any canal authorized by the laws of this state, any portion of which is actually constructed and navigated.

8. When such person is a minister of the gospel, or teacher in any college or academy, or when such person is or shall be specially exempted by law from serving on juries. 2 R. S. 415, § 33. Under this head is to be included the following classes of persons who are not embraced in the above enumeration of persons exempt, viz.: The clerks of canal collectors, not exceeding two, lock-tenders, inspectors of boats, and weigh-masters; the superintendent and inspector of the Onondaga Salt Springs, and each of their deputies, and all persons employed in attendance upon any works for the manufacturing of coarse salt; and the keepers of poor-houses, alms-houses, &c. 1 id. 250, § 187; id. 278, § 153; id. 631, § 72.

Courts are authorized to *excuse* persons returned as jurors from serving whenever it appears, 1st. That the person returned is a practicing physician and has patients requiring his attendance: 2d. That he is a surrogate, or justice of the peace, or executes any other civil office, the duties of which are, at the time, inconsistent with his attendance as a juror: 3d. That he is a teacher in any school, actually employed and serving as such: or 4th. When, for any other reason, the interests of the public or of the individual juror will be materially injured by such attendance; or his own health, or that of any member of his family, requires his absence from the court. 2 id. 416, § 35.

*Alms* are incapable of serving on juries. 1 id. 721, § 20.

In Massachusetts, the following persons are exempt by law from serving as jurors: The governor, lieutenant governor, members of the council, secretary and treasurer of the com-



Formerly Quakers and Moravians could not serve on juries, [\*159] for they could not be sworn ;(a) \*but as they may now make

(a) See *R. v. Chammens*, Ry. & M. 374.

monwealth, all judges and justices of any court, except justices of the peace, all county and special commissioners, clerks of courts, registers of probate, and registers of deeds, sheriffs and their deputies, coroners, constables and criers of the courts, marshals of the United States and their deputies, and all other officers of the United States, counsellors and attorneys at law, settled ministers of the gospel, officers of colleges, and preceptors and teachers of incorporated academies, practicing physicians, and surgeons regularly licensed, cashiers of incorporated banks, and constant ferrymen, and all persons who are more than sixty-five years old. Rev. Sta. of Mass. ch. 95. All members of the fire department, in the city of Boston are exempt from serving as jurors; and all engine men and members of the fire departments, in other towns, may be exempted, by their respective towns, by vote at any legal town meeting. Ib. sec. 3. No member of the legislature can, during the session of the general court, be required to perform the duty of a juror. Suppl. to Rev. Sta. of Mass. ch. 21. All members of the active volunteer militia are entitled to exemption from duty as jurymen, in all cases, by pleading and proving the fact by their own oath, in court, or by leaving a certificate of the fact, duly certified by the commanding officer of the company, or any general or field officer of line or staff, with the authorities of the town or city in which they reside, who may be entrusted with the drawing of jurymen. Ib. ch. 218, sec. 8.

In Pennsylvania, jurors are selected from the taxable citizens of the county. Dunlop's Laws of Penn. p. 621, 622.

In Ohio, jurors must have the qualifications of electors. Rev. Stat. of Ohio, ch. 64, sec. 3.

In Michigan, the following persons are exempt from serving as jurors; the governor, lieutenant governor, secretary, treasurer, and auditor general of the state, the justices of the Supreme Court, all judges of courts of record, acting commissioner of internal improvement, commissioner of the land office, superintendent of public instruction, clerks of courts, registers in chancery, registers of deeds, sheriffs and their deputies, coroners, constables, all officers of the United States, attorneys and counsellors at law, and solicitors and counsellors in chancery, officers of the university, officers of colleges, settled ministers of the gospel, preceptors and teachers of incorporated academies, all superintendents, engineers and collectors of any canal or railroad authorized by the laws of the state, any portion of which is actually constructed and used, constant ferrymen, all members of any company of firemen organized according to law, all persons more than sixty years of age. Rev. Stat. of Mich. tit. 22, ch. 103, sec. 25.

In Michigan, the court to which any person is returned as a juror, is required to excuse such juror from serving at such court, whenever it appears: 1. That he is exempt from serving on juries by the provisions of the preceding section; or, 2. That he is a practising physician or surgeon, and has patients requiring his attention; or, 3. That he is a justice of the peace, or executes any other civil office, the duties of which are at the time inconsistent with his attendance as a juror; or, 4. That he is a teacher of any school, actually employed and serving as such; or, 5. When for any other reason, the interests of the public, or of the individual juror, will be materially injured by such attendance, or his own health, or that of any member of his family, requires his absence from such court. Ib. sec. 26.

In Maine, the following persons are exempt from serving as jurors: the governor, counsellors, judges and clerks of the common law courts, secretary and treasurer of the state, all officers of the United States, judges and registers of the probate, registers of deeds, settled ministers of the gospel, officers of any colleges, preceptors of incorporated academies, physicians and surgeons regularly authorized, cashiers of incorporated banks, sheriffs and their deputies, coroners, counsellors and attorneys at law, county commissioners, constables, and constant ferrymen. Rev. Stat. of Maine, ch. 135, sec. 3.

In Virginia, the persons exempt from serving on a jury are: the governor of the state,

an affirmation instead of an oath,(a) they may be jurors in both civil and criminal cases. So may members of the sect called Separatists.(b)

(c) *Jury de medietate lingue.*

On the prayer of every alien, indicted or impeached of any felony or misdemeanor, the sheriff or other proper minister shall, by command of the court, return for one half of the jury, a competent number of aliens, if so many be in the town or place where the trial is had, and if not, then so many aliens as shall be found in the same town, or place, if any; and no such alien jurors shall be challenged for want of freehold or other qualification, although they may for any other cause.(c) Where an alien woman, married to a British subject, was, with her husband, indicted for murder, it was holden by the judges of the appeal

(a) See *ante*, p. 149.

mation, *ante*, p. 150.

(b) *Ante*, p. 150. See the form of the affir-

(c) 6 G. 4, c. 50, s. 47.

practising attorneys, officers of the fire department of a town, officers of any court, persons exempt from militia duty, except school commissioners, trustees of free schools, officers of the militia, and officers and members of volunteer companies. Code of Va. 1849, tit. 49, ch. 163, sec. 2.

In Wisconsin, the statute excuses the following persons from serving as jurors: the governor, lieutenant governor, secretary and treasurer of the state, all judges of courts of record, acting commissioners of the board of public works, register and treasurer of the state land office, superintendent of public instruction, clerks of courts, registers of deeds, sheriffs and their deputies, coroners, constables, all officers of the United States, attorneys and counsellors at law, and solicitors and counsellors in chancery, officers of the university, officers of colleges, ministers of the gospel, preceptors and teachers of incorporated academies, one teacher in each common school, practising physicians and surgeons, one miller to each grist mill, one ferryman to each licensed ferry, all superintendents, engineers and collectors of any canal or railroad authorized by the laws of the state, any portion of which is actually constructed and used, all members of companies of firemen organized according to law, all persons more than sixty years of age, and all persons not of sound mind or discretion, persons subject to any bodily infirmity amounting to any disability; and all persons are disqualified from serving as jurors, who have been convicted of any infamous crime. Rev. Stat. of Wis. ch. 97, sec. 2.

In Mississippi, all officers in the executive department of the government, all judicial officers and officers of the several courts of the state, all justices of the peace, all teachers, and all keepers of public ferries, actually engaged in their respective employments, are exempt from serving on juries; but no other freeholder or householder is excused from serving as a juror in his proper county, except for special cause, shown to the satisfaction of the court at that time. Hutchinson's Miss. Code, 889.

In Maryland, all magistrates, delegates, coroners, school-masters, overseers of highways and constables, are exempt from serving as jurors. Dorsey's Laws of Maryland, vol. 1, ch. 37, sec. 4.

In Iowa, the following persons are exempt from liability to act as jurors: All persons holding office under the laws of the United States or of the state; all practising attorneys, physicians, and clergymen; all acting professors or teachers of any college, school, or other institution of learning; and all persons disabled by bodily infirmity or over sixty-five years of age. Code of Iowa, 1851, ch. 96, sec. 1631.

court, that she was not entitled to have a jury *de medietate lingue*; for by stat. 7 & 8 Vict. c. 66, s. 16, any woman married to a natural-born subject or person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural-born subject.(a)[1]

(d) *How returned, summoned, &c., in counties.*

In the first week in July in every year, the clerk of the peace in every county shall issue his warrant to the high constables, commanding them to issue their precepts to the churchwardens and overseers of the poor of the several parishes within their respective constablewicks, requiring them to return a list of all men residing within their parishes, &c., qualified and liable to serve on juries.(b) The high constables make out their precepts accordingly;(c) and the churchwardens and overseers make out their lists;(d) and fix a copy on the church door on the three first Sundays in September;(e) and at a special petty sessions, to be holden in the last week in September, these lists shall be produced, and the justices may then strike out the names of any persons not qualified, or not able to serve by reason of any infirmity, or insert those omitted; and the lists so revised shall then be delivered to the high constable, who shall deliver them to the court of quarter sessions at the next session.(g) The lists are then copied into "The jurors' book" by the clerk of the peace, and the book delivered by him to the sheriff, to be used from the 1st of January, for one year.(h)

Before each assizes or sessions, a precept issues to the sheriff, requir-

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|---|--------------------------|
| (a) <i>R. v. Maria Manning</i> , 19 Law. J., 1 m. | (d) 6 G. 4, c. 50, s. 8. |
| 2 Car. & K. 887.                                  | (e) <i>Id.</i> s. 9.     |
| (b) 6 G. 4, c. 50, s. 4.                          | (g) <i>Id.</i> s. 10.    |
| (c) <i>Id.</i> s. 6.                              | (h) <i>Id.</i> s. 12.    |

[1] In New York, in case a prisoner, on his arraignment, suggests that he is an alien, and claims the privilege of a trial by jury *de medietate lingue*, the court of oyer and terminer may order such jury to be summoned *instantly*. *People v. McLean*, 2 Johns. Rep. 381. The right to such a jury is, however, now abolished in New York. 2 N. Y. Rev. Stat. 734.

In Pennsylvania, the statute provides that no alien shall, in any civil or criminal case whatever, be entitled to a jury *de medietate lingue*. Dunlop's Laws of Penn. p. 630. So, also, in Michigan. Rev. Stat. of Mich. ch. 103, sec. 43.

An alien is not entitled to a jury *de medietate*, in North Carolina. Taylor, C. J., contra, *State v. Antonio*, 4 Hawk's Rep. 200.

In Virginia, the statute (1 Rev. Code, ch. 75, sec. 13,) that "juries *de medietate lingue* may be directed by the courts respectively," is not imperative that they shall direct such a jury in cases even of a criminal nature in which aliens are parties, but confers a discretionary power on the courts to direct such jury, if to them it appear proper. *Richard's case*, 11 Leigh, 690; *Brown's case*, 11 Leigh, 711.

There is no such jury in Massachusetts. 7 Dane's Abr. 331, ch. 221, art. 6, sec. 2; 12 Am. Jurist, 333.

It is held in Illinois, that an alien is not qualified to serve as a juror in any case. *Greykowski v. People*, 1 Scam. 480; *Stone v. People*, 3 ib. 337.

ing him to return a competent number of jurors;(a) and the sheriff shall thereupon return the names of men contained in the jurors' book, and no others.(b) For the assizes, the judges appointed may order the sheriff to \*return any number not exceeding 144, to [\*160] serve indiscriminately on the civil and criminal sides, and to divide them into two sets, one to serve at the beginning of the assizes, and the other for the remaining time.(c) And the jurors shall be summoned ten days at least before the day they are required to attend.(d) In cases of treason or misprison of treason, a list of the jurors returned, mentioning their names, professions, and places of abode, shall be delivered to the prisoner at the same time with the copy of the indictment.(e)

By sect. 20, the court of King's Bench, and all courts of oyer and terminer and jail delivery, the superior criminal courts of the three counties palatine, and courts of sessions of the peace, shall respectively have and exercise the same power and authority as they have heretofore had and exercised, in issuing any writ or precept, or in making any award or order, orally or otherwise, for the return of a jury for the trial of any issue before any such courts respectively, and for the amending or enlarging the panel of jurors returned for the trial of any such issue; and the return to every such writ, precept, award, or order, shall be made in the manner heretofore used and accustomed in such courts respectively, save and except that the jurors shall be returned from the body of the county, and not from any particular hundred, &c., and that they be qualified according to this Act. This seems to recognize the right of a court of quarter sessions, amongst others, to order the sheriff to return a jury immediately, as well in misdemeanors as felonies, which seems formerly to have been doubted.(g)

The sheriff shall register in the jurors' book the names of such petty jurors as shall have served at the assizes, and give them certificates of their service;(h) and the clerk of the peace shall send him a list of those who have served at sessions, which he shall likewise register;(i) and no man, having such certificate, shall afterwards be summoned to serve at the assizes, for one year in Wales, or the counties of Hereford, Cambridge, Huntingdon, or Rutland,—for four years in Yorkshire,—and for two years in any other county;—or to serve at the sessions, within one year in Wales, or the counties of Hereford, Cambridge, Huntingdon, or Rutland,—or within two years in any other county.(k)[1]

(a) 6 G. 4, c. 50, s. 13.

(b) Id. s. 14.

(c) Id. s. 22.

(d) Id. s. 25.

(e) Id. s. 21.

(g) See 2 Hawk. c. 4, ss. 1, 4. 2 Hale, 261, 262.

(h) 6 G. 4, c. 50, s. 40.

(i) Id. s. 41.

(k) Id. s. 42.

[1] In the State of New-York, before the revised statutes went into effect, the party

bringing the cause to trial was obliged to issue a venire to the sheriff of the county where the cause was to be tried, requiring him to summon a jury for that purpose. This is now, however, dispensed with in all cases, except where a foreign jury is ordered. 2 N. Y. Rev. Sta. 410, sec. 9. The manner of summoning juries as prescribed by the Revised Statutes, is as follows:—

Fourteen days before the holding of any circuit court, or sittings, or of any special court of oyer and terminer, when no circuit is appointed to be held at the same time, or of any court of common pleas, or mayor's court, the clerk of the county in which such court is to be held, shall draw the names of thirty-six persons, to serve as jurors to such court, and any number in addition thereto that shall have been ordered according to law. 2 Rev. Sta. 413, sec. 24. At least six days notice of such drawing shall be given by such clerk, by publishing the same in a newspaper of the county if there be any, and if not, by affixing such notice on the outer door of the house where the court for which such jury is to be drawn, is about to be held; a copy of such notice shall also be served on the sheriff of the county, and upon the first or some other judge of the county courts, at least three days previous to the time appointed therein for drawing. Id. sec. 25. At the time so appointed, it shall be the duty of the sheriff of the county in person, or by his under sheriff, and of the first, or other county judge on whom such notice shall have been served, to attend at the clerk's office of the county to witness the drawing of such jury. Id. sec. 26. If the sheriff, or county judge so notified, do not appear, the clerk shall adjourn the drawing of such jury to the next day, and shall, by written notice, require the delinquent sheriff or judge, or some other county judge, or any two justices of the peace to attend such drawing on the adjourned day. Id. sec. 27. If, at the adjourned day, the sheriff or under sheriff, and a county judge, or justice of the peace, appear, or if any two county judges or justices of the peace appear, but not otherwise, the clerk shall proceed, in the presence of the officers so appearing, to draw the jury. 2 Rev. Sta. 414, sec. 28. The clerk shall conduct such drawing as follows:—

1. He shall shake the box containing the names of jurors returned to him, so as to mix the slips of paper on which such names were written as much as possible.
2. He shall then publicly draw out of the said box as many of the said slips of paper containing such names as there shall be jurors required by law, or specially ordered for such court.
3. A minute of the drawing shall be kept by one of the attending officers in which shall be entered the name contained on every slip of paper so drawn, before any other slip shall be drawn.
4. If, after drawing the whole number required, the name of any person shall appear to have been drawn who is dead, or become insane, or who has permanently removed from the county to the knowledge of the clerk, or any other attending officer, an entry of such fact shall be made in the minute of the drawing; and the slip of paper containing such name, shall be destroyed.
5. Another name shall then be drawn in place of that contained on the slip of paper so destroyed, which shall be in like manner entered in the minutes of the drawing.
6. The same proceedings shall be had as often as may be necessary, until the whole number of jurors required, shall have been drawn.
7. The minute of the drawing shall then be signed by the clerk, and the attending officers, and shall be filed in the clerk's office.
8. A list of the names of the persons so drawn, with their additions and places of residence, and specifying for what court they were drawn, shall be made and certified by the clerk and the attending officers, and shall be delivered to the sheriff of the county. Id. sec. 29. The sheriff shall summon the persons named in such list, to attend such court, at least six days previous to the sitting thereof, by giving personal notice to each person, or by leaving a written notice at his place of residence, with some person of proper age. He shall return the said list to the court at the opening thereof, specifying those who were summoned, and the manner in which each person was notified. Id. sec. 30.

The New-York Revised Statutes provide that the jury for the trial of an indictment, shall be drawn in the same manner as they are drawn in civil cases, except that the defendant in an indictment is entitled to have at least twenty-four names in the box, from which the jury is selected. 2 Rev. Sta. 733, sec. 3, 4, 5. Id. 420, 421. The jurors returned for a circuit court are to be the jurors for the oyer and terminer, when both courts are held at the same

time; and the jurors returned for any county court are to be the jurors for the court of sessions appointed to be held at the same time. *Id. Ib.* sec. 2. The same proceedings respecting the empannelling of juries and keeping them together, which are prescribed by law in civil cases, are also applicable to trials on indictments. 2 Rev. Sts. 635, sec. 14.

In the State of New-York the manner of summoning a jury in the court of sessions, where one is asked for, is as follows: The officer to whom a *venire* for a jury is delivered is to execute the same fairly and impartially, and must not summon any person whom he suspects to be biased or prejudiced for or against the defendant. He must summon the jurors personally, and make a list of the persons summoned, which he must certify and annex to the *venire*, and return it, with the *venire*, to the court.

The names of the persons returned by the officer are to be respectively written on several and distinct pieces of paper, as nearly of one size as may be; and the officer by whom the *venire* was served, must, in the presence of the court, roll up and fold them as nearly as may be in the same manner, and put them together in a box or other convenient thing. The court is then to draw out six of such papers, one after another, and if any of the persons whose names are thus drawn, do not appear, or shall be challenged and set aside, then such further number must be drawn as will be sufficient to make up the number of six, after all legal causes of challenge have been allowed.

If a sufficient number of competent jurors are not drawn, the court may supply the deficiency by directing the constable to summon any one of the bystanders, or others, who are competent and against whom no cause of challenge appears, to act as jurors in the cause. 2 R. S. 712, §§ 10 to 13.

The following provisions in relation to juries in the city of New-York, were enacted by the legislature in 1847; (Vide *Sess. Laws*, 1847, ch. 495.)

It is not necessary as a qualification, for any juror in the city of New-York, that he be actually assessed in the said city, but all persons residing in said city who are qualified to serve as jurors, and not exempted by any of the laws of this state, must be selected as such, whether they have been assessed or not.

It is enacted that the said jurors shall be selected by a person to be appointed by the supervisors of said city, the Judges of the Superior Court and the Judges of the Court of Common Pleas of said city and county, who must be known as the *commissioner of jurors*, and be authorized to appoint one or more assistants.

The commissioner of jurors is required to execute a bond to the mayor, aldermen and commonalty of the city, in the penalty of five thousand dollars, with two sureties, to be approved by the mayor, conditioned for the faithful discharge of his duties.

The commissioner must proceed to the selection of jurors immediately after the first day of May in each year, and the names must be entered in a book alphabetically, designating the ward, occupation and residence of each. After the first day of June in each year, as soon as the list is completed, the commissioner must publish a notice of at least ten days, in the newspapers in which the notices of the corporation of the city of New-York are printed, that the petit jury list is ready for examination and correction at his office, and he is to receive evidence of exemptions in the same manner as authorized in courts of record. The names of all persons found to be exempt from serving as jurors, must be struck from the list, and the ground of exemption recorded. When the list is completed, a certified copy must be delivered to the county clerk, who is required to prepare the ballots and deposit them in the box, in the manner now required by law. The commissioner may, in like manner, at any time return the names of any persons omitted on the list, if no sufficient cause be shown to excuse such persons, and their names must be deposited in the box as jurors for the residue of the year that the other jurors are to serve.

It is enacted that the jurors hereafter to be summoned for the several courts authorized to try issues of fact in New-York, shall, on requisition being made by such courts respectively, directed to the county clerk, be drawn from the petit jury box in his office, a minute of which drawing must be certified and filed with said clerk, as now required, who must deliver a copy thereof to the officer authorized to summon such jurors in the manner now

required by law. But no fine can be imposed by such courts on any juror failing to attend, unless he shall have been duly summoned.

The clerks of the respective courts are required within ten days after the jurors are discharged, to deliver to the clerk of the city and county of New-York, a certified list of all the jurors who were returned to such court, and must specify therein:

1. Those who appeared and served;
2. Those who were discharged on account of their being exempt from serving on juries, or on account of their being unqualified;
3. Those who, for any other reason, were excused from serving, and those who made default in appearing and serving. Laws 1847. 2 R. S. 512, sec. 37.

The county clerk is required to return to the box from which they were taken, the names of those jurors who appear from such certified list, to have been excused from serving, or to have made default in their appearance; he must destroy the ballots containing the names of those who were discharged on account of their being exempt, or on account of their being unqualified; and he must deposit the ballots containing the names of those who appeared and served, in a separate box, distinct from that from which they were taken.

The clerks of the several courts in New-York, to which jurors are summoned, must, within ten days after the expiration of each term, or, after the discharge of the jurors thus summoned, make a return to the commissioner of all jurors fined in their respective courts, setting forth the date when fined, the amount of each fine, and the residence of each juror.

The commissioner is required to notify each of the jurors, by written or printed notice, of the fine imposed upon him, and requiring the payment thereof, or to appear before him on a day to be named in the notice, to show cause, if any he have, for remitting the same.

#### FORM OF NOTICE.

To *Mr. John Doe*:—

This is to inform you that the — Court has imposed upon you the fine of — for refusal to serve therein as a juror on the 7th day of May last, pursuant to the command of said court; and that you are required to pay the said fine, or to appear before me on the 10th day of June instant, at 11 o'clock in the forenoon, to show cause, if any you may have, for remitting the same.

Dated June 5th, 1849.

DAVID BOYD,  
Commissioner of Jurors.

The commissioner, upon receiving a legal excuse, must enter an order remitting the whole fine, or a part of it.

#### ORDER OF COMMISSIONER.

In the matter of JOHN DOE, }  
a defaulting juror. }

Whereas, on the 5th day of June instant, I caused a notice to be served upon John Doe, informing him that, &c., [*here recite the notice.*] And whereas, the said John Doe, on this day, at the hour aforesaid, came before me, and rendered the following legal excuse for his said default, to wit: [*here state the excuse.*] It is therefore ordered and adjudged that the said fine [or "that the sum of —, being one-third part of said fine"] be, and the same is, hereby remitted.

Dated June 10th, 1849.

DAVID BOYD,  
Commissioner of Jurors.

At the expiration of ten days from the day appointed for the hearing of the excuses of such jurors, the commissioner must issue a warrant, directed to the sheriff of the city and county of New-York, commanding him to collect of the several persons named in a schedule to be annexed to such warrant the several sums affixed to their names respectively in such schedule, and pay over the same to the treasurer of the county.

The schedule must contain the names of the jurors fined, their respective places of residence, and the amount of fines imposed on each.

## FORM OF WARRANT.

*City and County of New-York, ss.*

To the Sheriff of said City and County, Greeting:—

Whereas, the persons named in the schedule hereunto annexed were severally fined by the — Court, on the 7th day of May, 1849, as defaulting jurors, and I caused a written notice of such fine, requiring the payment thereof, or an appearance before me on the 10th day of June instant, to show cause, if any they might have, why the same ought to be remitted, to be served upon each of said defaulting jurors according to law. And whereas, none of the said jurors either paid the said fine or appeared before me to show cause pursuant to the notice aforesaid [or whereas, the said jurors, each for himself, appeared before me, pursuant to the notice aforesaid; but each and every of them failed to render any legal excuse for their said default.] Now, therefore, you are hereby commanded, in the name of the people of the state of New-York, to collect of the several persons named in the schedule hereunto annexed the several sums affixed to their names respectively in such schedule, by levy and sale of the goods and chattels of such persons, and pay over the same to the treasurer of your county. And make return within thirty days from the receipt hereof, according to law.

Given under my hand this 21st day of June, 1849.

DAVID BOYD,

Commissioners of Jurors.

The return of the warrant may be enforced in the Supreme Court in the same manner as the return of civil process; and it may be renewed, in like manner, in cases where fines have not been paid or collected.

Each person applied to by the commissioner or his assistants for information as to the liability of persons to perform jury duty in the city, must communicate correct information; and in case of a refusal to give such information as they may possess on the subject, or give false information, they will forfeit the sum of fifty dollars, to be prosecuted by the commissioner in the name of the mayor, aldermen, and commonalty of the city, the money to be paid into the treasury of the city.

The grand or petit jurors summoned to attend any court in the city, by written or printed notice left at their respective places of residence, and not appearing before such court pursuant to the summons, must be ordered by the court to show cause before the commissioner, on the first Monday succeeding the expiration of the term of the court. The jurors must be summoned to appear before the commissioner, and the same proceedings must be had thereon by the commissioner as were hitherto had by the courts in relation to defaulting jurors.

After the deposit of the ballots, the several courts in the city may order as many jurors to be summoned for their respective courts, as in their judgment may be necessary.

In MASSACHUSETTS, the selectmen of each town, every three years, prepare a list of the inhabitants of the town qualified to serve as jurors, including not less than one for every one hundred inhabitants of the town, and not more than one for every sixty inhabitants, computing by the then last census. Rev. Stat. of Mass. ch. 95, sec. 4. The list when so prepared, is laid before the town, and the town may alter it, by adding to, or striking from it any names. Ib. sec. 5. The selectmen then cause the names on the list to be written each on a separate paper or ballot, and roll up or fold the ballots, so as to resemble each other as much as possible and so that the names written on them are not visible on the outside. The ballots are then placed in a box kept by the town clerk for that purpose. Ib. sec. 6. Jurors are selected by drawing ballots from the box. Sec. 8. When any jurors are to be drawn, the town clerk and selectmen attend at the clerk's office, or at some other public place appointed for the purpose; and if the town clerk is absent the selectmen may proceed without him. The meeting for drawing jurors must be held not less than seven days, nor more than twenty one days, before the day when the jurors are required. The ballots in the jury box are shaken and mixed together, and one of the selectmen openly draws from it as many ballots, as are equal to the number of jurors required. Sec. 9. No person is liable to serve as a juror in any court, oftener than once in three years. Sec. 12. The clerks of the several



courts, in due season before every term, or at such other times, at the respective courts order, issue writs of *venire facias* for jurors. Sec. 13. The venirens are delivered to the sheriff of each county, and by him transmitted to a constable in each of the towns to which they are respectively issued, and they are served by the constable forthwith on the selectmen and town clerk. Sec. 15. The constable is required four days at least before the time when the jurors are to attend, to summon each person who is drawn by reading to him the venire with the endorsement thereon of his having been drawn, or by leaving at his place of abode a written notification of his having been drawn, and also of the time and place of the sitting of the court, at which he is to attend, and to make return of the venire, with his doings thereon to the clerk before the opening of the court from which it was issued. Ib. sec. 17.

For the method of selecting jurors in Pennsylvania, see Dunlop's Laws of Penn., p. 621, *et seq.*

In PENNSYLVANIA, the clerks of the several courts of oyer and terminer, quarter sessions, and mayors courts are required, upon the order or precept of the court, or of two of the judges thereof in vacation, to issue, according to the direction of such order, to the sheriff and commissioners of the proper county, a writ or writs, commanding the sheriff and commissioners to empanel, and the sheriff to summon, a grand jury or petit jury, or both. Dunlop's Laws of Penn. p. 624.

The writ of venire for a petit jury, in Pennsylvania in any of the criminal courts must be in the following form:—

— County ss.

The Commonwealth of Pennsylvania, to the sheriff and commissioners of said county, greeting:—

We command you, and every of you, that in your proper persons you draw from the wheel (or the proper wheel, if there be several) containing the names of the persons selected, according to law to be jurors in the courts of the said county (or in the — court of the city of — as the case may be) the names of — persons to be jurors in our — court, — to be holden at — in and for said county (or city) the — day of — at — o'clock, in the — noon of that day:—*And further*, That you the said sheriff, do summon the persons whose names shall be so drawn, and every of them, to come before our said court, at the same time and place, to make up the juries requisite for the trial of all issues which may be then there depending for trial in our said court, and that you the said sheriff, have then there this writ, and the names and surnames of the persons so summoned, with the additions respectively, in a panel hereto annexed, and otherwise make return at the day and place aforesaid, how you shall have executed this writ. Witness, J. B. &c., at &c. See Dunlop's Laws of Penn. p. 625.

In PENNSYLVANIA, the number of persons summoned and returned as aforesaid to serve as petit jurors, in any court of oyer and terminer cannot be less than forty-eight nor more than eighty, and in any other court of criminal jurisdiction, not less than twenty-four nor more than sixty. Dunlop's Laws of Penn. p. 626.

In VIRGINIA, in a case of felony in which a writ of *venire facias* is necessary, the writ must command the officer charged with its execution to summon twenty-four persons, freeholders of his county or corporation, residing remote from the place where the offence is charged to have been committed and qualified in other respects to serve as jurors, to attend the court in which the accused is to be tried, on the first day of the next term of the court, or at such other time as the court may direct. If a person, summoned under such writ, fail to attend as required without sufficient excuse he is subject to a fine of eight dollars. Code of Va. 1849, tit. 55, ch. 208, sec. 4. If a person accused of felony be not tried at the term of a superior court to which he is remanded for trial, the clerk of the court is required, at least twenty days before any subsequent term that the case remains pending to issue a *venire facias* for his trial, returnable the first day of such term, or such other day as the court may direct. Ib. sec. 5. Any superior court in which a person accused of felony is to be tried, may, at any time, cause a *venire facias* to issue for his trial. Ib. sec. 6. In a criminal case in a superior court, if qualified jurors not exempt from serving, cannot be conveniently found in the county or corporation in which the trial is to be, the court may cause so many as may

*(e) Jurors in boroughs.*

In boroughs within the Municipal Corporation Act, 5 & 6 W. 4, c. 76, to which separate quarter sessions have been or shall be given, seven days at the least before the holding of every quarter sessions, the clerk of the peace shall cause to be summoned a sufficient number of persons, being qualified and liable as before mentioned(a) to serve as grand jurors at every such sessions, and shall also cause to be summoned not less than thirty-six nor \*more than sixty per- [\*161] sons so qualified and liable to serve as jurors at every such sessions.(b) The clerk of the peace shall make out a list of the grand jurors, and a panel of the petty jurors, containing their names, places of abode, and descriptions.(c)[1]

(a) *Ante*, p. 157.

(c) 5 & 6 W. 4, c. 76, s. 121.

(b) 5 & 6 W. 4, c. 76, s. 121.

be necessary of such jurors to be summoned from any other county or corporation by the sheriff or sergeant thereof, or by its own officer. *Ib.* sec. 10.

For further information on this subject, see the statutes of the several states.

The New York Revised Statutes contain the following provisions:

Sec. 1. All issues of fact joined upon any indictment, shall be tried by a jury, in the county where such indictment was found, unless for special causes the Supreme Court shall order an indictment removed into that court to be tried in some other county. 2 R. S. 733, sec. 1.

Sec. 2. Such trials shall be had by jurors drawn, summoned and returned in the manner prescribed by law; and where any court of oyer and terminer shall be held at the same time with any circuit court, the jurors returned for such circuit court shall be the jurors for such oyer and terminer; and the jurors returned for any court of common pleas, shall be the jurors for the court of general sessions to be held at the same time. *Id.* sec. 2.

Sec. 3. When twenty-four jurors duly drawn and summoned, do not appear, or when, by reason of there being one or more juries impanelled, or in consequence of jurors being set aside, or for any other reason, and there shall not remain twenty-four ballots containing the names of jurors then attending, the court shall order the sheriff to summon from the bystanders or from the county at large, so many persons qualified to serve as jurors, as shall be necessary to make at least twenty-four jurors, from whom a jury for the trial of the indictment may be selected. *Id.* sec. 3.

Sec. 4. The names of the persons so summoned by the sheriff, shall be rolled or folded each in the same manner as near as may be, and shall be deposited with the ballots undrawn, if any there be, or in a sufficient box by themselves, if there be no undrawn ballots, from which a jury shall be drawn. 2 R. S. 734, sec. 4.

Sec. 5. In all other cases, the jury for the trial of any indictment, shall be drawn in the same manner as prescribed by law, for the trial of issues of fact in civil cases. *Id.* sec. 5.

Sec. 6. Every person summoned by order of the court, as a juror, shall be liable to the same penalties for disobedience or neglect as in civil cases, which shall be collected and applied in the same manner. *Id.* sec. 6.

Sec. 7. No alien shall be entitled to a jury of part aliens, for the trial of any indictment whatever. *Id.* sec. 7.

[1] In New York, the statute provides that the supervisors of the several counties of this state, except the city and county of New York, at their annual meetings in each year, shall prepare a list of the names of three hundred persons, to serve as grand jurors at the courts of oyer and terminer, and courts of general sessions, to be held in their respective counties during the then ensuing year, and until new lists shall be returned. 2 R. S. 720, sec. 1.

In preparing such lists, the said board of supervisors shall select such persons only as they know, or have good reason to believe, are possessed of the qualifications by law required of persons to serve as jurors for the trial of issues of fact, and are of approved integrity, fair character, sound judgment, and well-informed. Id. sec. 3.

Persons exempt by law from serving as jurors for the trial of issues of fact, shall not be placed on any list of grand jurors, required by the preceding provisions. Id. sec. 4.

The lists so made out by the said board of supervisors, shall contain the christian and surnames at length, of the persons named therein, their respective places of residence, and their several occupations; it shall be certified by the clerk of the board of supervisors, and filed in the office of the clerk of the county, within ten days after the first day of the meeting at which the same is herein directed to be made. 2 R. S. 721, sec. 5.

On receiving such list, the county clerk shall write the names of the persons contained therein, with their additions and places of residence, on separate pieces of paper, each in the same manner as near as may be, so that the name written thereon shall not be visible; and shall deposit such pieces of paper in a sufficient box, from which they shall be drawn, as hereinafter provided. Id. sec. 6.

If the county judges of any other county of this state, other than New York, or any three of them, shall at any time be of opinion that a greater number of persons than that herein required, should be returned to serve as grand jurors in their county, they may, by an order under their hands, direct such number to be increased, but such increase shall not exceed one-half the number herein required to be selected for such county. Id. sec. 8.

Upon any order which is authorized by the last section being served upon the board of supervisors, they shall, at their next annual meeting, increase the number of persons returned by them to serve as grand jurors, pursuant to such order. Id. sec. 9.

At the time of drawing the names of jurors for the trial of issues of fact, in any court of oyer and terminer, and at the time of drawing such jurors for any term of the court of common pleas of the county, at which a court of general sessions may by law be held, the county clerk, in the presence and with the assistance of the sheriff or under sheriff, and of a county judge or justice of the peace, or two county judges or justices of the peace, who shall have attended for the purpose of drawing the petit jury for such court, shall proceed and draw the names of twenty-four persons, from the box in which the pieces of paper shall have been deposited for that purpose, to serve as grand jurors at such court of oyer and terminer and general sessions, as the case may be. Id. sec. 10.

Such drawing shall be conducted in all respects, in the manner prescribed by law, for drawing petit jurors; a minute of such drawing shall be kept, signed and filed in like manner; and a list of the persons so drawn, with their additions and places of residence, and specifying for what court they shall have been drawn, shall be made and certified by the clerk and the attending officers, and shall be delivered to the sheriff of the county. 2 R. S. 722, sec. 11.

The sheriff shall summon the persons named in such list, or attend such court as grand jurors, at least six days previous to the sitting of such court, by giving personal notice to each person, or by leaving a written notice at his place of residence, with some person of proper age. He shall return such list to the court at the opening thereof, specifying those who were summoned, and the manner in which each person was notified. Id. sec. 12.

The court to which any list of grand jurors so drawn, shall be returned by the sheriff, shall impose a fine not exceeding twenty-five dollars, for each day that any person duly summoned as a grand juror shall, without reasonable cause, neglect to attend. But if it appear that any such person was notified, by leaving a written notice at his place of residence, the court shall suspend such fine until the defaulting grand juror shall be notified as provided by law. Id. sec. 13.

The court may discharge any person from serving as a grand juror, in the same cases in which petit jurors may, by law, be discharged. Id. sec. 14.

When any person drawn as a grand juror shall not attend the court for which he was drawn, or shall be excused for the term only, his name shall be returned into the box of undrawn ballots for that year. Id. sec. 15.

Where any person drawn as a grand juror shall have attended and performed his duty as such at any court, the ballot containing his name shall be destroyed, and he shall not be again required to serve as a juror during the year for which his name was returned. *Id.* sec. 16.

When any person drawn as a grand juror, shall be discharged by the court, or excused from attending on account of any disqualification, or for any other cause not being of a temporary nature, the ballot containing his name shall be destroyed. *Ibid.* s. 17.

Sec. 16. When the same person shall be drawn as a grand juror and as a petit juror, to attend the same court, his name shall be omitted from the list of petit jurors, and another name shall be drawn from the box containing the names of persons returned as to serve as petit jurors; and after the completion of the drawing of the petit jurors, the name of such person drawn for the grand jury, shall be returned into the box containing the undrawn names of petit jurors. *Ibid.* s. 18.

If any new list of persons to serve as grand jurors, shall not be returned to the county clerk, before he shall have completed the drawing of the grand jurors for any court, he shall proceed to draw grand jurors in the manner herein provided, from the box containing the names of those already provided for that purpose, notwithstanding they may have been returned for a year then expired, or which will expire before the term or sitting of the court for which they shall be drawn; and such persons shall be summoned and shall serve in the same manner, and be subject to the same penalties for neglect, as if such year had not expired. 2 Rev. Sta. 723, s. 19.

When it shall appear, upon the representation of a county clerk, that there are less than fifty names remaining in the box containing the names of persons returned to serve as grand jurors, any three judges of the county courts, may select from the citizens of the county qualified to serve as grand jurors, and who shall not have served during the preceding twelve months, the names of fifty persons to serve as grand jurors. *Ibid.* sec. 20.

Such names shall be certified to the county clerk, who shall file such certificate in his office, and shall cause such names to be written on distinct pieces of paper, and deposited in the box containing any undrawn names of persons returned to serve as grand jurors, or if there be none, then in a proper box; and from such box, in either case, the clerk shall draw a grand jury to serve for any court of oyer and terminer or general sessions, to be held immediately after such drawing. *Ibid.* s. 21.

Such drawing shall be made at the time, and in the same manner, in all respects, as herein provided in respect to persons returned by the supervisors, and the persons drawn shall be summoned in like manner, and subject to the same penalties for neglect. *Ibid.* s. 22.

If, at any court of oyer and terminer, or court of general sessions, there shall not appear at least sixteen persons duly qualified to serve as grand jurors, who shall have been summoned for that purpose, or if the number of grand jurors attending shall be reduced below sixteen, by any of them being discharged, or otherwise, such court may, by an order to be entered in its minutes, direct the sheriff of the county to summon the number of persons necessary to complete the grand jury for such court. *Ibid.* s. 23.

The sheriff shall summon such persons accordingly, who shall be bound forthwith to attend and serve, unless excused by the court, in the same manner and subject to the same penalties for neglect as persons drawn by the county clerk, and summoned by the sheriff, as herein provided. *Ibid.* s. 24.

It shall not be necessary for the judges of the county courts, or the justices of the peace of any county, to issue any precept to the sheriff to summon any grand jury to any court of general sessions, but the list of persons certified to be drawn for that purpose by the county clerk, and the officers attending such drawing, shall authorize and make it the duty of the sheriff to summon and return such persons as grand jurors. 1 R. S. 724, sec. 25.

There shall not be more than twenty-three, or less than sixteen persons sworn on any grand jury; and from the persons summoned to serve as grand jurors and appearing, the court shall appoint a foreman, and they shall also appoint a foreman in every case where any person already appointed shall be discharged or excused before the grand jury are dismissed. *Id.* sec. 26.

Members of the grand jury may be required by any court to testify whether the testimony of a witness examined before such jury, is consistent with or different from, the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person, upon a complaint against such person for perjury, or upon his trial for such offence; but in no case can a member of a grand jury be obliged or allowed to testify or declare, in what manner he or any other member of the jury voted on a question before them, or what opinions were expressed by any juror, in relation to any such question. *Ibid* s. 31.

Whenever required by the grand jury, it shall be the duty of the district attorney of the county, to attend them for the purpose of examining witnesses in their presence, or of giving them advice upon any legal matter; and to issue subpoenas and other process to bring up witnesses. 2 R. S. 725, s 32.

The district attorney of the county shall be allowed at all times to appear before the grand jury, on his request, for the purpose of giving information relative to any matter cognizable by them; and may be permitted to interrogate witnesses before them, when they shall deem it necessary; but no district attorney, constable or any other person, except the grand jurors, shall be permitted to be present during the expression of their opinions or the giving of their votes, upon any matter before them. *Id.* s. 33.

If any offence shall be committed during the sitting of any court of oyer and terminer or court of general sessions, after the grand jury attending such court shall have been discharged, such court may, in its discreting, by an order to be entered in its minutes, direct the sheriff to summon another grand jury. *Id.* s. 34.

The sheriff shall, accordingly, forthwith summon such grand jury from the inhabitants of the county, qualified to serve as petit jurors, who shall be returned and sworn, and shall proceed in the same manner, in all respects, as provided by law in respect to other grand juries. *Id.* sec. 35.

In Massachusetts all grand jurors shall be drawn, summoned, and returned in the same manner as jurors for trials; and whenever grand jurors shall be drawn at the same time with jurors for trials, the persons, whose names are first drawn, to the number of grand jurors required, shall be returned as grand jurors, and those afterwards drawn shall be the jurors for trials.

In case of a deficiency of grand jurors in any court, writs of *venire facias* may be issued to the constables of such towns as the court may direct, or, in the county of Suffolk, to the constables of the city of Boston, to return forthwith such further number of grand jurors, as may be required.

In Pennsylvania, the clerks of the several courts of oyer and terminer, quarter sessions, and mayor's courts of this commonwealth shall, upon the order or precept of the said court, or of two of the judges thereof, in vacation issue, according to the direction of such order, to the sheriff and commissioners of the proper county, a writ or writs, commanding the said sheriff and commissioners to empanel, and the said sheriff to summon a grand jury or petit jury, or both, to inquire of or try all causes and matters which may be depending in the said court, and given to them in charge at the term thereof, to be holden next after the date of the said precept.

The writ of *venire* for a grand jury in any of the said courts, shall be made according to the following form, to wit:

— County, ss.

The Commonwealth of Pennsylvania, to the sheriff and commissioners of the said county, greeting:

We command you and every of you, that in your proper person you draw from the wheel, (or from the proper wheel, if there be several) containing the names of the persons selected for jurors according to law, the names of twenty four persons to be grand jurors in our — court — (describing the court,) to be holden at — in and for the said county, on the — day of — at — o'clock in the — noon of that day: *And further*, that you, the said sheriff, do summon the persons whose names shall be so drawn, and every of them, to come before our said court at the said time and place, to inquire of and perform all those

things, which on our part shall be enjoined upon them; and that you, the said sheriff, have then and there this writ, and the names and surnames of the persons so summoned, with their additions respectively, in a panel hereto annexed, and otherwise make return at the day and place aforesaid, how you shall have executed this writ. Witness (J. B.) at, &c.

It shall be lawful for the judges of the court of quarter sessions to award one writ in the form aforesaid for the summoning and returning a grand jury in the said court, and in a court of oyer and terminer to be holden by them at the same time, and if distinct writs of *venire* shall in such case be awarded, it shall be the duty of the said judges to order the sheriff and commissioners of the respective county to annex and return one and the same panel to each of the said writs.

In Georgia the statute is as follows: It shall be the duty of the justices of the inferior courts of each county, together with the sheriff and clerk, or a majority of them, to convene at the court-house of their respective counties, on the first Monday in June next, and biennially on the first Monday in June thereafter, whose duty it shall be to select from the books of the receiver of tax returns, for their respective counties, fit and proper persons to serve as grand jurors; and shall make a list of persons as selected, and transmit it under their hands to the next superior court of their respective counties; and it shall be the duty of the judge then presiding, to cause the clerk of the said superior court to make out tickets, with the names of the persons so selected, which tickets shall be put in a box to be provided by the clerk at the public expense, which said box shall have two apartments, marked number one and two; and the clerks of said courts shall, immediately after receiving such lists, fairly enter the same in a book for that purpose, to be provided at his own expense, distinguishing in separate columns the persons liable to serve as grand jurors, and those for the trial of civil and criminal causes, as pointed out by law: which said box shall be locked and sealed up by the judge, and placed in the care of the clerk, and the key in the care of the sheriff, and no grand jury shall be drawn and empanelled but in the presence of the judge in open court, nor shall any clerk of the court, or other person having the custody of the jury box, presume, on any pretence whatever, to open the said jury box, transpose or alter the names, except it be by the direction of the judge in open court, attending for the purpose of drawing jurors, under the penalty of being dealt with in the manner pointed out by law for malpractice in office.

The said judge in open court shall unlock and break the seal, and cause to be drawn out of the apartment of the said box, marked number one, not less than twenty-three, nor more than thirty-six names, to serve as grand jurors, which names so drawn out, shall, after an account is taken of them, at each time of drawing, be carefully deposited in the other apartment of such box, marked number two; and when all the names shall be drawn out of the apartment number one as aforesaid, they shall then commence drawing from the apartment number two, and return them into number one, and so on alternately; but no name so deposited shall, on any pretence whatever, be destroyed, except it is within the knowledge of the judge that the said juror is either dead, removed out of the county, or otherwise disqualified by law, or the sheriff certify the same. Sec. 71 of R. S.

In Vermont the revised statutes, (chapters 15 and 35,) provide: At the annual meeting in each town, such of the board of civil authority as may be present, shall agree upon such number of grand and petit jurors as they shall judge will be the proportion of such town, to attend the county court for the year ensuing, which number shall be nominated by said board, and chosen by the inhabitants present at such meeting.

The town clerk shall write, on separate pieces of paper, the name of each person, so chosen and put them into appropriate boxes, to be kept in his office, to be drawn by the sheriff, as provided by law. Sec. 72 of R. S.

Previous to the stated term of each county court to be held next after the last day of April in each year, the clerk of such court shall seasonably issue and deliver to the sheriff of the county, or his deputy, a venire, commanding such officer to summon eighteen judicious men, [being freeholders,] (see § 14 of chap. 15) within such county, from the several towns in such county, as the judges of such court shall direct, to appear before such court at nine

*(f) Grand jury called, sworn, and charged.*

The clerk of arraigns at the assizes, or the clerk of the peace at the sessions, calls over the names of the grand jurors. This is the first business done at the sitting of the court. As each juror answers, he goes into the jury box. The number must be at least twelve,<sup>(a)</sup> and must not exceed twenty-three.<sup>(b)</sup>[2] They are sworn in this form ;

(a) See 2 Hale, 161.

(b) 2 Burr. 1088.

o'clock, forenoon, on the first day of the term, to serve as grand jurors in such court. Sec. 1 of R. S.

The grand jury in said county, instead of being summoned to appear at the county court next after the last day of April, as now by law provided, shall be summoned to appear at the court to be holden next after the last day of August in each year. No. 2 of 1849.

The judges of the county court, in each county, shall from time to time direct the clerk of such court, from what towns the grand and petit jurors shall be summoned, and the number from each town. Sec. 3, of R. S.

Any county court, or either of the judges thereof, may make a special order requiring a grand jury to be summoned to attend any term of the said court, and it shall be the duty of the clerk of such court, on receiving such order, to issue a venire accordingly. Sec. 4, of R. S.

The sheriff or his deputy, on receiving a venire for a grand or petit jury, shall repair to the office of the town clerk in each town mentioned in the venire and in the presence of such town clerk or one of the selectmen of such town, draw out of the box, containing the names of the persons nominated by the authority of such town to serve as grand or petit jurors, as the case may be, the number of names he is required to summon from such town. Sec. 5, of R. S.

And such officer shall summon the persons so drawn, not less than seven nor more than fifteen days before the term of such court, by reading the venire in their hearing and notifying them respectively of their being drawn to serve as jurors, agreeably to the precept of such venire, or by leaving a copy of the venire with such notice endorsed thereon as is directed in the service of writs of summons. Sec. 6, of R. S.

The officer serving a venire shall return the same, with the names of the persons summoned endorsed thereon, to the clerk who issued the same, before the first day of the term of such court. Sec. 8, of R. S.

If all the persons summoned to attend any county court, to serve as grand jurors, shall not appear at the time stated in the venire, the court may order the sheriff or other officer to summon, immediately, a sufficient number of judicious men, [being freeholders] (see § 14, of chap. 15,) of such county, to fill up the panel. Sec. 13, of R. S.

In Virginia, the statute (Code of Va. 1849, ch. 206, secs. 4 and 5,) provides that : For every grand jury there shall be summoned twenty-four citizens of this state, who are freeholders of the county or corporation in which the court is to be held, and in other respects qualified jurors, and not constables, ordinary keepers, surveyors of roads, nor owners nor occupiers of water grist mills ; and when they are grand jurors for a county court, not inhabitants of a town having a corporation court.

Any sixteen or more of such persons shall be a competent grand jury. If a sufficient number do not attend, the said officer shall forthwith summon so many others as may be necessary.

[2] The number of grand jurors required by statute in the several states, is very different.

In New York the revised statutes provide that not more than twenty-three, nor less than sixteen, shall be sworn on the grand jury. No indictment can be found without the concurrence of at least twelve grand jurors. But if twelve agree, it is sufficient, though the rest dissent. 2 N. Y. Rev. Stat. 724, 726, secs. 26, 36. The number of grand jurors required by statute in Wisconsin is the same as in New York. Rev. Stat. of Wis. ch. 97, sec. 12.

and first the foreman, thus:—"You, as foreman of this inquest, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge. The Queen's counsel, your fellows' and your own, you shall keep secret. You shall present no man for envy, hatred, or malice; neither shall you leave any man unpresented for fear, favor, or affection, or hope of reward; but you shall present all things truly, as they come to your knowledge, according to the best of your understanding: So help you God." The remaining jurors are then sworn thus: "The same oath which your foreman has taken upon his part, you and every of you shall well and truly observe and keep on your parts: So help you God." [3]

In Massachusetts twenty-three grand jurors, are to be returned to the court of common pleas for every county, except the county of Suffolk seven days at least, and not more than thirty days before the commencement of the first term of the court in each year, to serve at each term of the court throughout the year, except that in the counties where the terms of the court are established for the transaction of criminal business, the grand jurors are required to attend only at such terms. Rev. Stat. of Mass. ch. 136, sec. 1. By the common law a grand jury may consist of thirteen or of any greater number not exceeding twenty-three. The statute of Massachusetts makes no provision relative to the number necessary to form a quorum, but leaves that to the rule of the common law. It cannot therefore consist of less than thirteen. *Com. v. Wood*, 2 Cushing Rep. 149.

In Pennsylvania, the number of grand jurors must be twenty-four. Dunlop's Laws of Penn. page 625, sec. 109. In Ohio, the number is fifteen, and the concurrence of twelve, is necessary to find the bill true. Rev. Stat. of Ohio, ch. 64, sec. 12. In Maryland twenty-three. Dorsey's Laws of Maryland, p. 350, sec. 8. In Michigan, not less than sixteen, and no indictment can be found without the concurrence of at least twelve. Rev. Stat. of Mich. tit. 31, ch. 164, sec. 5; 1b. sec. 17. In Virginia, sixteen persons are a competent grand jury. Code of Va. of 1849, ch. 207, secs. 4 and 5. In Mississippi not less than thirteen nor more than eighteen. Hutchinson's Mississippi Code, p. 887. In Georgia not less than eighteen nor more than twenty three; but twelve may find a bill or make a presentment. Hotchkiss' Stat. Law of Geo. p. 579. In Iowa, fifteen, and they are to serve one entire year after their selection. Code of Iowa, tit. 18, ch. 96. In Vermont, no bill of indictment can be presented by a grand jury unless twelve of the jurors agree in the same. Rev. Stat. of Verm. ch. 35, sec. 17. In Arkansas, a grand jury must consist of sixteen legally qualified men; and an indictment found by less number, will be illegal, and the statute providing that an indictment may be found by a concurrence of not less than twelve of the grand jury, does not dispense with the necessity of there being sixteen grand jurors on the panel. *The State v. Hawkins*, 5 Engl. Rep. 71.

In the state of New York the Revised Statutes provide that, if from any cause whatever the number of the grand jurors shall subsequently be reduced below sixteen it shall be the duty of the clerk to make the following entry in his minutes, a copy of which is served upon the sheriff of the city and county of New York, and returnable either *instantly* or at any subsequent time named by the court. 2 N. Y. Rev. Sts. 723, sec. 23.

At a court of oyer and terminer or general sessions of the peace, [as the case may be,] holden in and for the city and county of New-York, at the city Hall of the said city, on — the — day of — in the year of our Lord one thousand eight hundred and thirty —

*Present.*—The honorable —, of the city of New-York, and —, — Aldermen of the said city, justices of sessions.

The number of grand jurors, attending this court being reduced below sixteen, by —.

It is ordered, that the sheriff of the city and county of New-York be, and he is hereby directed to summon — persons, the number necessary to complete the grand jury for this court.

*Extract from the Minutes.*

[3] The form of oath given in the text, is used substantially in the several states. See F



The usual proclamation against vice and profaneness is then made. Then the proclamation is made for silence, whilst the charge is delivered to the grand jury.

The judge at she assizes, or the chairman at the quarter sessions, then charges the grand jury. After which the grand jury retire to their room, to consider such bills of indictment as may be brought before them; and from time to time return them into court, as has been already mentioned.(a)[4]

(a) *Ante*, pp. 98, 99.

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Sta. of Mass. Ch. 136, sec. 5; Rev. Sta. of Maine ch. 172, sec. 2; Rev. Sta. of Ohio ch. 64, secs. 11 and 12. Rev. Sta. of Mich. ch. 164, secs. 2 and 3; Hotchkiss' Stat. Laws of Geo. 582; Hutchinson's Mississippi Code 878; Rev. Sta. of Wisconsin, ch. 97, sec. 16; Code of Iowa, 1851, ch. 166, secs. 2892, 2893.

In Virginia, the form of oath prescribed by statute, (Rev. Code of Va. 1849, ch. 206, sec. 6,) is as follows: "*You shall diligently inquire and true presentment make of all such matters as may be given you in charge or come to your knowledge touching the present service. You shall present no person through ill will, nor leave any unpresented through fear or favor, but in all your presentments you shall present the truth, the whole truth, and nothing but the truth. So help you God.*" The other grand jurors shall afterwards be sworn as follows: "*The same oath that your foreman has taken on his part, you and each of you shall observe and keep on your part. So help you God.*"

The form of the oath administered to grand jurors is of ancient origin and should be substantially observed. *Brown v. The State*, 5 Engl. Rep. 607.

After the grand jurors are all duly sworn and affirmed, the crier makes the following proclamation:

Hear ye, &c.: All persons are enjoined and strictly commanded to keep silence, on pain of imprisonment, while the court charge the grand jury.

In charging the grand jury, the court are directed by law to call their attention to offences against the election laws, (1 R. S. 155;) to violations of the laws against lotteries, (1 R. S. pt. 1, c. 20;) not to disclose the fact of an indictment being found against any individual for a felony, until the defendant in such indictment shall have been arrested thereon, (2 R. S. 812;) and to violations of law by public officers, in demanding, charging or receiving fees to which they are not entitled by law. Laws of 1845, c. 455.

In Ohio, the act against betting at elections is to be specially given in charge of the grand jury, at each term of the court of common pleas, by the presiding judge, (R. S. c. 35, s. 124;) also, the act to preserve the purity of elections, (Law passed March 20, 1841;) also, as to unauthorized bank paper, &c., (R. S. of Ohio, 137, 141;) as to taverns, &c., (ib. 900;) as to ferries, (ib. 415;) as to gaming and gambling, (ib. 429;) as to duties of supervisors of roads, &c., (ib. 813;) as to auctions and auctioneers. Ib. 104.

In Michigan, the grand jury are to be charged in relation to the violation of the election laws, (R. S. 101;) and to be specially charged in relation to trespasses on public lands. Ib. 246, 247.

In Virginia, the grand jury are to be charged, in a county or corporation court, by the prosecution attorney. Code of Va. of 1849, c. 206, s. 7.

[4] Justice Blackstone, in speaking of a grand jury, says, that they are usually gentlemen of the first figure in the county. Mr. Livingston, in speaking of the same subject, in his Criminal Code, says that they consist of a body of men taken at stated periods from the mass of citizens, to perform a most important function in the administration of justice. It is their duty to protect the innocent from accusation, and to discover and bring the guilty to trial. They have no political, nor any other civil powers, and they must confine their deliberations

The prisoners against whom bills are found, are then arraigned, and plead, as mentioned ;(a) and their cases are then ready for trial.

(a) *Ante*, p. 108.

to the question whether there has been an infraction of the law, and who has been the offender. And in New York, it is provided by statute, that in preparing lists of grand jurors, the board of supervisors shall select such persons only as they know, or have good reason to believe, are possessed of the qualifications by law required to serve as jurors for the trial of issues of fact, and are of approved integrity, sound judgment and well informed. 2 R. S. 720, s. 3.

In New York, Vermont, and Mississippi, the foreman of the grand jury is appointed by the court. 2 N. Y. Rev. Stat. p. 810, s. 26; Hutchinson's Miss. Code, 878; R. S. of Verm. c. 35, s. 16. In Maine, Massachusetts, and Michigan, the jury, after the retire, elect one of their number to be foreman. R. S. of Maine, c. 172, sec. 4; R. S. of Mass. c. 136, s. 7; R. S. of Mich. c. 164, s. 5.

In New York and New Jersey, the foreman of the grand jury is authorized to administer the oath to the witnesses who appear before the grand jury. 2 N. Y. Rev. Stat. p. 724, s. 29; R. S. of N. J. tit. 34, c. 13, s. 3. In Pennsylvania, "the foreman of a grand jury, or any member thereof, is authorized and empowered to administer the requisite oaths or affirmations to any witness or witnesses whose names may be marked by the attorney general on the bills of indictment. Dunlop's Laws of Pennsylvania, p. 453. In Maine, Massachusetts and Michigan, the foreman, attorney-general or prosecuting attorney, has power to swear the witnesses before the grand jury. R. S. of Maine, c. 172, s. 6; R. S. of Mass. c. 136, s. 9; R. S. of Mich. c. 164, s. 9.

Every grand jury may appoint one of their number to be a clerk thereof, to preserve minutes of their proceedings, and of the evidence given before them, which minutes shall be delivered to the district attorney of the county when so directed by the grand jury. 2 N. Y. Rev. Stat. 724, s. 30; R. S. Maine, c. 172, s. 8; R. S. of Mass. c. 136, s. 10; R. S. of Mich. c. 164, s. 10.

In New York, the statute provides that no grand juror, constable, district attorney, clerk, or judge of any court, shall disclose the fact of an indictment having been found against any person, for a felony, not in actual confinement, until the defendant in such indictment, shall have been arrested thereon; every person violating this provision, shall be deemed guilty of a misdemeanor. 2 R. S. p. 726, s. 30. And there is substantially the same provision in the revised statutes of Maine, Massachusetts and Michigan. R. S. of Maine, c. 172, s. 10; R. S. of Mass. c. 136, s. 12; R. S. of Verm. c. 164, s. 12.

In New York, the statute provides that deliberations of a grand jury shall be private. The district attorney of the county shall be allowed at all times to appear before the grand jury, on his request, for the purpose of giving information relative to any matter cognizable by them; and may be permitted to interrogate witnesses before them, when they shall deem it necessary; but no district attorney, constable, or any other person except the grand jurors, shall be permitted to be present during the expression of their opinions, or the giving of their votes, upon any matter before them. 2 R. S. 725, s. 33.

And in like manner, such persons as may be sent for or appear as witnesses, may come to make complaint or give information in relation to the breach of any law. Every one announcing himself as complainant or informant against such breach of the law, must be admitted and heard at any such time as the grand jury will permit.

Subpoenas for witnesses in support of any prosecution, may be issued and signed by the district attorney, without the seal of the court. And the attendance of such witnesses may be compelled in the same manner as in civil causes. 2 N. Y. Rev. Stat. 729, s. 63, 64.

The witnesses being called in, are examined (on oath) by the grand jury, or with their consent by the district attorney. 3 Chit. Burn, 354; Mat. Dig. 281. The grand jury should require the same evidence, written and parol, as may be necessary to support the indictment at the trial. They are not, however, usually very strict as to the documentary evidence;

they often admit copies where the originals alone are evidence; and sometimes even evidence by parol of a matter which should be proved by written evidence. But as they may, and in general should, insist on the same strictness of proof as must be observed at the trial, it is prudent in all cases to be provided, at the time the bill is preferred, with the same evidence with which it is intended afterwards to support the indictment. Arch. Cr. Pl. 63.

It seems that the defendant has no right to have a counsel or attorney, or any person skilled in the law, present before the grand jury as an advocate on his behalf; it being only a preliminary investigation, and not conclusive on him. 1 Barn. & Cress. 37, 51; 10 id. 237.

In New York, the statute provides that members of the grand jury may be required, by any court, to testify whether the testimony of a witness examined before such jury, is consistent with or different from the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person upon a complaint against such person for perjury, or upon his trial for such offence; but in no case can a member of a grand jury be obliged or allowed to testify or declare, in what manner he or any other member of the grand jury voted on any question before them, or what opinions were expressed by any jurors, in relation to any question. 2 N. Y. Rev. Stat. 724, sec. 31.

Whenever required by the grand jury, it shall be the duty of the district attorney of the county to attend them for the purpose of examining witnesses in their presence, or of giving them advice upon any legal matter, and to issue subpoenas and other process to bring up witnesses. 2 R. S. 725, s. 32.

The grand jury are to proceed in the following order:

The calendars are to be read and taken up for consideration.

The causes of those who are in custody, beginning with the highest in degree. The indictments sent in by the public prosecutor shall then be read, together with the examinations and other documents returned by the magistrates. The witnesses shall then be examined, and if any member requires the advice of the public prosecutor, he may be called, heard, and after he has retired the foreman shall again read the indictments, and put the following questions to the jury:

1. Whether the offence stated in the indictment has been committed.
2. Whether it was committed by the person accused in the indictment.

Each of these questions shall be debated and decided separately, and on each the jury may, with the assent of twelve members, make any amendments or alterations in the indictment, either in the description and circumstances of the offence, according to their view of the testimony and law, or in the name or description of the offender, if another person than the accused in the indictment appears to have committed the offence.

If both the questions above stated are decided in the affirmative by twelve jurors, the indictment shall then be signed by the foreman, adding to his name the quality in which he signs. When thus signed, the indictment is said to be found.

In cases where the public prosecutor has not sent an indictment, the grand jury, after hearing the testimony, shall in like manner decide, 1. Whether an offence has been committed, and what that offence is; and, 2. Who is the offender. And if it result from the decision of these questions, that twelve jurors are of opinion that any designated person has been guilty of an offence, the clerk shall certify that there is matter for accusation against the person (naming him) for such an offence (specifying it,) and shall deliver such certificate with a minute of the evidence to the public prosecutor, who shall immediately send an indictment to the grand jury, conformable to the fact and the law, which indictment, before it can have any force, must be found in the manner above directed.

If the grand jury decide that they have not sufficient evidence, either that the offence was committed, or that it was committed by the person accused (whether this decision be made on an indictment or under the last preceding clause, where no indictment has been presented,) it is the practice to indorse "*ignoramus*."

The grand jury have a right to ask the instruction and opinion of the court, on any point of law on which they may be dissatisfied with the opinion of the public prosecutor. In order to obtain such instruction, the grand jury shall come into court, and if the matter on which

(g) *Petty jury called and sworn.*

The petty jurors are called, and the first twelve who answer to their names usually go into the jury box.[5] On the first day of the assizes

they desire to obtain information requires secrecy, the foreman shall so state to the judge, and thereupon the judge shall give his opinion and instructions thereon. After hearing which, the said grand jury shall retire to their chamber to deliberate.

The grand jury are confined in their examinations, to the witnesses on the side of the state, but still the result of their examinations ought to enure as well for the benefit of the defendant as of the state, because the state is not less interested in the protection of the innocent than in bringing the guilty to trial.

The object of a grand jury being to reach the truth as to the innocence or guilt of the party accused, they have a right to examine any and every person who may be able to throw light upon the subject, saving and excepting the defendant himself.

The foreman of the grand jury should endorse each indictment "a true bill," and sign his name as foreman; but it is not necessary that the name should be copied into the indictment. *Gardner v. People*, 3 Scam. 83. An indorsement by the foreman over his signature, on the back of the bill, of the words "true bill," is sufficient without the prefix of the article "a". *The State v. Davidson*, 12 Verm. Rep. 300.

Held, in New Hampshire, that indictments found by a grand jury, must be signed by the foreman, and be thus returned into court in the presence of the jury. *The State v. Squire*, 10 N. Hamp. Rep. 558.

In Virginia, where a trial had been commenced, and it was then discovered that the indictment was not signed by the foreman of the grand jury, it was held that no further proceedings could be had on it, although the counsel were willing to proceed. *Com. v. Sargent*, Thacker's Crim. Cas. 116.

Held, in Kentucky, that it is not material whereabouts in the indictment the signature of the foreman of the jury is placed. *Overshiner v. Com.*, 2 B. Mon. Rep. 244.

When the grand jury come into court with bills of indictment, it becomes the duty of the clerk to call over their names requesting them to answer. The foreman then delivers to the court the bills. The court after examining them, directs the grand jury to proceed with public business—or if they have finished the business before them, they are discharged by the court.

OF PROCESS UPON AN INDICTMENT.

In the state of New York, a process is issued under the provisions of the statute which directs that, "a warrant for the arrest of any defendant indicted, may be issued by the court to which such indictment shall be presented, or by any justice of the supreme court, any circuit judge, or judge of the county courts of the county in which such indictment shall be found, either in vacation or during the sitting of any such court; but such warrant shall not be issued by any other officer. 2 Rev. Sta. 728, sec. 55.

After the grand jury have found the indictment, it becomes the duty of the clerk to arraign the prisoner; directing those who are indicted for felonies to hold up their right hands. If the indictment is for a capital offence he reads the indictment at length: in other cases, he briefly states the substance thereof, and then asks the prisoner if he demands a trial upon this indictment; if he answers "yes"—the clerk records a plea of not guilty. 2 Rev. Sta. 730, sec. 70; Rev. Sta. of Mass. ch. 136, secs. 128, 129; Rev. Sta. of Mich. ch. 164, sec. 134; Rev. Sta. of Maine, ch. 172, sec. 18; Hotchkiss' Stat. Law of Georgia, p. 790; Code of Va. of 1849, ch. 208; Code of Iowa, of 1851, ch. 170, sec. 2931.

[5] The judges having taken their seats, order the court to be opened. The crier then proclaims with a loud voice, "silence! while I proclaim the orders of the court;" which is done in the following manner:

Hear ye—Hear ye—Hear ye.—All persons having business at this court of general sessions

or sessions, the whole list of jurors is usually called over, as soon as the grand jury are charged and have retired. And by stat. 6 G. 4, c. 50,

of the peace, held in and for the city and county of New York, draw near and give your attendance and you shall be heard.

The court is now opened.

The same proclamation is made every day during the session of the court.

After the opening of the court the crier makes the following proclamations:

Hear ye, &c. All justices of the peace, mayors, recorders, sheriffs, coroners and other officers, who have taken any inquisition or recognizance whereby you have let any person to bail, put the record thereof forthwith into court, that the justices of the people now here may proceed thereon.

Hear ye, &c. The sheriff of the city and county of New York, is hereby directed forthwith to return the panels of grand and petit jurors to serve at this court, that the justices present may proceed thereon.

Hear ye, &c. The sheriff of the city and county of New York is hereby directed forthwith to return the precept for summoning the grand jury to him directed and delivered, and returnable here this day, that the justices present may proceed thereon.

Hear ye, &c. You good men and true, here returned as grand jurors in and for the body of the city and county of New York, answer to your names every one at the first call and save your fines.

It is usual for the officers referred to in the preceding proclamations to make their returns some time anterior to the commencement of the term.

After the crier has made the foregoing proclamations according to law, the clerk gives notice, that those gentlemen having excuses to offer, will come up before the court, as their names are called.

Those having excuses to offer are sworn by the clerk according to the following forms:

You do solemnly swear, that you will true answers make to such questions as shall be put to you by the court touching your excuse for not serving as a grand juror, so help you God.

[or]

You do swear in the presence of the ever living God, &c., (omitting the words, "so help you God.")

[or]

You do solemnly, sincerely, and truly declare and affirm, &c., (omitting the words, "so help you God.")

#### CHALLENGE TO GRAND JURY.

There exists the same right of challenging for favor to the grand jury as the petit jury. A person held to answer to any criminal charge, may object to the competency of any one summoned to serve as a grand juror before he is sworn; on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of such prosecution, and has been subpcensed or been bound in a recognizance as such; and if such objection be established, the person so summoned shall be set aside. 2 N. Y. R. S. 724, s. 27.

No challenge to the array of grand jurors, or to any person summoned to serve as a grand juror, shall be allowed in any other cases than such as are specified in the last section. Ibid. s. 28.

A challenge to the array will not be allowed on the ground that in the selection of grand jurors, all persons belonging to a particular fraternity or association (in this case free-masonry) were excluded, if those who are returned are unexceptionable, and possess the qualifications required by statute. 3 Wend. R 314.

It is a good cause of exception to a grand juror, that he has formed and expressed an opinion as to the guilt of a party whose case probably will be presented to the consideration of the grand jury; so also a grand juror's having evinced feelings of hostility towards such

s. 38, if any man summoned to attend upon a jury, shall not attend in pursuance of such summons,—or being thrice called shall not answer to his name,—or if he be present but do not appear,—or if after appearing he wilfully withdraw himself from the presence of the court: the court shall set such fine upon him as it shall think meet unless some reasonable excuse \*for the default shall be made [\*162] by oath or affidavit. The stat. 5 & 6 W. 4, c. 76, s. 121, as to jurors at the quarter sessions in boroughs, contains a similar enactment with this addition, that if the fine be not paid, the court shall make an order that the same may be levied by distress and sale of the party's goods.[1]

If there have been a view, those jurors who have had the view, are first called. It must be observed, however, that a view can be had in a criminal case, only where the indictment is pending in the court of Queen's Bench,(a) or with the consent of the opposite party.(b) But in one case, in the Crown Court at the Assizes, where the defendant wished the jury to view the place where the offence (rape) was said to have been committed, which was in the immediate vicinity of the court, the judge allowed the jury to have a view, although the counsel for the prosecution did not consent.(c) In all cases where a view is necessary, if the opposite party consent, a rule for it or a judge's order in vacation

(a) 6 G. 4, c. 50, s. 23.

(c) See *R. v. Whalley*, 2 Car. & K. 376.

(b) See *R. v. Whalley*, 2 Car. & K. 376.

party, is good cause of exception. But these exceptions must be taken before the indictment is found, and will not afterwards be heard. 2 Rev. Sta. 724, sec. 27.

In Michigan, a person held to answer to any criminal charge, may object to the competency of any one summoned to serve as a grand juror, on the ground that he is the prosecutor or complainant upon any charge against such person; and if such objection be established the person so summoned, must be set aside. Rev. Sta. of Mich. ch. 164, sec. 7. No challenge to the grand jury, is allowed in any other case. Ib. sec. 8.

See Rev. Sta. of New Jersey, tit. 34, ch. 13, sec. 2; Hutchinson's Mississippi Code, page 888.

#### CALLING THE PETIT JURY.

The clerk if requested by the counsel for the prisoner, calls the whole panel of the jurors. After which the crier makes the following proclamation:

Hear ye, &c. You good men and true, here returned to inquire between the people of the state of New York and A. B., the prisoner at the bar, answer to your names, every one at the first call, and save your fines.

The clerk then, generally draws the ballots,—as he draws them, calling their names.

[1] In Massachusetts, the court is authorized by statute to impose a fine upon a juror for neglecting to attend, not exceeding forty dollars. Rev. Sta. of Mass. ch. 95, sec. 19. In Maine and Michigan the fine must not exceed twenty dollars. Rev. Sta. of Maine, ch. 135, sec. 26; Rev. Sta. of Mich. ch. 103, sec. 24. In Pennsylvania, the fine cannot exceed thirty dollars. Dunlop's Laws of Penn. p. 628. In Maryland, jurors neglecting to appear when summoned, without sufficient excuse, may be fined £35 by the general court and £20 by the county courts. Laws of Maryland, passed April 1782, ch. 40. See Dorsey's Laws of Maryland, vol. 1, page 179.

may be had almost as of course: but without consent, the only mode of obtaining it, is by removing the indictment into the court of Queen's Bench by *certiorari*, and then applying for and obtaining the rule.

Upon a full jury appearing, the prisoners who have been arraigned being at the bar, the clerk of the arraigns at the assizes, or the clerk of the peace at sessions, in cases of treason or felony, addresses the prisoner thus: "Prisoners: these good men who shall now be called, are the jurors who are to pass between our sovereign Lady the Queen and you upon your [*respective*] trials; if therefore you [*or either of you, or any of you*] would challenge them or any of them, you must challenge them as they come to the book, to be sworn, and before they are sworn, and you shall be heard."

In treason and felony the names of the jurors are then separately called over by the clerk of arraigns or clerk of the peace, and the crier of the court administers the oath to each of them, thus: "You shall well and truly try, and true deliverance make, between our sovereign Lady the Queen and the prisoners at the bar, whom you shall have in charge, and a true verdict give according to the evidence: So help you God." [2] As to the affirmation of Quakers, Moravians, and Separatists, (a)

As each juror is named, and before he is sworn, or rather before the oath or affirmation is tendered to him, the prisoner may challenge him as mentioned *infra*.

But in misdemeanors, the jury are at once sworn, usually four jurors at a time, without giving the defendants their challenges as above-mentioned. The oath is thus: "You shall well and truly try the issue joined between our sovereign Lady the Queen and the defendants, and a true verdict give according to the evidence: So help you God."

[\*168]

*\*(h) Challenges of jurors.*

The jurors must be challenged, if at all, before they are sworn, (b) or the oath or affirmation tendered to them. And where, after the jury were all sworn, the case opened, and one witness examined, the foreman intimated to the court that there was a relation of the defendant

(a) See *ante*, p. 150.

(b) 2 Hawk. c. 43, a. 1.

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[2] The following oath or affirmation must be administered by the court, to each juror: "You do swear in the presence of Almighty God [or, "you do solemnly affirm," as the case may be,] that you will well and truly try this traverse between the people of the state of — and — defendant, and a true verdict give, according to evidence, unless discharged by the court."

After the jury have been thus sworn, they are to sit together, and hear the proofs and allegations in the case, which must be delivered in public, and in the presence of the defendant.

on the jury, Erskine, J. (after conferring with Tindal, C. J.) held, that he had no power to discharge the jury, and that the case must therefore proceed.<sup>(a)</sup>[1]

The Queen or the party may challenge the whole array, for favor.<sup>(b)</sup>[2]

In *R. v. Dolby*,<sup>(c)</sup> the defendant being indicted in Middlesex, before

(a) *R. v. Wardle*, Car. & M. 647.

(c) 1 Car. & K. 238.

(b) 1 Inst. 156.

[1] The term *challenge*, is used in law for an exception to jurors who are returned to pass on a trial. The practice of challenging jurors is mentioned by Blackstone as answering to the *recusatio judicis* in the civil and common laws. Mr. Spence (Spence's Chan. 10 b.) speaks of the "Roman right of challenge," as introduced into England, or confirmed at the conquest.

The challenge of a juror must be before the oath is commenced; and the oath is commenced by the juror taking the book, having been directed by the officer of the court, to do so; but if the juror takes the book without authority neither party desiring to challenge, will be prejudiced thereby. *Regina v. Frost*, 9 Car. & Payne 137. See *M'Clure v. State*, 1 Yerger, 206; *Commonwealth v. Knapp*, 10 Pick. 477; *Bratton v. Bryan*, 1 Marsh. 212; *King v. State*, 5 How. (Miss.) Rep. 730; *State v. Flower*, 1 Walker, 318; *Com. v. Jones*, 1 Leigh, 598; *Beauchamp v. The State*, 6 Blackf. 299; *Hooker v. The State*, 4 Ohio, 348; *Munly v. State*, 7 Blackf. 593; *Morris v. State*, 7 Blackf. 607. It is provided by statute, in Virginia, that no exception shall be allowed against any juror after he is sworn upon the jury, on account of his estate, or age, or other legal disability. Rev. Code of Va. of 1849, tit. 49 ch. 163, sec. 4. In Massachusetts, it is said that a challenge is not too late after a juror has been merely sworn, and not impaneled. *Com. v. Twombly*, 10 Pick. Rep. 480; see *Williams v. The State*, 3 Kelly's Geo. Rep. 453.

In the case of *The People v. Damon*, 13 Wend. Rep. 355, the court, Savage, C. J., held, that if it was made to appear, *even after a juror was sworn*, that he was totally incompetent, by reason of having prejudged the case, that it was not too late to set him aside and call another; and see *Toole's case*, 11 Leigh. 714. The rule, however, as stated by Hawkins, and other standard writers on criminal law, is, that no juror can be challenged by either side, without consent, after he has been sworn, unless it be for some cause which happened since he was sworn. 1 Coke Just. book 3, ch. 9; 2 Hawk. Pl. Cr. 568; 1 Chitty's Cr. Law, p. 545. This last author maintains that the proper time for challenging, is between the *appearance* and the *swearing* of the jurors. And this seems to be the true doctrine.

In *Hooker v. The State of Ohio*, 4 Hammond, 350, it was held that the right of peremptory challenge ought to be held open, for the latest possible period, to wit, *up to the actual swearing of the jury*. And in *Beauchamp v. The State*, 6 Blackf. Rep. 307, the supreme court laid down the rule that either party may challenge at any time between the appearance, and swearing of the jury. See also *Jones v. Venzand*, 2 M'Lean Rep. 611. But in Massachusetts, in the case of *Com. v. Rogers*, 7 Met. Rep. 500, it was held that the right of a party who is put on trial for a capital offence, to a peremptory challenge, must be exercised, if at all, before the jurors are interrogated by the court concerning their bias and opinions. But see *State v. Potter*, 18 Conn. Rep. 166.

In Alabama, the court may permit a party to challenge a juror for cause, at any time before the case is submitted to the jury, although they may have been selected and sworn. *Haynes v. Crutchfield*, 7 Ala. Rep. 189. And in South Carolina, under the statute of 1841, either party may claim the right of challenge at any time before the jury is charged, either party challenging first. *Klemback v. The State*, 2 Speer's Rep. 418.

See Waterman's Criminal Law, Tit. CHALLENGES OF JURORS.

[2] Challenge are of two kinds,—to the array, or to the polls; and each of these are again subdivided into principal challenges, and challenges to the favor. By challenge to the array,



the court of King's Bench, for a seditious libel, challenged the array, because he said that he was prosecuted by an association called the Consti-

is meant, challenge to the whole jury as it stands arrayed in the panel. By challenge to the polls, is understood the challenging the several jurors individually.

In New York, the statutes provides that every person indicted for any offence shall be entitled to the same challenges as are allowed in civil cases, either to the array of jurors or to individual jurors. Rev. Stat. of New York, 4th Ed. vol. 2, p. 917, sec. 12.

The attorney general, or district attorney prosecuting for the people of this state, shall be entitled to the same challenges in behalf of this state, either to the array or to individual jurors, as are allowed to parties in civil cases; and the same proceeding shall be had thereon, as in civil actions. Ib. sec. 13.

In Maine, Massachusetts, Pennsylvania, and Wisconsin, there are substantially the same statutory provisions as in New York, permitting like challenges to jurors in criminal and civil cases. Rev. Stat. of Maine, ch. 172, sec. 31; Rev. Stat. of Mass. ch. 137, sec. 3. Dunlop's Laws of Penn. p. 630; Rev. Stat. of Wis. ch. 148, sec. 3 and 4.

A challenge to the array, is an objection to all the jurors returned by the sheriff, collectively: (Co. Litt. 156, 158;) not for any defect in them, but for some partiality or default in the sheriff, or his under officer, who arrayed the panel. 3 Bl. Com. 359; 2 Tidd, 779; 9 John. 261. This is the English definition, where the panel is arrayed by the sheriff. Since our statute, authorizing the clerk to array the jury, a challenge to the array also lies, for partiality or default in the clerk; who, for many purposes, is substituted for the sheriff, in selecting and arraying the jury. 9 John. 261. This is either a principal challenge, or challenge to the favor.

The causes of principal challenge to the array are such as the following, viz: that the officer who makes the array is of kindred or affinity to either party, within the ninth degree, (1 South. Rep. 384)—that one or more of the jury are returned at the nomination of either party—that an action of battery, or other action implying malice, is pending at the suit of either party, against the officer, or at the suit of the officer, against either party—that an action of debt is pending, at the suit of the party, against the officer, but not, if by the officer, against the party—that the officer holds land depending upon the same title with that in litigation, between the parties—that the officer is under the distress of either party—that the officer is counsel, attorney, (Cowp. 112,) officer, servant, or gossip, of either party, or is an arbitrator, in the same matter, and has treated thereof, (Co. Litt. 156.)—that the clerk, instead of drawing 36, drew 72 names, put them in a list, and selected 36 from them. 9 John. 260.

The causes of challenge, to the array for favor, are, such as imply, at least, a probability of bias or partiality in the officer, but do not amount to a principal challenge. Thus, that the plaintiff or defendant is the tenant of the officer. or that the son of the officer has married the daughter of the plaintiff or defendant, or the like. Co. Litt. 156. See *Quinebaug Bank v. Tarbox*, 20 Com. Rep. 510.

In Mississippi, a challenge to the array cannot be made, since the act of 1836, for informality of the venire facias. *Thomas v. The State*, 5 How. Miss. Rep. 20.

*To the Polls.* A challenge to the polls is an exception to one or more of the jurors who have appeared individually; and this is either a principal challenge, or a challenge to the favor. The causes of a principal challenge to the polls may be classed under the following heads.

1. Challenge, *propter honoris respectum*, (Co. Litt. 156; 2 Hawk. c. 43, s. 11; 3 Bl. Com. 361,) is inapplicable, as depending on a title of nobility. Con. U. S. art. 1, s. 9, pl. 7.

2. *Propter defectum*, that the juror is not qualified to serve upon a jury. Thus, that he has not sufficient freehold, or other property, (1 R. L. 627, s. 9; Co. Litt. 45,) excepting, of course, where the jury are *de medietate linguæ*, (1 R. L. 327, s. 9,) that he is within the age of 21, (Co. Litt. 157; 1 R. L. 327,) or above the age of 60, (1 R. L. 327,) or that he is an idiot or lunatic. Gilb. C. B. 95. So if a woman be empanelled, she may be challenged *propter defectum sexus*, (3 Bl. Com. 362,) unless empanelled on the writ *de venire inspiciendo*.

tutional Association, and that one of the sheriffs who returned the jury was one of the association; the counsel for the prosecution thereupon

See Cro. Eliz. 566. That the juror is an *alien*, (6 John. 332, 4 Dall. 353,) or that he is a slave, or not a resident of the county. Co. Litt. 156, b. Boots, 157.

But a matter which merely *exempts* a man from serving on a jury, and does not incapacitate him, can never be a cause of challenge. An instance of these *exempts* is in 1 R. L. 335, a. 28. And it is said in Hawk. c. 43, s. 26, that if a person thus exempted, be summoned, and appear, he cannot excuse himself from serving on a jury, if there be not a sufficient number of jurors without him. He instances old age, &c., under the statute of Westm. 2, ch. 38.

If a juror be erroneously named in the *distringas*, panel &c. and sworn by such wrong name, if the error be in the christian name it amounts only to a matter of challenge, and cannot be objected after verdict. Willes, 488; 12 East, 230, a.; 2 Burn. J. 856. If the surname, (particularly where the person serving is not the same that was intended to be summoned) the court have, in such a case, set the verdict aside. Willes, 484; Barnes, 453; 6 Taunt. 460; Barnes, 455. But see 12 East, 229, where the court held it was discretionary with them to grant a new trial in such a case, or not; and that they would not do so, unless the mistake, as to the juror, had been productive of some injustice.

3. Challenge *propter affectum*, by reason of some supposed bias or partiality. Thus, that the juror is of kin to either party, within the ninth degree, (Finch. L. 401; 3 Bl. Com. 363,) or, according to Ld. Coke, however remote the kindred, (Co. Litt. 157)—that there is an affinity or alliance, by marriage, between the juror and one of the parties, if such affinity continue, or there be issue of the marriage alive; for otherwise it would be but a challenge to the favor, (Co. Litt. 157,) that the juror is god-father to the party's child, or the party god-father to the juror's child—that the juror has land which depends upon the same title as the land in question; or, in a cause where the parson of the parish is a party, and the right to the church comes in debate, that the juror is a parishioner is a good cause of challenge; and so in all other cases where the juror has an interest in the action, direct or collateral, (see Burr. 1847; 2 John. 194; St. sess. 43, ch. 37, s. 3; 5 Mass. Rep. 90; 2 South. Rep. 686,) that the juror has before given a verdict in the same cause, or upon the same title or matter, though between other parties—that he was chosen arbitrator in the same cause, by one of the parties, and has entered upon an examination of it; but otherwise if he were chosen indifferently by both parties—that he is counsellor, servant, or of fee of either party, (Co. Litt. 157,) that he is tenant of either party, (Gilb. C. B. 95,) that he is of the same society or corporation with either party, (3 Bl. Com. 363,) but that he is his fellow servant is but a challenge to the favor, (Co. Litt. 157,) that he has taken information of the case before he is sworn, (2 Hale, 306,) that he has declared his opinion of the case beforehand, (2 Hawk. ch. 43, s. 28; 1 John. Rep. 316,) but not where he merely expresses a conditional opinion, thus: "If the reports of the neighbors be correct, the defendant is wrong, and the plaintiff is right;" (8 John. 445; 1 C. H. Recorder, 24, S. P.; 6 C. H. Recorder, 71, S. P.,) that since he has been returned, he has eaten or drunk at the expense of one of the parties; (Co. Litt. 157,) but that one of the parties has been lately entertained at the juror's house, is only matter of challenge to the favor, (3 Salk. 81,) that one of the parties has labored the juror, and given him money or other thing for giving his verdict; but if the party only labor the jury to appear, and act conscientiously, it is no matter of challenge whatever—that an action, implying malice or displeasure, is pending between the juror and one of the parties; but if not implying malice or displeasure, it is but matter of challenge to the favor. Co. Litt. 157.

4. Challenge *propter delictum*; when for some act of the juror, he has ceased to be, in consideration of law, *probus et laicus homo*. Thus, that he has been convicted of treason, felony, perjury, conspiracy, forgery, &c.—that he has received judgment of the pillory or other infamous corporal punishment, for any infamous crime—that he is outlawed upon criminal process; (Co. Litt. 158,) but it is doubted whether outlawry in a personal action disqualifies a man from being a juror. See Cro. Car. W. Jon. 198; Ley. 81.

The challenge to the polls for favor, is of the same nature with the principal challenge

took issue; the chief justice then appointed two triers to try the issue, who were accordingly sworn; the counsel for the defendant first ad-

*propter affectum*, but of an inferior degree. The general rule of law is, that the juror shall be indifferent; and if it appear probable that he is not so, this may be made the subject of challenge, either principal or to the favor, according to the degree of probability of his being biased. The cause of principal challenge to the polls, we have seen, is such matter as carries with it, *prima facie*, evident marks of suspicion, either of malice or favor. But when, from circumstances, it appears probable that a jury may be biased in favor of, or against either party, and yet such circumstances do not amount to matter for a principal challenge, it may then be made a challenge to the favor. The effect of these two species of challenge is the same; the only difference between them is in the mode of trying them. 1 Archbold, 183; Co. Litt. 158, a.; 2 Caines' Rep. 138. If a juror declare on oath to the triers, that the testimony being equal, he should find a verdict for the plaintiff, he should be rejected. 7 Cranch, 291. And in an action by a bank, the juror stating that he was the indorser of a note to the bank, was found by the triers not different; and this was holden well. 19 John. 115. That he was a stockholder in the bank, would of course, be a good objection. 6 C. H. Recorder, 69. If the triers are in doubt whether the juror is indifferent, they should find him not indifferent. 4 C. H. Recorder, 81.

*When and how made.* No challenge either to the array or to the polls, can be made, before a full jury have appeared. 2 Hawk. c. 43, s. 1. It is immaterial, which party challenges first; but the party who first begins to challenge, must finish all his challenges before the other begins; otherwise, he is precluded from making any further challenges. Also, the challenges of the party who challenged first, shall be first tried. Tr. per Pais, 144.

The challenge to the array must be in writing. It may be in this form: "And now at this day, to wit, on — come as well the aforesaid J. S. as the aforesaid J. N. by their respective attorneys; and the jurors of the jury impanelled, being summoned, also come: and hereupon the said J. N. challengeth the array of the said panel; because he saith that [*here set forth the matter of challenge, with certainty and precision,*] and this he is ready to verify. Wherefore he prayeth judgment, and that the said panel may be quashed." See the form of a challenge to the array that the jury were returned at the instance of the party, (2 Burn. J. 868,) that the sheriff is of kin to one of the parties, (*id.*) that the sheriff is an alderman, and interested in the event of the trial, (Cr. Cir. Comp. 105,) that the sheriff is a citizen and freeman, and has paid a sum of money towards defraying the expenses of the suit. And see a counterplea to this last challenge, and a demurrer to the counterplea. *Id.* See also, Tr. per Pais, 159, 184; 10 Wentw. 474; 2 Rich. Pract. C. B. 180; Litt. Ent. 472. Mr. Wooddeson, the late Vinerian professor, has furnished the form of a challenge to the array, a demurrer, and judgment thereupon, and a principal challenge to the polls *ore tenus*, and a judgment thereupon, with some other useful particulars in relation to these challenges, which are mentioned in *Hesketh v. Braddock*, Burr. 1847. See 3 Wood. Lec. 347, n. i.

Mr. Wooddeson's note is thus: "As Sir James Burrow has not given the record at length, I have set down the form of these challenges, (which is not of every day's experience) from my MS. precedents.—"And hereupon the said S. B. prayeth judgment of the panel aforesaid, because he says that the said panel was arrayed and made by J. C. and J. D. sheriffs of the said city of Chester; and that the said J. C. and J. D. were, at the time of the making of the panel aforesaid, and continually from thenceforth hitherto have been and still are citizens and freemen of the said city of Chester; and this the said S. B. is ready to verify. Wherefore he prays judgment and that the panel aforesaid may be quashed. And the said P. E. and H. H. say, that the matter in the aforesaid challenge to the array of the said panel contained, is not sufficient, in law, to quash the array of the said panel; and this they are ready to verify. Wherefore they pray judgment, and that the array of the said panel may be allowed by the court here. And the said S. saith for that he hath above alleged a sufficient challenge to quash the array of the panel aforesaid, which he is ready to verify, which said challenge the said P. and H. do not, nor doth either of them deny, nor to the same in any wise answer, but do, and each of them doth altogether refuse to admit that averment,

dressed these triers, and called a witness, who proved that the sheriff named was one of the subscribers to the association; the counsel for

he the said S. prays judgment, and that the array of that pannel may be quashed. And hereupon it is judicially taken notice of by the said court here, and is known to the same court, that by the custom and constitution thereof, and of the city aforesaid, no person or persons can or ought to array the panel of any jury within the jurisdiction of the said court, or in any civil suit within the same city, other than the sheriffs of the same city, for the time being, or one of them, or (by reason of any default in the said sheriffs) the coroners of the said city, for the time being, or one of them; and that, by the custom of the said city, from time immemorial, no person or persons can or ought to be sheriffs or coroners, of or within the said city, but citizens and freemen of the same city. And now all and singular the matters aforesaid, whereof the said parties have above put themselves upon the judgment of the said court here, having been seen, and fully understood, by the same court, it appeareth to the same court here, that the matter contained in the aforesaid challenge to the array of the said panel, is not sufficient in law to quash the said array of the panel aforesaid.—Therefore it is considered, by the said court here, that the said challenge of the aforesaid S. to the said array of the said pannel be disallowed; and that the said panel of the aforesaid jury, so arrayed as aforesaid, be allowed and taken. And hereupon the said S. B. *ore tenus* in open court challengeth the polls, because he says, that the jurors, above named, are citizens and freemen, and each of them is a citizen and freemen of the said city of Chester. Which said challenge by the court here is disallowed. And here upon the said jurors," &c.

N. B. This challenge *ore tenus* was omitted in the first engrossment of this record; and which the defendant *alleged diminution*; and this challenge *ore tenus* was then inserted, &c., by rule."

The challenge to the polls is made *ore tenus*; and it is not in general required that the party challenging shall immediately declare his cause of challenge, unless there be not a sufficient number of jurors remaining on the panel, or that the other side challenge *touts paravail*. Tr. per Pais, 143. 4 C. H. Recorder, 81. But if the juror were formerly sworn in the same cause, and be now challenged, (in which case the cause of challenge must have arisen since the juror was before sworn,) or, if after a challenge to the array is tried and overruled, the party challenge the polls, he must declare his cause of challenge presently. Co. Litt. 158. If a juror be challenged, and the challenge tried and overruled, he may still be challenged by the opposite party. Co. Litt. 158.

*How tried.* As to challenges to the array, it lies entirely in the discretion of the Court, how they shall be tried. Sometimes they are tried by two of the coroners; sometimes by two of the jury. 2 Hale, 275. But see 1 South. Rep. 364. Perhaps any two individuals may be named by the court. 9 John. 261. If the challenge, however, be a principal challenge, it may be tried by the court itself, without the aid or intervention of triers. 1 Archbold, 184. 1 South. Rep. 364. If the facts are admitted, but are deemed insufficient, the court adjudges on them, and either *quashes* the array, or overrules the challenge.

If the array be quashed as to the sheriff, a new *venire* shall be awarded to the coroner; if quashed as to the coroner, then the *venire* is awarded to persons appointed by the court for that particular purpose, called *Elisors*, (1 Cowen, 32,) to whose array no challenge is allowed. Co. Litt. 158. If the array be not quashed, the party may then make his challenges to the polls, (1 Archbold, 184,) as was done in *Hesketh v. Braddock*, (Burr. 1847,) and in Wooddeson's precedent given in this note.

A principal challenge to the polls, is tried by the court without the aid or intervention of triers.

If the challenge to the polls be to the favor, it is thus tried: If two jurors have been already called, and take the box without challenge, they shall try the challenge; if not, the court appoint two indifferent persons to try it, and who are thence named *triers*. If the *triers* try one juror, and he is found indifferent, he and the two *triers* shall try the next. Co. Litt. 158. 1 South. Rep. 712. 1 C. H. Recorder, 185. 4 id. 81. The following oath

the prosecution then addressed the triers, and called a witness to prove that the sheriff had ceased to be a subscriber to or member of the association before the return of the jury process, but failed in proving it for want of the letter by which the sheriff had withdrawn himself from it; the triers were then addressed by the counsel for the defendant in reply; the chief justice summed up; the triers thereupon found in favor of the challenge; and the cause was adjourned. This will be found to be a good precedent to follow, in similar cases, where issue is taken on the challenge.

In another case, (a) the counsel for the prosecution demurred to the challenge, as being too general, in merely stating that the sheriff had not chosen the panel indifferently and impartially, and that the panel was not an indifferent panel, without showing in what respect the sheriff had acted partially, &c.; the counsel for the defendant joined in demurrer; the two judges Gurney, B. and Cresswell, J., after argument, allowed the demurrer, and the trial proceeded.[3]

(a) *R. v. Hughes*, 1 Car. & K. 235.

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is previously administered to those who try the challenge: "You shall well and truly try whether J. S. (the juror challenged) stands indifferent between the parties to this issue; so help you God." See the form in a criminal case, 1 C. H. Recorder, 185. 1 Salk. 152. More than two triers or two jurors, cannot be sworn to try a challenge, except in the single case before mentioned. 1 South. Rep. 72.

The juror himself may be examined as to the matter of challenge, provided it do not tend to his dishonor or discredit. Co. Litt. 158. 1 Salk. 153. 19 John. 115.

The causes of favor are infinite, and with regard to all cases of challenges to the favor, in the emphatic language of Lord Coke, "The rule of law is, that the juror must stand indifferent, as he stands unsworn."

One called as a juror on a trial for murder, offered an excuse, that though not a quaker he had determined never to consent to a verdict of guilty, which involved the life of an individual. He was challenged to the favor, by the District Attorney, tried, and found not indifferent. 1 C. H. Recorder, 185, 6.

[3] A challenge to the array will not be allowed, on the ground that all persons of a particular fraternity have been excluded from the jury, if those who are returned possess the requisite qualifications. *People v. Jewett*, 3 Wend. 314.

In Pennsylvania, under the acts of Assembly relating to the summoning of jurors, it was held no cause of challenge to the array, that the sheriff was not present the whole time during which the selection of jurors was made; or, that the sheriff and commissioners took up between two and three weeks in making the selection and putting the names of the jurors into the wheels, or that it did not appear that the sheriff and commissioners wrote the names of the jurors selected by them, and put the same into the wheels, this duty having been performed by a clerk in their presence and by their order; or, that the pieces of paper on which the names were written, were not safely kept between the time of writing and putting them into the wheel, the same having been put into a box where they were kept until the selection was completed, when they were put into the wheels; or that the names which were remaining in the wheels at the end of the year were taken out before the names selected for the new year were put in. *Com. v. Lippard*, 6 Serg. & R. 395.

The person challenging the array must be strictly prepared to prove the cause, (*R. v. Savage*, R. & M. C. C. 51,) and if he omit to challenge, he cannot take advantage of the alleged defect afterwards. *R. v. Sutton*, 8 B. & C. 417; 2 M. & R. 406.

The prisoner may peremptorily challenge twenty jurors in murder or other felony ;(a) thirty-five in treason ; but there is no peremptory challenge in misdemeanors,(b) or upon the trial of collateral issues.(c) Every peremptory challenge above the limited number, is void, and the trial may proceed as if no such challenge had been made.(d)[4]

(a) 6 G. 4, c. 50, s. 29.

(c) Fost. 42. *R. v. Ratcliffe*, 1 W. Bl. 3.

(b) *R. v. Reading*, 7 How. St. Tr. 264.

(d) 7 & 8 G. 3, c. 28, s. 3.

#### [4] PEREMPTORY CHALLENGE.

The following are the legislative enactments of some of the states relative to peremptory challenges :

##### NEW YORK.

Every person arraigned and put on his trial for any offence punishable with death, or with imprisonment in a state prison ten years or any longer time, shall be entitled peremptorily to challenge twenty of the persons drawn as jurors for such trial and no more.

Every person arraigned and put on trial for any offence not punishable with death, or with imprisonment in a state prison ten years, or for a longer time, shall be entitled peremptorily to challenge five of the persons drawn as jurors for such trial and no more ; except that in cases tried in any court of special sessions, said right of peremptory challenge, shall extend to only two of the said persons so drawn. 1847, ch. 134, sec. 1.

Nothing in this act contained shall be deemed to prevent any challenges heretofore allowed, either to the array of jurors, or to individual jurors. 2 R. S. 917, sec. 9, 10, 11.

##### MASSACHUSETTS AND MAINE.

Any person, who is put on trial for an offence punishable with death, shall be allowed to challenge, peremptorily, twenty of the persons returned as jurors, and no more. Rev. Sts. of Mass. ch. 137, sec. 5. There is substantially the same statute in Maine. Rev. Sts. of Maine, ch. 172, sec. 17.

##### PENNSYLVANIA.

No person shall be deemed incompetent to serve as a juror, in any suit or prosecution upon any official bond or forfeited recognizance, or upon any penal act of assembly, by reason of his being subject to any tax which would be diminished by the recovery which may be had in such case.

Every person who shall be arraigned for murder or any other felony, whereof the courts of oyer and terminer and general gaol delivery have exclusive jurisdiction, shall be admitted to challenge, peremptorily, twenty of the panel, but no more.

In cases of felony, the commonwealth shall not challenge any juror without cause, nor shall the commonwealth, in any criminal proceeding, have a right to challenge, peremptorily, a greater number of jurors than the defendant or defendants in such case.

All challenges in criminal proceedings shall be conducted as follows, to wit :

The commonwealth shall challenge one person and then the defendant shall challenge one person, and so alternately, until all the challenges shall be made, but if the commonwealth shall refuse to make any challenge, the defendants shall nevertheless have their right to challenge the full number allowed to them by law. Dunlop's Laws of Penn. p. 630.

##### MICHIGAN.

Any person who is put on trial for an offence punishable with death, or for murder in the first degree, shall be allowed to challenge, peremptorily thirty of the persons returned as jurors and no more. Rev. Sts. of Mich. ch. 165, sec. 5.

##### MISSISSIPPI.

From and after the passage of this act, it shall any may be lawful for any circuit or criminal court in this state, or any judge thereof, in vacation, to change the venue in criminal cases

The Queen has no peremptory challenge; she can only challenge for cause; (a) but she is not bound to show the cause, until the whole panel

(a) 6 G. 4, c. 50, s. 29.

to any adjoining county, on a sufficient showing being made by the prisoner on oath, supported by the testimony of one or more credible witnesses, that he cannot have a fair and impartial trial in the county where the offence is charged to have been committed.

Hereafter whenever any person shall have been arraigned, charged with any felony, the punishment of which is death, it shall be the duty of the court to award forthwith a special venire, which shall be issued by the clerk, commanding the sheriff to summon from the county any number which may be directed by the judge of said court, not exceeding one hundred jurors, requiring them to attend on a particular day to be mentioned in said venire: and in case the special venire is exhausted without having empannelled a jury, the court shall then proceed to make up said jury from the regular panel and tales jurors, who may have been summoned for that day, and if, after having exhausted said regular panel and tales jurors, there shall still not be obtained a full and competent jury for the trial of said prisoner, the court may direct the sheriff to summon forthwith, from among the bystanders, as many tales jurors as may be sufficient.

From and after the passage of this act, upon the trial of any white person or persons indicted for any capital offence, the accused shall not be entitled to challenge peremptorily, above the number of twelve persons presented as jurors, to pass upon his case; and the state in the same case, shall be permitted a peremptory challenge of six persons, and in all criminal cases, where the offence is not capitally punished, the state shall be entitled to two peremptory challenges: *Provided always*, That all peremptory challenges by the state, shall be made before the state presents the juror to the prisoner, and not afterwards. Hutchinson's Mississippi Code, p. 1007, 1008.

#### VIRGINIA.

No challenge of a juror shall be allowed the commonwealth, except for cause, and all challenges shall be tried by the court in which they are made. Rev. Code of Va. 1849, tit. 55, c. 208, s. 8.

#### WISCONSIN.

On the trial of criminal cases when the punishment is capital, the prosecuting officer shall be entitled to challenge peremptorily, six of the persons returned as jurors, and no more; and on the trial of criminal cases where the punishment is not capital, the prosecuting officer and the defendant shall each be entitled to challenge peremptorily four of said jurors, and no more. R. S. of Wis. c. 97, s. 37.

#### NEW JERSEY.

And be it enacted, That every person who shall be indicted for treason, murder or other crime punishable with death, or for misprison of treason, manslaughter, sodomy, rape, arson, burglary, robbery, forgery, perjury or subornation of perjury, and shall voluntarily and duly plead the plea of not guilty to such indictment, shall be admitted peremptorily to challenge twenty of the jury, and no more; and if any person, indicted as aforesaid, after having voluntarily and duly pleaded as aforesaid, shall peremptorily challenge a greater number of the jury than twenty, the court shall disallow all such challenges, over and above the said number of twenty; and the jury shall be charged, and the trial shall proceed in like manner, in all respects, and the like judgment shall be given as would or ought to be had and given if the person so indicted as aforesaid, and having pleaded as aforesaid, had not peremptorily challenged a greater number of the jury than in and by this act he or she is admitted to challenge.

And be it enacted, That neither the attorney-general, nor any other person prosecuting for and in behalf of this state, shall be admitted in any case to challenge any juror, without

be gone through, \*and it appear that there will not be a full [\*164] jury without the person challenged.(a)

(a) 2 Hawk. c. 43, s. 3. See *R. v. Geach*, 9 Car. & P. 499.

assigning a cause certain, to be tried and approved by the court: and further, the privilege of such peremptory challenges shall not be allowed to offenders in any cases, but such as are specified in the section immediately preceding. Rev. Stat. of N. J. p. 294, s. 6, 7.

## IOWA.

The defendant, on his trial, if indicted for a capital crime or an offence punishable with imprisonment in the penitentiary for life, may challenge peremptorily twelve jurors, and no more; if indicted for any other felony, he may challenge only six in the same manner; and if for an offence less than felony, on four. In each case, the prosecuting attorney has the right to challenge peremptorily one-half as many as the defendant is entitled to. Code of Iowa, p. 412, s. 2981.

## TENNESSEE.

The act of 1794, c. 4, s. 71, allows peremptory challenges to the number of thirty-five jurors, in cases capital. The act of 1803, c. 1, s. 5, provides, that in civil cases, either plaintiff or defendant may challenge two jurors, without cause shown; and by the same section it is provided, that in cases of petit larceny, both the state and party charged may, in like manner, challenge four jurors. By the act of 1803, c. 17, on a charge for counterfeiting, &c. which offence is not by it declared to be a felony, a challenge of five jurors is allowed the prisoner. By the act of 1811, against forging or stealing deeds, the prisoner is allowed a challenge of twenty jurors. On an indictment for usury, by the act of 1819, c. 22, s. 4, a challenge of four jurors is allowed. By the act of 1811, against the crime of counterfeiting, or passing counterfeit bank paper, the punishment of which is whipping, fine, &c., the prisoner may challenge twenty jurors. In the act of 1813, c. 65, on the subject of offences against the paper credit, the most penal law in our code, inflicting the punishment of death for at least five of the offences, whipping with a cowskin, fine, imprisonment, &c. for others, challenges are not so much as mentioned. The act of 1807, c. 72, describes the offences of horse stealing, larceny of goods, forgery, perjury, malicious conspiracy, arson, harboring felons, receiving stolen goods, breaking jails, and maiming, disfiguring, or stabbing. For three of these offences, to wit, horse stealing, perjury, and arson, the punishment on a second conviction, is death; yet the act is silent on the subject of challenges. In 1803, c. 9, against malicious mischief, the act is silent as to challenges. In the act of 1801, against vagrancy, unlawfully wearing arms, keeping gaming tables, &c. no right of challenge is provided for.

## NORTH CAROLINA.

In North Carolina, a prisoner may challenge thirty-five jurors, and no more, without showing cause. *The State v. Gayner*, Cameron & Norwood's Rep. 305.

## SOUTH CAROLINA.

In South Carolina, the state has no right to challenge peremptorily, but may challenge for cause; and the cause need not be shown until the prisoner has gone through with his challenges. *The State v. Stalmaker*, 2 Brevard, 1.

## MISSOURI AND INDIANA.

In Missouri, in criminal cases, the state may challenge peremptorily three jurors. *Mallison v. The State*, 6 Mis. Rep. 399. So, also, in Indiana. *Wiley v. The State*, 4 Blackf. 458; *Beauchamp v. The State*, 6 Blackf. 300. And in Indiana, they may be made at any time between the appearance and swearing of the jury. *Ib.*

## LOUISIANA.

In all criminal prosecutions in this state, the right of peremptory challenge to the number



The prisoner, besides his peremptory challenges, may also challenge as many of the jury as he pleases for cause, showing the cause present-

of twelve of the jury, shall be allowed to every person put upon his trial for any crime where the punishment may be imprisonment at hard labor for a term of twelve months or more, as well as in cases punishable by death. Robinson's Penal Law of La. art. 521.

## OHIO.

The defendant, in a capital case in Ohio, is entitled to twenty-three peremptory challenges. *Martin v. State*, 16 Ohio Rep. 364.

The statute of Ohio, "relating to juries," (29 Ohio Laws, 98,) which gives to the prosecuting attorney, on the trial of an indictment, a right to two peremptory challenges, gives only two in the same indictment, however many defendants may be joined in the indictment. *Mahan v. The State*, 10 Ohio Rep. 233.

The several defendants in a cause, constitute but one party, and are entitled to no more peremptory challenges than a single defendant. *Bibb v. Reid*, 3 Ala. Rep. 88.

In *Freeman v. The People*, 4 Denio Rep. 9, on a preliminary trial as to the sanity of the accused, the counsel for the prisoner claimed the right to challenge juries peremptorily. This the court refused to allow. Peremptory challenges are allowed in *favorem vite*, and at common law are restricted to the main issue in which the life of the party is in jeopardy, and cannot be made on the trial of any collateral issue whatever. 2 Hale's P. C. 267, ch. 35; Bac. Abr. Tit. Juries; Foster's Cr. Law, 42; 4 Blac. Com. 353, 396; Co. Lit. 156, b; *The King v. Radcliffe*, 1 Wm. Bl. Rep. 3, 6. To the like effect, is the New-York Statute which provides that "every person arraigned and put on his trial for any offence punishable with death, or with imprisonment in a state prison, ten years, or any longer time," may "peremptorily challenge twenty of the persons drawn as jurors for such trial." 2 N. Y. Rev. Sta. 734, sec. 9. Challenges for cause, are allowable on the trial of preliminary as well as first issues. This was conceded in the case of *Freeman v. The People*, and several of this description were interposed on behalf of the prisoner.

Where a statute gives the right of peremptory challenges to a prisoner put on trial "for an offence punishable with death, or imprisonment in a state prison ten years or any longer time," a person indicted for burglary in the second degree, which is punishable "by imprisonment in a state prison for a term not more than ten years, nor less than five years," is entitled to peremptory challenges. *Dull v. People*, 4 Denio, 91.

If, in the trial of a criminal case in Tennessee, a juror becomes sick and is discharged, upon the summoning of a juror to fill his place, the defendant is entitled to as many challenges of persons not before summoned in that cause, as if no juror had been selected. *Granger v. State*, 5 Yerg. 160.

The prevailing opinion is that the prisoner's right to a peremptory challenge is waived when the juror is passed over to the court or the prosecution; *Com. v. Rogers*, 7 Met. 500; *U. S. v. Hanaway*, U. S. Circuit Ct., Phil. 1852; though this has been doubted by a court of great respectability. *Wyatt v. State*, 8 Blackf. 507; *Henrick v. Com.* 5 Leigh, 708.

Peremptory challenges are not allowable on the trial of any collateral issue, (Fost. 42; Burn's Justice, Jurors, viii,) nor, at common law, in a trial for a misdemeanor. *Reading's case*, 7 Howell's State Trials, 265; *Oate's case*, 10 Howell's State Trials, 1079; 4 Bl. Com. 353, note by Mr. Christian.

A prisoner who, in case of felony has challenged twenty jurors peremptorily, cannot withdraw one of those challenges to challenge another juror, instead of one that he had previously challenged. *R. v. Parry*, 7 C. & P. 836.

The right of peremptory challenge is a right, not to select, but to reject. *U. S. v. Merchant*, 4 Mason, 160; 12 Wheaton, 480; *State v. Smith*, 2 Iredell, 402; see, however, *People v. Bodine*, 1 Denio, 281.

Peremptory challenges are allowable to a prisoner on trial, to be made or omitted according to his judgment, or his pleasure, will or caprice. No reason is ever given or required for the manner in which the right is exercised by the party. Blackstone says, they are allowed

ly, (a) and being prepared to prove it. (b) Thus, he may challenge a juror, because he is a peer; (c) or because he is one of the grand jurors who found the indictment; (d) or because he has not the qualification required by the Jury Act; (e) or because he is an alien; (g) or because he is under age; (h) or because he is outlawed; (i) or because he is of kindred or affinity to the prosecutor; (k) or because he has made some declaration, showing a prejudice against the prisoner; (l) or the like. [1]

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| (a) 1 Inst. 158. 2 Hawk. c. 43, s. 10.          | (g) 1 Inst. 156. 2 Hawk. c. 43, s. 10.           |
| (b) <i>R v. Savage</i> , Ry. & M. 51.           | (h) 1 Inst. 157. 2 Hawk. c. 43, s. 10.           |
| (c) 1 Inst. 156. 2 Hawk. c. 43, s. 11.          | (i) 2 Hawk. c. 43, s. 27.                        |
| (d) Lamb. 554.                                  | (k) Semb. 1 Inst. 457. See <i>R. v. Wardle</i> , |
| (e) 6 G. 4, c. 50, s. 27. 2 Hawk. c. 43, s. 12. | <i>ante</i> , p. 163.                            |
|   | (l) 2 Hawk. c. 43, s. 28.                        |

"on two reasons: 1. As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner, (when put to defend his life,) should have a good opinion of his jury, the want of which might totally disconcert him: the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike; 2. Because upon challenges for cause shown, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke the resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside." 4 Bl. Com. 353. See also 1 Chit. Cr. Law, 534; 1 Inst. 156, b.

#### OPINIONS OF JURORS FORMING GROUND OF CHALLENGE.

[1] It seems that in England, expressions used by a jurymen previous to the trial, are not a cause of challenge, unless they can be referred to something of personal ill will towards the party challenging. *R. v. Edmonds*, 4 B. & Ald. 492. It has, however, been considered in England, to be good cause for challenge, on the part of the prisoner, that the juror had declared his opinion beforehand, that the party is guilty and will be hanged. 2 Hawk. C. 43, sec. 28.

In the United States, the weight of authority seems to be that the holding by a juror of any opinions which may disqualify him from rendering a verdict in accordance with the laws of the land, is a disqualification.

In reference to opinions formed and expressed by jurors, affording ground for challenge, see *People v. Mather*, 4 Wendell, 229; *Ex parte Vermilyea*, 6 Cowen, 555; *People v. Jewett*, 3 Wendell, 314; *Pringle v. Huse*, 1 Cowen, 435; *People v. Vermilyea*, 7 Cowen, 108; *Rice v. State*, 1 Yerger, 432; *State v. Scott*, 1 Ruffin, 24; *Brown v. Commonwealth*, 2 Leigh 769; *Commonwealth v. Knapp*, 9 Pick. 496. Marshall, C. J. 1 Burr's Trial, 416; *United States v. Wilson*, 1 Baldwin, 78; *Commonwealth v. Buswell*, 16 Pick. 153; *People v. Bodine*, 1 Denio, 281; *Armstead v. Commonwealth*, 11 Leigh, 657; *Heath v. Same*, 1 Robinson, 735; *State v. Buswell*, 2 Harr. 529; *Brown v. Commonwealth*, 11 Leigh, 769; *Osander v. Same*, 3 ib. 780; *Hendrick v. Same*, 5 ib. 708; *State v. Benton*, 2 Dev. & Bat. 196; *State v. Johnson*, 1 Walker, 392; *State v. Hooker*, ib. 318; *King v. State*, 5 How. (Miss.) 730; *Howerton v. State*, Meigs, 262; *M'Gregg v. State*, 4 Black, 106; *Smith v. Eames*, 3 Scammon, 78; *Gardner v. People*, ib. 88; *Sellus v. People*, ib. 414.

In the above cases will be found the expression of the views of the courts in various states in reference to the exclusion of a juror on account of his having formed or expressed an opinion upon the case.

If the opinion expressed be merely conditional, thus, "if the reports of the neighbors be correct, the defendant is wrong, and the plaintiff right," it is said to be no ground for chal-

If a person serve on the jury who has been regularly summoned, but against whom there is a cause of challenge, for which the prisoner

lunge. See 1 Cowen, 438, in note; and cases there cited; *Durrell v. Mosher*, 8 Johns. 445; *People v. Mather*, 4 Wendell, 243. In a capital case, it is not a ground for peremptory challenge to a juror, that he has formed, upon common report, and expressed an opinion of the guilt of the prisoner, if the juror believed that such opinion would have no influence upon him in the formation of his verdict, should the evidence on the trial be different from the report of the facts. *State v. Williams*, 3 Stewart, 454. See *Queensbury v. State*, 3 Stewart & Porter, 308. But see *M'Gowan v. State*, 9 Yerger, 184, where it is held, that if a juror has heard the circumstances of the case, and believing the circumstances he has heard to be true, has formed, or formed and expressed an opinion, that is, has made up his mind as to the guilt or innocence of the prisoner, he ought to be rejected. See also *Ned v. State*, 7 Porter, 187.

The forming and expressing an opinion by a juror upon the guilt or innocence of a party on trial for a felony, is a principal cause of challenge; the mere forming an opinion is enough, *People v. Rathbun*, 21 Wendell, 509.

See *People v. Bodine*, 1 Denio, 281; *Lohman v. People*, 1 Comstock, 379; *State v. Spencer*, 1 Zabriskie, N. J. Rep. 196; *Nelius v. State*, 13 Smedes & Marsh. Rep. 500; *Sam v. State*, 13 Smedes & Marsh. 189; *Monroe v. State of Geo.*, 5 Geo. Rep. 85; *State v. Potter*, 18 Conn. Rep. 166; *State v. Webster*, 13 N. H. Rep. 491; *Pierce v. State*, 13 N. H. Rep. 536.

In Massachusetts, New York, Pennsylvania, Indiana, Ohio, Georgia, and Mississippi, it is a principal cause of challenge that a juror, on being called in a capital case declares that he has conscientious scruples on the subject of capital punishment. Rev. Sts. of Mass. ch. 137, sec. 6. *People v. Damon*, 13 Wend. Rep. 351; but see 2 Wheeler's Cr. Cas. 48; *Com. v. Leshner*, 17 Serg. & Rawle, 155; *Jones v. State*, 2 Blackf. 475; *State v. Town*, Wright's Ohio Rep. 75; *Martin v. State*, 16 Ohio Rep. 364; *Williams v. State*, 3 Kelly's Rep. 453; *Lewis v. State*, 9 Smedes & Marshall's Rep. 115.

#### HOW CHALLENGES ARE TO BE TRIED.

When a challenge has been made to the array, it lies in the discretion of the court to direct the mode in which it shall be tried. 2 Hale, 275. Burn, J. Jurors, IV. 3. Williams, J. Juries, V. Dick. Sess. 189. Sometimes it is referred to the attorneys, sometimes by the two coroners, and sometimes by two of the jury. 2 Hale, 275. Burn, J. Jurors, IV. 3. Williams, J. Juries, V. Dick. Sess. 189, 190. But it is said, that when the challenge is on the ground of affinity in the sheriff, it is best to leave it to two of the jurymen returned; but if for favor and partiality, then by two indifferent persons, taken from the by-standers. 2 Rol. Rep. 363. 2 Hale, 275. 4 Bla. Com. 353, n. 8. Burn, J. Jurors, IV. 3. Williams, J. Juries, V. Dick. Sess. 190.

When the array is thus challenged for favor, the opposite party may either plead to it, or demur to its sufficiency in law. See form of demurrer and joinder, 10 Wentw. 474, 475. If the former course be taken, then the triers are sworn, and charged to inquire "whether it be an impartial array or a favorable one;" if they affirm it, the clerk enters under it "affirmatur;" but if they find it to be partial, the words, "calumnia vera" are written on the record. Tr. per Pais, 165. 4 Bla. Com. 353, n. 8. Bac. Abr. Juries, E. 12. Williams, J. Juries, V. Dick. Sess. 190. If a demurrer be resolved on, either to the array or the polls, it is said that there is no occasion for those circumstances which must attend a demurrer to a plea, such as the counsel's signature; but it is good, as soon as agreed on at the bar, and the prothonotaries ought of right to enter it on the record. 3 Leon. 222. Bac. Abr. Juries, E. 12. The court may either decide the demurrer immediately, or adjourn its consideration to a future period. Style, 464. Tr. per Pais, 199. Should the judges, upon hearing the argument, overrule the challenge, the decision is entered on the original record, and at *nisi prius* it appears on the *postea*; but if it is over-ruled without demurrer, on being debated, the objection may afterwards be made the subject of a bill of exceptions. Skin. 101. Hut. 24. Bac. Juries, E. 12. If the challenge be admitted, and the array be quashed, a new venire is awarded to the coroners or elisors, in the same manner as if it had been prayed by one of the parties to

would have challenged him if he were aware of it, still this is no ground for applying for a new trial.(a) Where a son served on a jury for his

(a) *R. v. Sutton*, 8 B. & C. 417.

be so directed, to prevent the delay at an earlier stage of the proceedings. Co. Lit. 158, a. The disallowing the challenge, is not a ground for a new trial. 4 B. & A. 471.

When a challenge is made to the *polls*, if it be a principal challenge, for some apparent partiality, it is sufficient, if the ground be made out to the satisfaction of the court, without any further investigation. Co. Lit. 157, b. Bac. Abr. Juries, E. 12. Williams, J. Juries, V. 1 Southard, 364. But a challenge to the favor, where the defendant simply denies, the matter of challenge is left to the discretion of triers. Co. Lit. 157, b. Bac. Abr. Juries, E. 12. Williams, J. Juries, V. 4 B. & A. 471.

This mode of ascertaining the impartiality of a juror, is employed in New York, and in most of the Southern States. 12 Amer. Jurist, 337; 7 Dane's Abr. 334; 1 Cowen, 441, note, and see cases there cited; *People v. Mather*, 4 Wendell, 429; *Ex parte Vermilyea*, 6 Cowen, 559; *People v. Bodine*, 1 Denio, 281; *Vanuaker v. Beemer*, 1 Southard, 364; *Hooks v. Paige*, 1 Tenn. 260; *Mima v. Hepburn*, 7 Cranch 290. But in New Hampshire the court always decide on the validity of a challenge to the favor. *Rollins v. Ames*, 3 N. Hamp. 350. So it would seem in Vermont. *Boardman v. Wood*, 3 Vermont, 570. So also in Connecticut. 2 Swift's System, 233. And it is held by the learned author of an article upon this subject in the American Jurist, (12 Amer. Jurist, 330, *et seq.*) that such has also been the prevailing practice in Massachusetts. The questions in reference to the competency of jurors, which arose in the celebrated case of *Commonwealth v. Knapp*, 9 Pick. 496. See also 10 Pick. 480,) were submitted to the court. See also, 7 Dane's Abr. 334; 6 id. 231. But see Howe's Prac. 247.

In New York, when the facts on which a challenge rests are disputed, the proper course is said to be, to submit the question to the triers; but if neither of the parties ask for triers to settle the issue of fact, and submit their evidence to the judge and take his determination thereon, they cannot afterwards object to his competency to try that issue. *People v. Mather*, 4 Wendell, 229.

Where on a trial for felony, the prisoner, by his counsel, consents to substitute the court for triers, upon challenges to jurors, such consent cannot afterwards be *revoked*, and a demand made that a challenge to jurors shall be passed upon by triers, especially after the challenge has been passed upon by the court. *People v. Rathbun*, 21 Wendell, 509.

A *bill of exceptions* lies for refusing triers, or upon any question arising upon a challenge to jurors, in a case where triers may be demanded. Id.

In Tennessee, the judge who tries the cause as the trier of the competency of the jurors. *McGowan v. State*, 9 Yerger, 184; *State v. Wall*, 9 Yerger, 347.

The triers do not exceed two, unless by the consent of the prosecutor and the defendant, or some special cause is alleged by one of them; or where one juror is sworn, and two triers appointed with him. Co. Lit. 158, a. Bac. Abr. Juries, E. 12. 4 Bla. Com. 353, n. 8. If this challenge be made to the first juror, and, of course, before any one has been sworn, then the court will direct two indifferent persons to try the question; and if they find the party challenged indifferent he will be sworn, and join with the triers in determining the next challenge. But when two jurors have been found impartial, and have been sworn, then the office of the triers will cease, and every subsequent challenge will be referred to the decisions of the jurymen. Co. Lit. 158, a. 2 Hale, 275. Bac. Abr. Juries, E. 12. Burn, J. Jurors, IV. 3. Williams, J. Juries, V. Dick. Sess. 190.

#### OATH OF TRIERS.

*You, and each of you, will well and truly inquire, whether A. B., the juror called, stands indifferent between the People of the state of New York and C. D., the prisoner at the bar, and a true verdict will give according to the evidence. So help you God.*

father, at his father's request, and without collusion with either the prosecutor or the defendant, and the son was under age and had no qualification, nor was his name upon the panel: the court of King's Bench held this to be a mistrial, and granted a new trial.(a) But by stat. 7 G. 4, c. 64, s. 21, no judgment after verdict upon any indictment or information for any felony or misdemeanor, shall be stayed or reversed for any misnomer or misdescription of any of the jurors, nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer.

No challenge can be made, until after a full jury appears.(b)[2]

(a) *R. v. Tremearne*, 5 B. & C. 254.

(b) *R. v. Edmunds*, 4 B. & Ald. 471.

In New York, in the case of *Freeman v. The People*, an objection was made to the oath as administered to some of the triers. The oath was thus: "You do solemnly swear that you will well and truly try, and well and truly find, whether the juror is indifferent, between the People of the state of New York, and the prisoner at the bar, upon the issue joined." The oath as given in books of approved credit and authority contains no such limitation, as that made by the preceding words, "*upon the issue joined*;" but requires the triers to find whether the juror is or is not indifferent between the parties to the controversy. And jurors should be so. It is not enough that they are indifferent upon the particular issue to be tried. See 4 Denio Rep. 9.

After this the triers take their seats in the jury box.

After challenging the juror, he is sworn in the following manner.

#### OATH TO THE JUROR.

You do solemnly swear that you will true answers make to such questions as may be put to you by the court touching your competency to serve as a juror in this cause (or "touching the challenge exhibited against you,") so help you God.

After this the juror if the triers are satisfied of his competency is sworn as a trier and takes his seat in the jury box.

After another juror is challenged, examined and sworn in the same manner as the last juror he also takes his seat in the jury box with the other triers. The two first triers are then discharged.

The challenges being completed, and a full jury of unexceptionable persons, having been obtained, the jury is sworn. Care should be taken that the parties sworn answer to the proper names by which they are returned, though a mistake in this respect will not, after verdict be material. Thus where the party actually summoned answers to a wrong name, and is sworn, it is merely a ground of challenge, which may instantly be removed by correcting the panel, and will afford no objection in arrest of judgment. So if the son of a juror be summoned and answer to the name of his father, the court will not arrest the judgment, unless it be shown that some actual injustice has been done to the prisoner. As soon as each juror is sworn, he is set apart on the jury box, and when a full jury of twelve are thus sworn the trial commences. See *Waterman's Cr. Law*, tit. Trial.

[2] No challenge can be made either to the array or to the polls, until a full jury have made their appearance; because, if that should be the case the issue will remain *pro defectu juratorum*. And on this account, the party who intends to challenge the array, may pray a tales to complete the number, and then object to the panel. 1 Chitty's Cr. Law, p. 544, and authorities.

When a juror is challenged for principal cause, or for favor, the ground of the challenge should be distinctly stated; for without this the challenge is incomplete and may be wholly disregarded by the court. It is not enough to say I challenge for principal cause or for favor, and stop there; the cause of the challenge must be specified. In *Mann v. Glover*, (2 Green's

The following is the form of a

*Challenge to the array.*

And hereupon the said A. B. doth challenge the array of the panel aforesaid; because he saith that [*&c., stating the particulars of the cause of challenge.*] And this he the said A. B. is ready to verify; wherefore he prayeth judgment that the said panel may be quashed.

The challenge to individual jurors (which is called a challenge to the polls,) is made verbally, whether it be a peremptory challenge, or for cause. Indeed a challenge to the polls \*for cause, seldom occurs in practice; for the counsel either for the defendant or the prosecution, have only to intimate to the clerk of arraigns or clerk of the peace that they desire that a particular juror or jurors named may not be put upon the jury, and he will in general refrain from calling them.

R. 195,) the court say: "A party cannot make a principal challenge, or a challenge to the favor, by giving it a name. A challenge, whether in writing or by parol, must be in such terms that the court can see, in the first place, whether it is for principal cause or to the favor; and so determine by what forum it is to be tried; and secondly, whether the facts if true, are sufficient to support such challenge." Again, the challenger must "state why the juror does not stand indifferent; he must state some facts or circumstances which, if true, will show either that the juror is positively and legally disqualified, or create a probability or suspicion that he is not or may not be impartial. In the former case the challenge would be a principal one, triable by the court; in the latter, it would be to the favor, and submitted to triers."

These views are sound and appropriate, and their observance would greatly promote order and convenience in the determination of challenges. I am aware that challenges are not unfrequently made in general terms, which merely indicate the supposed character of the challenge, as for principal cause or for favor, but without designating the particular grounds by which, if at all, they must be sustained. In this posture of the question, as far as a question can be said to have been made, the parties proceed to the examination of witnesses before the court or triers, as the case may be. No issue has been joined, and no matter of fact alleged by either party. What is to be tried? It can hardly be determined in such a state of things whether the question is one of fact or of law, and the proceeding is obviously inconvenient and irregular. Challenges for principal cause may become part and parcel of the record, and should therefore be made in due form. They may be demurred to, and unless some cause, sufficient of itself to raise the legal presumption of unindifference is alleged, the challenge must of course be overruled. But the opposit party is not bound to demur; he may take issue on the facts stated as ground for the challenge, or may counterplead new matter in avoidance. Thus an issue of fact may be joined, which must be decided upon the evidence to be adduced by the respective parties. By pursuing the orderly mode of requiring the challenger to specify the grounds of his challenge, and the opposite party to demur, take issue or counterplead, questions of law and fact will be kept distinct, and, as I apprehend the convenience of the parties as well as that of the court will be greatly promoted.

The case of *Mann v. Glover*, has not been referred to as containing any new doctrine, but because it presents a terse summary of the law on this subject. All challenges, except such as may be made peremptorily, are *for cause*; and unless some cause is stated by the challenger, the objection cannot justly be called a challenge, nor should it be regarded as such.

(1) *Petty jury charged.*

When the challenges (if any) have been disposed of, and a full jury have been sworn, the clerk of the arraigns at the assizes, or the clerk of the peace at sessions, in cases of treason and felony, and in cases of misdemeanors if no counsel be employed for the prosecution, charges the petty jury with each case, thus: "Gentlemen of the jury: the prisoner stands indicted by the name of A. B. [*late of, &c.*] for that he on the" [*&c. as in the indictment, to the end.*] "Upon this indictment he has been arraigned, and upon his arraignment he has pleaded not guilty, and for his trial has put himself upon his country, which country you are: Your charge therefore is, to inquire whether he is guilty of the [*felony*] whereof he stands indicted, or not guilty, and to hearken to the evidence."

By stat. 14 & 15 Vict. c. 19, s. 9, reciting that by the stat 12 & 13 Vict. c. 11, and that Act, provisions were made for the more exemplary punishment of persons who should commit certain offences after one or more previous conviction or convictions for the like or other offences, and it was expedient to define the time of charging the jury to inquire as to such previous conviction or convictions: it is enacted, "that it shall not be lawful on the trial of any person for any subsequent offence, where a plea of not guilty shall have been entered on his behalf, to charge the jury to inquire concerning any previous conviction, until they shall have inquired concerning such subsequent offence, and shall have found such person guilty of the same; and whenever in any indictment any previous conviction shall be stated, the reading of such statement shall be deferred until after such finding as aforesaid: provided, that if upon the trial of any person for any such subsequent offence as aforesaid, such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person, for the previous offence or offences, before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence." [1]

[1] In New-York, by the revised statutes, a copy of the minutes of any conviction, with the sentence of the court thereon, entered by the clerk in whose custody such minutes shall be, under his official seal, together with a copy of the indictment on which such conviction was had, certified in the same manner, is declared to be evidence in all courts and places of such conviction, in all cases in which it shall appear by the certificate of the clerk, or otherwise, that no record of the judgment on such conviction has been signed and filed. 2 R. S. 739, § 10.

The statute also requires the judgment of the court upon any conviction to be entered in the minutes of the court; and requires the clerk to send a certified transcript of the entries in the minutes, of convictions and sentences thereon, to the secretary of state. An exemplification of which transcript, under the seal of the secretary of state, it is declared shall be

The recital here makes no mention of prosecutions for subsequent felonies after a previous conviction for felony within stat. 7 & 8 G. 4,

sufficient evidence on the trial of any person for a second or subsequent offence, of the conviction stated in such transcript. *Id.* 738, § 5 to 8.

It has been held that it is no objection to the validity of a record of conviction by the general sessions, that the judge who signed it was not such when the conviction took place, but received his appointment afterwards. 1 Hill, 261.

It is also provided by statute that whenever any conviction shall be had before any court of special sessions, held in any other county than New-York, the magistrates shall make a certificate of such conviction, briefly stating the offence charged, and the conviction and judgment thereon, and if any fine has been collected, the amount thereof, and to whom paid. This certificate is to be filed in the office of the county clerk within twenty days after the conviction; and when so made and filed, such certificate, or a certified copy thereof, is made evidence in all courts and places of the facts stated therein. 2 R. S. 717, §§ 38, 39, 40.

It has been decided that a certificate of conviction in the form directed by the above section of the statute, and which was filed in the clerk's office within the prescribed time, is competent evidence of the facts therein stated; although it does not contain evidence that the court had obtained jurisdiction over the person of the prisoner. *The People v. Powers*, 7 Barb. 462. Such a certificate being made evidence, by statute, of the facts contained in it, cannot be contradicted by parol evidence showing that there was in fact no trial and conviction. Yet it seems that a party may so far contradict a record of conviction by a court of inferior jurisdiction, as to prove that the court had no jurisdiction of the offence, or of the person of the prisoner. *Ibid.*

General character was allowed in evidence for the defendant on trial for a capital offence; and per Parsons, C. J., it is admissible for the defendant in all criminal prosecutions, which *Sewall v. Parker, Jr.* doubted. *Commonwealth v. Hardy*, 2 Mass. Rep. 317, 318. This may be encountered by evidence on the part of the prosecution; but no evidence can be given against the defendant's good character, till he has put it in issue, by calling witnesses on his part. Per Parsons, C. J., in *Commonwealth v. Hardy*, 2 Mass. Rep. 317, 318. It was denied that it is admissible in actions or informations for penalties; but said to be confined to trials for crimes subjecting to corporal punishment. Per Judge Owsley, in *Givens v. Bradley*, 3 Bibb, 196. It is said by other authorities to be admissible in all criminal cases where character is in jeopardy. 2 Stark. Ev. pt. 4, p. 365; adopted per Daggett, J., in *Humphrey v. Humphrey*, 7 Conn. Rep. 118, 19.

Testimony cannot be given in reply, of conversations heard since the commencement of the prosecution, though they relate to the prisoner's character before the alleged crime. *Carter v. The Commonwealth*, 2 Virg. Cas. 169. On trial of an indictment for keeping a disorderly house, proof is inadmissible, that the neighbors generally complained of it as disturbing them. It is no more than general reputation of a disorderly house, which is inadmissible. *Commonwealth v. Stewart*, 1 Serg. & Rawle, 342.

It was said by an Irish judge, (Smith, B.,) on trial for murder, "Character is of great weight in every case, and requires particular attention when the charge is grounded on circumstantial evidence. It creates a greater degree of doubt than where the prosecution is supported by direct evidence. In the former case, character ought to be particularly attended to, because the jury is more or less embarrassed, and called upon to weigh the case with more scruple and doubt, from the very nature of the testimony on the part of the crown." *Rez v. Crawley*, Dublin Oyer and Terminer, 40 Geo. 3, Macnally's Ev. 579.

Other authorities speak with more diffidence. It "ought never to have any weight except in a doubtful case." 1 Stark. Ev. 35. Character cannot defeat the force of strong circumstances. *Freeland's case*, before Radcliff, mayor. Gen. Sess. N. Y., 1 C. H. Rec. 82, 83. But the same learned judge allowed that it should overcome slight evidence of scintilla in a case of forgery. *James' case*, N. Y. Gen. Sess. Aug. 1816, 1 C. H. Rec. 132, 133. General good character has weight in all cases, where the facts are doubtful, or admit of different interpretations. But where the testimony is positive and satisfactory to the jury, it cannot



c. 28, s. 11. But as the enacting part is general,—“on the trial of *any* person for *any* subsequent offence,”—there is no doubt this section would be holden to apply to it.

[\*166]

## \*SECTION II.

## THE TRIAL.

Before the trial is commenced, it may be necessary for the prosecutor or prisoner to make some application to the court. The prosecutor may move to postpone the trial, on account of the absence of a material witness; and if the absent witness be one of those who were examined before the committing magistrate, the judge has an opportunity of ascertaining from the deposition, whether he is a material witness or not; but if he were not examined before the magistrate, the judge in that case will require an affidavit, stating what the witness is expected to prove.(a) Where, to account for a witness being unable to attend, a surgeon made affidavit that the witness was the mother of an unweaned child, which was afflicted with inflammation of the lungs, and that the child could neither be brought to the assize town, nor be separated from its mother, without danger to its life: this was deemed sufficient ground for postponing the trial.(b) But where, upon a prisoner being

(a) *R. v. Savage et al.*, 1 Car. & K. 75.(b) *R. v. Savage et al.*, 1 Car. & K. 75.

avail. Said on a trial for murder, per Story, J. in *U. States v. Freeman*, 4 Mason, 510. Per Parsons, C. J. in *Commonwealth v. Hardy*, 2 Mass. Rep. 317. Again; though the case be clear against the prisoner, yet character is admissible; but unless the evidence is dubious, or the testimony presumptive, general character is entitled to but little weight. *The State v. Wells*, 1 Cox, 424, 429. Per Savage, C. J. in the *People v. Vane*, 12 Wend. 82. It cannot always avail against a circumstantial case, which may sometimes be so strong as to overcome positive testimony; (*The Struggle v. The United States*, 9 Cranch, 71;) but good character alone should uniformly be allowed to outweigh the mere testimony of an accomplice. Per Savage, C. J. in the *People v. Vane*, 12 Wend. 82.

On the other hand, where the recorder, on a trial for grand larceny, charged that, from the age of the prisoner, it was evident that he must have acquired a character of some kind; that if it was good, it was in his power to have shown it; and his omission to offer any evidence on that point, was a circumstance which the jury ought to consider as weighing strongly against him; on error, this was holden well. The testimony on the part of the prosecution was that of an accomplice. Savage, C. J. said, “had the witness implicated some respectable citizen whose character was above reproach, can there be a doubt that good character alone would have been a perfect shield? A man is not to be convicted of a crime because he has a bad character, or no character; but, in cases like the present, character becomes important; and where no such evidence is produced, the presumption is, it cannot be produced. The further inference is, that the defendant is a man of bad character, and would naturally be associated with such men as the witness.” *The People v. Vane*, 12 Wend. 78, 82.

about to be tried for carnally knowing a girl of only six years of age, an application on the part of the prosecution was made to postpone the trial, until the child could be instructed as to the obligation of an oath: Pollock, C. B., refused it.<sup>(a)</sup> And where the trial had been postponed twice, on account of the absence of a witness, and at the third assizes it appeared, that notwithstanding the most diligent inquiry, he could not be found, and one of the deponents stated that he heard that he had embarked for India, as a soldier: Maule, J., on application of the prosecutor, discharged the prisoners, and discharged the prosecutor's recognizances, notwithstanding the prisoners opposed it.<sup>(b)</sup>[1]

(a) *R. v. Nicholas*, 2 Car. & K. 246.

(b) *R. v. Bridgman et al.*, Car. & M. 271.

[1] In New York, it is provided by statute, if any prisoner indicted for any offence triable in the court of sessions, and committed to prison, whose trial shall not have been postponed at his instance, shall not be brought to trial before the end of the next term of the court of sessions which shall be held in the county in which he is imprisoned after such indictment found, he shall be entitled to be discharged, so far as relates to the offence for which he was committed.

If any prisoner indicted for any offence not triable in a court of sessions, but which may be tried in a court of oyer and terminer and committed to prison, whose trial shall not have been postponed at his instance, shall not be brought to trial before the end of the next court of oyer and terminer which shall be held in the county in which he is imprisoned, after such indictment found, he shall be entitled to be discharged, so far as relates to the offence for which he was committed.

If satisfactory cause shall be shown by the district attorney, to any court to which application shall be made under either of the two last sections, for detaining such prisoner in custody or upon bail until the sitting of the next court in which he may be tried, the court shall remand such prisoner, or shall hold him to bail, as the case may require.

Whenever the trial of an indictment shall be postponed by the court in which the same shall be pending, it shall be the duty of the district attorney to cause all the witnesses on the part of the people in attendance, deemed by him material, to be recognized to appear at the time and place to which such trial shall have been postponed. 2 N. Y. Rev. Stat. p. 919, 920, s. 30, 31, 32, 33.

In Pennsylvania, if any person shall be committed for treason or felony, and shall not be indicted and tried some time in the next term of oyer and terminer, general jail delivery, or other court, where the offence is properly cognizable after such commitment, it shall and may be lawful for the judges or justices thereof, and they are hereby required upon the last day of the term, sessions, or court, to set at liberty the said prisoner upon bail, unless it shall appear to them upon oath or affirmation, that the witness for the commonwealth, mentioning their names, could not then be produced; and if such prisoner shall not be indicted and tried the second term, sessions, or court, after his or her commitment, unless the delay happen on application, or with the assent of the defendant, or upon trial shall be acquitted, he or she shall be discharged from imprisonment. Provided always, that nothing in this act shall extend to discharge out of prison any person guilty of, or charged with treason, felony, or other high misdemeanor in any state, and who by the confederation, ought to be delivered up to the executive power of such state, nor any person guilty of, or charged with a breach or violation of the laws of nations. Act of Feb. 18th, 1785, s. 3; 2 Smith's Laws, 275; Purdon's Dig. 6th ed. 533.

In Virginia it is required, whenever any prisoner committed for treason or felony, shall apply to the court the first day of the term by petition or motion, and shall desire to be brought to his trial before the end of the term, and shall not be indicted in that term, unless it ap-

In like manner the prisoner may apply to postpone the trial, on account of the absence of a material witness. And where a witness for the prosecution was absent, who had been examined before the committing magistrate, and the prisoner stated in an affidavit that it would be material to his defence that such witness should be cross-examined by his counsel: *Cresswell, J.* (after conferring with *Patteson, J.*) postponed the trial, saying that he would not require an affidavit of any diligent search having been made for the witness, as the witness being bound over to attend, the prisoner would naturally expect he would appear.<sup>(a)</sup> But where, upon an indictment for murder by poison, the counsel for the prisoner applied to postpone the trial, on the ground that [\*167] the names of witnesses were on the back of the \*indictment, who were not examined before the magistrate, and who it was understood were to be called to prove previous attempts of the prisoner to poison the deceased, and it was material for the prisoner that those alleged attempts should be investigated, and the character of the witness inquired into: *Alderson, B.*, after consulting with *Rolfe, B.*, refused the application as unprecedented.<sup>(b)</sup>[1]

(a) *R. v. Macarthy*, Car. & M. 625.

(b) *R. v. Johnson*, 2 Car. & K. 354.

pear by affidavit that the witnesses against him cannot be produced in time, the court shall set him at liberty, upon his giving bail in such penalty as they shall think reasonable, to appear before them at a day to be appointed, of the succeeding term. Every person charged with such crime, who shall not be indicted before or at the second term after he shall have been committed, unless the attendance of the witnesses against him appear to have been prevented by himself, shall be discharged from his imprisonment, if he be detained for that cause only; and if not tried at or before the third term after his examination before the justices, he shall be forever discharged of the crime, unless such failure proceed from any continuance, granted on motion of the prisoner, or from the inability of the jury to agree on their verdict. R. C. of Va., c. 169, s. 28.

The revised statutes of Michigan (tit. 31, ch. 164, sec. 30,) provide: Every person held in prison upon an indictment, shall, if he require it, be tried at the next term of the court after the expiration of six months from the time when he was imprisoned, or shall be bailed upon his own recognizance, unless it shall appear to the satisfaction of the court, that the witnesses on behalf of the people have been enticed or kept away, or are detained and prevented from attending court by sickness, or some inevitable accident.

Occasionally, the delay of a trial, and even the discharge of a jury becomes necessary, in order to complete the examination of witnesses. Thus, if a witness be seized with sudden illness, so that a full examination cannot be had, the true course seems to be for the party to move a postponement of the trial, which it is presumed the court may grant, even if it require the discharge of the jury, and a re-trial. But where the cross-examination of the plaintiff's witness, after being commenced, was interrupted by a fit, so that it could not be completed, and the plaintiff was prevented from re-examining, yet neither party requesting a postponement, the court refused a new trial, on the application of the plaintiff, who, notwithstanding, choose to go on with the trial, and take the chance of a verdict against him. He complained that he was deprived of all opportunity to re-examine, to certain points coming out on the cross-examination, which required explanation by a re-examination. *Depeyster v. The Columbian Ins. Co.*, 2 Cain. Rep. 85.

[1] The doctrine of *putting off, postponing, or continuing causes or trials*, as it is called in the legal nomenclature of different states and countries, rests much upon the discretion and

In strictness, all applications of this kind, whether on the part of the prosecutor or prisoner, should be made before the jury are sworn. But

rules of practice of the court where the cause is depending, especially after the first application to postpone, or where this is attended with circumstances which take it out of the ordinary course. The putting off a trial upon a first application after issue joined, is held to be so much a matter of discretion, that a refusal cannot be assigned for error. *Woods v. Young*, 4 Cranch, 237. In this case the application was a second one, founded on a rule of practice of the circuit court for the district of Columbia; but the rule is laid down generally and without qualification, that the refusal to continue a cause cannot be assigned for error, because it is merely a matter of favor and discretion. This was doubted by the general court of Virginia, in *Smith v. The Commonwealth*, (a case of refusal to put off the trial of a prisoner indicted for murder, 2 Virg. Cas. 6,) though they agreed it was matter of discretion; and that error would not lie unless the cause was a very plain one. The same doubt was expressed in *Holt v. The Commonwealth*, id. 156, (a case of forgery;) and the writ of error denied, because the postponement was properly refused. Also in *Bledsoe v. Commonwealth*, 6 Rand. 673, 674, a like doubt is expressed.

The doctrine of putting off trials is the same, in principle, both in civil and criminal causes. *Rez v. D'Eon*, 1 W. Bl. 515, per Wilmot, J. 3 Burr. 1415. *State v. Lewis*, before Grimke, J. 1 Bay, 1, 2. *The People v. Kelly*, Jud. Repos. 51. *The People v. Vermilyea*, 7 Cowen's Rep. 369. 1 Chit. Cr. L. 490. *Vid. Smith's case*, 3 Wheel. Cr. Cas. 114, 171. The difference of course lies only in the different modes of proceeding, and the different incidents and objects. The affidavit of the prisoner is receivable even in a capital case. *Commonwealth v. Knapp*, 9 Pick. 496. Nor need he on a first application disclose what his witnesses will swear. *State v. Morris*, 1 Tenn. Rep. 220. The common pecuniary terms, of necessity, must be out of the question in criminal causes; and "all the authorities agree," says Sutherland, J. (7 Cowen, 390.) "that the matter is to be scanned more closely on account of the superior temptation to delay, and escape the sentence of the law." In the case of Lord Kilmar-nock and others, (high treason, at a specialoyer and terminer, *Fost.* 1, 2,) the common affidavit was presented about a week after the prisoners were arraigned. At a conference of several judges, they agreed that in the common cases of trials in the circuit, affidavits of this kind ought *very sparingly* to be admitted; for in circuit trials, the prisoners, from the time of their commitment, may and ought to be preparing for their defence. The place where they are to be tried is in most cases well known, and they have likewise a reasonable certainty of the time long before the circuits begin. But they deemed the principal case an extraordinary one, from its distance and suddenness, and granted the motion. Notice is held to be given by the warrant of commitment. Per *Ld. Mansfield*, 1 W. Bl. 515. Yet, in general, a subpoena cannot issue for the prisoner till after indictment found; for before this there is no cause in court. *State v. Evans*, 1 Tenn. Rep. 215, per Overton, J. Per Griffith, J. in *United States v. Moore*, Wallace, 25. An exception exists under the peculiar constitution and laws of the U. States; (*vid.* 1 Burr's Tr. by Robertsen, 177 to 180; *U. States v. Moore*, Wallace, 23;) but it is anomalous; and the statute of New-York, (2 R. S. 729, § 59,) gives a subpoena only on indictment found. Even in the U. States court a postponement was not denied for neglect to exercise this right, (*U. States v. Moore*, Wallace, 23) though it would hardly be safe to rely on that decision, perhaps, since the right is better understood. In *The State v. Lewis*, (1 Bay, 1,) the prisoner was committed on a charge of horse stealing, the day before the session. On being indicted and arraigned, his trial was postponed for six months, viz, till the next session, on the common affidavit. But where the prisoner (a forgerer) put off his cause on the common affidavit from September to June, and then moved again on an affidavit that, about three weeks before, he had mailed his subpoena for the witness, for whose absence the cause was first postponed, though he made a special affidavit of what his witness would prove; held that he had been negligent, and a farther postponement was denied. *Holt v. The Commonwealth*, 2 Virg. Cas. 156. So where nine days had elapsed from finding a bill for horse stealing, and the prisoner had made no effort to procure his witnesses, though they resided only 40 miles distant, his motion to post-

where the prisoner made the application after the jury were sworn and charged, Cresswell thought that it might be done; but the affidavit

pone was denied. *State v. Evans*, 1 Tenn. Rep. 211. In this case the court declined hearing a supplemental affidavit made by the prisoner, though they received such affidavits from third persons. In *The People v. Broad*, (3 Cit. H. Recorder, 7,) the recorder of New-York held that the affidavit made and presented on arraignment need not state the facts to be proved by the absent witnesses. In *The People v. Robetaille*, (5 id. 171,) the prisoner, charged with grand larceny, swore he expected his father from Upper Canada with witnesses as to his character. The affidavit being holden insufficient to warrant a postponement, the court (Colden, mayor, presiding) refused to hear a supplemental affidavit. The prisoner was committed one day, and a bill was found the next. On the third day a motion was made to postpone the trial for the absence of the prisoner's witness at Boston, and allowed, though due diligence was not averred, nor that he expected to procure his witness at the next term; (*The People v. Lee*, 1 Wheel. Cr. Cas. 17.) And where a subpoena has been served and disobeyed, the trial will not be ordered till an attachment is issued and time given for its execution and return. *The People v. Bush*, 1 Wheel. Criminal Cases, 137. In *The People v. Brigham*, 1 Cit. H. Rec. 30, which was a case of grand larceny, the court of sessions of the city of New-York, (Radcliff, mayor, sometime a justice of the supreme court, presiding,) received the prosecutor's affidavit of the circumstances, in reply to an affidavit of the prisoner, naming the witness and saying the prisoner expected to prove by him that the article, a great coat, was taken by mistake for his own. The prisoner's affidavit also stated the witness to be material, and no neglect was imputed. The affidavit received in reply went merely to establish that the prisoner could not be mistaken, as he had been at the prosecutor's house several times, who had never seen him with a great coat on. In *The People v. Hettick*, (1 Wheeler's Criminal Cases, 26,) before the same court, (Riker, recorder, presiding,) the prisoner was indicted for larceny of a trunk and \$4000, committed on board the steamboat between Albany and New-York. The affidavit of the prisoner was in the common form, swearing to materiality generally; but naming the witnesses and describing them as residing at Philadelphia. No neglect in not procuring the witnesses was imputed. Yet the court refused the motion, but gave time to execute a commission by consent. The prisoner not having availed himself of the commission, moved to postpone again at a subsequent day; but the motion was denied. The courts in Indiana require the prisoner to state the facts he expects to prove by the absent witness in the first instance. *The Commonwealth v. Fuller*, 2 Wheel. Cr. Cas. 223, 4, 5. In *The People v. Catherine Foote*, (1 Wheel. Cr. Cas. 70, 72, N. York sessions, Riker, recorder, presiding,) which was an indictment for keeping a disorderly house, the prisoner, on being arraigned at the term in which the indictment was found, made the common affidavit. In reply, the district attorney insisted upon a special affidavit stating what the absent witness would prove; and offered to admit any fact which should be so stated, as proved to the jury. The prisoner declining to make such an affidavit, the court denied the postponement.

These cases in the sessions of New-York were passed upon by learned and experienced judges; and on the strict practice of the criminal courts of that city, the case of the *People v. Vermilyea* probably proceeded at the circuit holden by Edwards, C. Judge. In that case, so often cited from 7 Cowen's Rep. 369, the practice underwent a thorough review. By it the doctrine, both in civil and criminal cases, seems to be put completely on the same footing. Supplemental affidavits are recognized as admissible, and general affidavits as enough in the first instance, and not to be done away by a cross inquiry into their possible untruth in swearing to materiality.

In *The Commonwealth v. Millard*, (1 Mass. Rep. 6,) the prisoner had suffered a whole vacation after indictment found to elapse, without any endeavor to obtain his witness, who resided in a neighboring state. The court refused to put off the trial. They assign, it is true, as the main ground, that the witness resided beyond the reach of their process. But this would not, of itself, be enough in New York, since the case of *The People v. Vermilyea*; and especially since our statute allowing a commission as in civil cases.

produced being insufficient, the trial proceeded, and the defendant was convicted.(a)

So, a defendant may move that money which has been taken from him by the constable, &c., may be delivered up to him, and the court will make the order accordingly, although the money is sought to be retained to pay the expense of conveying the defendant to prison;(b) but if it appear, or be probable, that such money was part of the produce of the offence with which the prisoner is charged, the court usually refuse the application.

Either party, immediately after the jury are charged, or indeed at any time during the trial, may apply to have the witnesses for the opposite party sent out of court; and the court will make an order accordingly. The attorneys of the respective parties, however, are never included in this order;(c) nor is the surgeon or any other witness, who is to depose to mere matter of opinion, and not to facts. If the witness do not withdraw when ordered, or afterwards return into court before he is called for, and is present during the examination of some other witness, it is discretionary with the judge whether he will allow him to be examined or not.(d)[2]

(a) *R. v. Fitzgerald et al.*, 1 Car. & K. 201. C. 430.

(b) *R. v. Bass*, 2 Car. & K. 882.

(d) *Parker v. M<sup>r</sup> William*, 6 Bing. 683. *R.*

(c) *Pomeroy v. Baddeley*, Ry. & M., N. P. v. *Coley*, 1 Moody & M. 329.

It was decided in the circuit court of the United States, that a district attorney was not entitled to continue a cause for the purpose of attaching a witness, unless he would make affidavit that the witness was material. *United States v. Frink*, 4 Day, 471.

It is the province of the court, in which the trial takes place, to judge of the truth or sufficiency of the causes assigned for a motion for a continuance or removal of a trial. It must be so. Otherwise it would be in the power of a prisoner to postpone a conviction indefinitely, however clear his guilt, by making affidavits with the requisite matter on the face of them. The temptation to perjury is so strong in capital cases, that it is an established practice for the court to distrust affidavits after one continuance or removal, and scrutinize them narrowly. See *The State v. Hildreth*, 9 Ired. 429; *Magruder v. Snapp*, 4 Eng. 108; *Holmes v. The People*, 5 Gilman, 478; *Spence v. The State*, 8 Blackf. 282.

[2] Where witnesses are ordered to withdraw, each party furnishes his list of them to the sheriff, whose duty it then becomes to take charge of them, and see that they are kept out of the hearing of each other's examination; and if the order be violated, he will then know it and apprise the party. If the sheriff neglect his duty, the party will not be responsible. If certain of the witnesses be not in attendance, but are coming in, the party in whose behalf they are to testify must either put their names on the list or at his peril, see that they do not violate the order, by coming into court before they are called to testify. If there be no pretence that the newly arrived witnesses were in court, and hearing any of the testimony, then it is no objection that their names were not furnished to the sheriff, and they may, notwithstanding, be sworn. Those absent when the order to withdraw is made, cannot be embraced by it. If the party do not furnish a list to the sheriff, he is responsible that the witnesses present shall obey the order to withdraw. *Anon.*, 1 Hill's Rep. 254, 5, 6. In this case, though lists were given to the sheriff, and kept filed out as the witnesses arrived, yet owing to a continual arrival of witnesses who were to speak to character, the order was accidentally violated by some of them. In the exercise of its discretion, the court heard

them; and it was held well, especially in a case of general character, which *O'Neill, J.* hardly thought within the rule requiring witnesses to be separated, there being such slight difference in the facts, if any; all the witnesses being bound to speak of general reputation. *Id.* 356. He remarks that the object of separating witnesses is to afford the means of discovering discrepancies in the different accounts, which (if not true) the witnesses will give of the same transaction, which he seems to consider as inapplicable to these inquiries into character. *Id.* But quere, where there may be, as there commonly is, a cross-examination as to particulars. See farther as to this practice, *Woods v. M'Pheran*, Peck, 371.

An attorney for the party will be excepted from the order. *Everett v. Lowdham*, 5 Carr. & Payne, 91. In this case he was mentioned as one of the witnesses who had been subpoenaed, and express permission obtained for him to remain. In *Re v. Webb*, (3 Stark. Ev. 1733,) the attorney, who remained, was excluded as incompetent, but he was not excepted from the order.

It is always in the discretion of the judge, to receive a witness who remain in court after an order to withdraw, except in the exchequer, where he is peremptorily excluded. *Parker v. M'Williams*, 6 Bing. 683; 4 Moore & Payne, 480. In this case, the witness was in during the plaintiff's opening speech, but said he did not hear it, being deaf, though he seemed capable of hearing a low tone. The court would not interpose and grant a new trial, however, because it was a matter entirely for the presiding judge at nisi prius. They mentioned several cases where it would be proper, as where the witness is not contumacious, remains in court accidentally, or by contrivance of the opposite party. It is, says Mr. Justice Gaselee, (4 Moore & Payne, 483,) purely a question of nisi prius practice. The following case is to the same point: The witness, who disobeyed the order, was received; but confined to facts distinct from those stated by other witnesses in her presence. *Beamon v. Ellice*, 4 Carr. & Payne, 585. In *Re v. Colley*, (1 Mood. & Malk. 329,) one of the withdrawn witnesses was called in to exhibit a plan, and stayed and heard some witnesses, and he was examined. Little and Gaselee, Js held that the receipt of the witness depended on circumstances. In *Re v. Brown*, (arson) cited in a note to *Beamon v. Ellice*, supra, a witness for the prisoner had retired, but returned in open violation of the order. Yet he was examined. In the exchequer, the rule excluding a witness who has disobeyed the order is inflexible. *Attorney General v. Buhpit*, 9 Price, 4.

Witnesses who have remained in court, a by-stander for example, notwithstanding the order to withdraw, may still be called to impeach the character of a witness sworn and examined in his presence. Such an accidental witness is not within the rule, and if he be not received, it would be error. *Woods v. M'Pheran*, Peck, 371.

In North Carolina, it has been held that a defendant in a criminal case could not, at common law, and cannot now claim as a right that the witnesses should be separated; nor can the state, though the crown might, by the common law. It is now granted to both as matter of indulgence. Hence, though one of the prosecutor's witnesses remain in court after an order made to withdraw at the prisoner's request, yet the witness may be sworn; and so it would be of the prisoner's witnesses. Such is the spirit of the constitution of North Carolina. It will not extend a greater right to the state, in this and the like respects, than it accords to the prisoner. The witnesses may therefore be sworn, on either side, though suffered to remain even by design of the party. *The State v. Sparrow*, 3 Murph. 487. Henderson, J. in this case, doubted the right to exclude for incompetency in any case, as a consequence of the witnesses not obeying the order. He had never read nor heard of such a consequence. He did not find that this was sanctioned by the cases in *Foster*, *Chitty's Cr. Law*, *Bacon's Abr.* or *Peako' Ev.*, which he had examined. They all speak of sending out witnesses, but do not speak of incompetency as a consequence of disobedience. But the judges laid the main stress on the clause in the constitution giving the accused a right to witnesses, which he was entitled to call in the ordinary way without, as they thought, intending to recognize the refusal to withdraw as a ground of exclusion, though, when the list should be called over, a witness were omitted even by design. This would not go so far as to let in witnesses at any time, after arguments closed, or after the charge. The right secured to the prisoner by law must be claimed at the proper time, i. e. when he is called

*(a) Case stated, and evidence for the prosecution.*

If counsel be engaged for the prosecution, (a) he addresses the jury, states \*the case to them, and then calls the witnesses [\*168] to prove it.

As to the examination, cross-examination, and re-examination of witnesses, they belong more properly to a treatise on evidence; and I have treated of them so fully in other works, (b) and of the rules by which they are regulated, that I must refer the reader to them for the law upon these subjects. [1]

(a) It is a bad, a mischievous economy to cast upon the judge, recorder, or chairman, the task of examining the witnesses, and, in appearance at least, of conducting the prosecution against the prisoner. It must be mortifying to the judge to find that he, who is deemed the prisoner's counsel, or who at all events is to hold the scales evenly between the prosecutor and the prisoner, should be thrust forward into the place of prosecutor, to examine the witnesses, and to play the advocate against the very party for whom he is deemed counsel. Those who know the high honor of those learned persons, their anxiety that all trials before them should be conducted in the true spirit of English fairness, may readily imagine the dislike, disgust, they must feel, when they find a duty cast

upon them, so ill becoming their position, their station, and the nature of their office. I say it is a bad, a mischievous economy; it may save some money to the county or borough fund; but it must tend to lower the sense the people entertain of the fair, the impartial manner in which justice is really administered to them, and create a distrust where there should be, and there deserves to be, unbounded confidence. I hope and trust this practice, which I most heartily deprecate, will soon cease to exist.

(b) Examination, Arch. Pl. & Ev. Civ. Act. 481; 1 Arch. N. P. 33; Cross-examination, Arch. Pl. & Ev. Civ. Act. 485; 1 Arch. N. P. 38; Re-examination, Arch. Pl. & Ev. Civ. Act. 488; 1 Arch. N. P. 40.

on to make his defence. The answer to a subsequent offer of testimony would be, that the party had not availed himself of the proper opportunity; and his neglect should preclude him. Yet, doubtless, a refusal by either party to comply with an order of separation would make an unfavorable impression, would be fairly open to observation, and go to the credit of the witnesses. Id. 490 to 493.

On a trial of slander for a libel, before Best, C. J. with not guilty, and three justifications, on the first witness being called for the defendant, the plaintiff's counsel applied for directions for the rest of the witnesses to go out of court. Best, C. J. "I confess, that for one, I wish the same rule prevailed here as prevails in the houses of lords and commons, where no witnesses are allowed to be present, except the person who is under examination. *Taylor v. Lawson*, 3 Carr. & Payne, 543. But in *Beamon v. Ellice*, (4 Carr. & Payne, 585,) Taunton, J. said there is a great deal of time lost by sending witnesses out of court; and I think that, in general, it does not answer any good purpose."

On the whole, it seems, that although the right to exclude witnesses for wilful disobedience of the order be well established, yet judges are quite cautious of exercising the power. The reason, probably, is, because a party may, in that way, without any fault of his own, be put in very great hazard, by losing important testimony. He cannot prevent the misbehaviour of the witness.

[1] The witness is first examined by the party producing him, after which the other party is at liberty to cross-examine; whereupon, the party producing the witness may re-examine.

On the primary examination of the witness, or, as it is generally called, his examination in chief, you are bound at your peril to ask all material questions in the first instance; and if you omit this, it cannot be done in reply. No new question can be put in reply uncon-



If there be no counsel for the prosecution, the prosecutor has no right to address the jury as counsel, particularly if he is to be examined as a witness himself in the course of the trial.(a)

(a) *R. v. Brice*, 2 B. & Ald. 606. *R. v. Milne*, Id. 606 n.

nected with the subject of the cross-examination, and which does not tend to explain it. If a question as to any material fact has been omitted upon the examination in chief, the usual course is to suggest the question to the court, which will exercise its discretion in putting it to the witness. 1 Stark. Ev. 150. This rule is exemplified in its native rigor by the following case: The counsel for the crown having, by direction of the court, called witnesses, whose names appeared on the back of the indictment, and had them sworn to give the prisoner's counsel a chance of cross-examination; but not examining them in chief, that the prisoner's counsel having accordingly cross-examined, held that, after this, the counsel for the crown could not examine them in chief, but only by way of re-examination, and therefore must confine himself to what arose out of the cross-examination. *Rex v. Beezley*, 4 Carr. & Payne, 218.

With regard to closing the examination of the witness, it is matter of discretion whether, after he is dismissed from the stand, he shall be examined farther. *The People v. Mather*, 4 Wend. 249. And a new trial will not be granted, even where a witness is recalled and re-examined after several others, and a lapse of 24 hours from his being dismissed from the stand. Id. It is discretionary with a court, after charging a jury on a witness's testimony, which is vague and indefinite, whether they will allow him to be called back to correct, explain or render his testimony more plain and certain. *Law v. Merrills*, 6 Wend. 268; 9 Cowen's Rep. 65, S. C. The particular case was where the witness left it doubtful at what precise time a usurious agreement had taken place. Id. This is a mere matter of practice, and error will not lie upon the exercise of the discretion. *Law v. Merrills*, 6 Wend. 268.

So, in regard to the entire cause, "In strict practice, he who has the affirmative, ought to introduce all the evidence to make out his side of the issue; then the evidence of the negative side is heard, and finally, the rebutting proof of the affirmative, which closes the investigation. In doing this, neither side ought to be permitted to give evidence by piece-meal, then to apply for instructions, and again to mend and add to his proof, until, by repeated experiments, he shall make it come up to the opinion of the court. An adherence to these rules, generally, will be found necessary in all courts of original jurisdiction; and, without them, confusion, loss of time, and captious and irritable conduct must follow.

The general rule is adhered to with the greatest strictness in criminal cases. Thus, on a prosecution for larceny, which was sustained in the first instance merely by the prisoner's possession of the stolen goods, the latter proved by his daughter that he bought the goods of T. The prosecutor then called T. for the first time, but was restrained from inquiring of him any farther than to negative the sale, for he was a witness in reply. On asking him whether he did not see the prisoner steal the goods, the inquiry was stopped, as T. was not called in chief, and in the first instance, as he should have been, to warrant his giving evidence in chief. Being a witness in reply, he could only be received so far as his testimony went to destroy the case set up by the prisoner. *Rex v. Stimpson*, 2 Carr. & Payne, 415.

After the plaintiff rested his cause, the defendant proposing to sum up, without introducing any evidence on his side, the plaintiff was still allowed to add other witnesses on his part, the court having strongly intimated that his action had not been sustained. *Green v. Cornwell*, Mayor's Court, Riker, recorder, presiding, Jan, 1816, 1 C. H. Rec. 11. The admission or rejection of a witness, after the case is closed, is mere matter of discretion. Error will not lie on either ground. *Frederick v. Gray*, 10 Serg. & Rawle, 182. And under circumstances, a new witness may be received, even after counsel have begun to address the jury; and semb. a witness who has been subpoenaed, but does not come before, may then, if the judge choose to allow it, be received. *Duncan v. McCullough*, 4 Serg. & Rawle, 482. But not, if one party has discharged his witnesses, and one of them is not to be found, and the

Each witness is sworn in this form :—"The evidence you shall give to the court and jury sworn, between our sovereign Lady Queen and

witnesses of the other party were all present, and might have been sworn. *Id.* *Semb.* the judge may, in his discretion, allow witnesses to be sworn, who arrive after the testimony is closed, and even as late as when the plaintiff's counsel rise, and begin to reply. *Legget v. Boyd*, 3 Wend. 376. The granting or refusing to delay a trial until absent witnesses arrive, will equally be left to the judge's discretion. *Legget v. Boyd*, 3 Wend. 376. After the counsel for the defendant had summed up, the prosecuting attorney was allowed to add other testimony, it appearing that it was newly discovered. *Sturdivant's case*, N. Y. Gen. Sess., Radcliff, mayor, presiding, July, 1816, 1 C. H. Rec. 110.

There is perhaps generally danger of injustice, in allowing the examination of witnesses to be renewed, after both parties have rested. Witnesses, who generally attend with reluctance, and can with difficulty be depended on as being in court on the call of the cause, and during the trial, are apt to seize on such a crisis as an entire absolution from farther attendance, and retire from court. The question whether the examination shall be opened, is, therefore, often very far from standing merely upon a waste of the time of the court, or a mistaken omission of a new discovery of evidence on the side proposing to open the case. It may work a material wrong to the opposite party, who is thus perhaps left unable, even by his own deposition, to explain wherein he is to suffer. To him it is many times of peculiar importance that all the testimony should be heard, while his witnesses, and his entire means of private and public explanation are present, or within his immediate reach. Yet, in all cases, it is a matter of discretion with the judge, in any stage of the cause, before the jury shall have retired, to allow the re-examination of witnesses, and perhaps receive additional witnesses; and it is generally taken as quite a hard measure of justice, when he refuses.

In cross-examinations, the object of which is to sift evidence, and try the credibility of the witness, a great latitude is allowed in the mode of putting questions. The rule, however, is still subject to certain limitations. A witness cannot be cross-examined as to any fact, which (if admitted) would be collateral, and wholly irrelevant to the matter in issue, for the purpose of contradicting him by other evidence, (in case he should deny the fact,) and in this manner to discredit his testimony; and if the witness answers such an irrelevant question before it is disallowed or withdrawn, the evidence cannot afterwards be withdrawn. *Phil. Ev.* 210; 2 *Campb.* 638; 7 *East*, 108.

In the application of this rule, the principal thing to be considered will be, whether the question is *irrelevant* to the points in issue between the parties. *Phil. Ev.* 210; 2 *Campb.* 638.

When a witness has been once sworn to give evidence the other party may cross-examine him, though he gave no evidence for the party that called him. 1 *Esp. N. P.* 357. *Phillipps' Ev.* 211.

And it is reported to have been ruled at *nisi prius*, that if a witness has been once examined by a party, the privilege of cross-examination continues in every stage of the cause; so that the other party may call the same witness to prove his case, and in examining him may ask him leading questions. 4 *Esp. N. P.* 67.

In the case referred to, the witness might possibly have shown a strong bias in favor of the first party that called him, and on this account perhaps a greater scope was granted to the adverse party than is usually allowed. It may happen, on the other hand, that the plaintiff calls a witness, unwillingly and from mere necessity, knowing him to be favorable to the other side; in such a case, to allow the defendant, on calling him up afterwards as his own witness, to put leading questions, would be giving him an unreasonable advantage; on the contrary, the court might perhaps be induced to invest the plaintiff's counsel with some of the powers of cross-examination, at the same time that it would probably oblige the defendant's counsel strictly as his own and confine him within the limits of an examination in chief. *Phil. Ev.* 211.

It has been decided that when a party cross-examines a witness, he makes him as much

the prisoner at the bar [*or defendant*,] shall be the truth, the whole truth and nothing but the truth : so help you God."

his own, as if he himself had called him, and therefore he could not introduce through him any proof which would not have been legal, had the witness been originally produced on his behalf; for instance, he cannot give parol proof, by the witness, of the contents of a writing, without showing notice to produce it. 2 Caines' Rep. 178.

The examination of witnesses, says Tilghman, C. J., is to be conducted in such a manner as to discover the truth without taking any unfair advantage. The party who calls the witness examines him first, he is then cross-examined by the opposite party, after which, if necessary, the party who produced him may examine him again. The mouth of the witness is not to be closed because the counsel omitted to ask a material question at first. It may be necessary, in order to come at the truth of the case, to examine him as to new matter, and after that, there may be a second cross-examination. The court, at their discretion, may permit a witness to be examined by either party, over and over again, at any time during the trial.

But they will take care to exercise this discretion, so as not to suffer any advantage to be gained by trick or artifice. If the plaintiff should declare that he had finished his testimony, in consequence of which the defendant should dismiss some of his witnesses, and then the plaintiff should offer to produce new testimony which might perhaps have been contradicted by the witnesses who had been dismissed, the court would not suffer him to avail himself of such disingenuous conduct. 5 Binney (Penn.) Rep. 488. See 4 Binney, 198.

#### OF THE RE-EXAMINATION.

The object of re-examining a witness being merely to explain the facts stated by the witness on cross-examination, he cannot be re-examined as to any facts unconnected with it but if any material question has been omitted in the examination in chief, the practice is to suggest it to the court, who will put it to the witness, or decline to do so, at its discretion. 2 Russ. 621.

After a witness has been cross-examined respecting his former statements and declarations, for the purpose of affecting his credit, the counsel who called him has a right to re-examine him so as to give him an opportunity of explaining such statements and declarations. Thus if that which the witness has stated in answer to the question on his cross-examination, arose out of the inquiries of the person with whom he had the conversation, the witness may be asked in re-examination what those inquiries were. 2 Brod. & Bing. 295. 2 Russ. 633.

But this, it should seem, is the limit of such a re-examination. Lord C. J. Abbot, in delivering his opinion in the Queen of England's case, said, "I think the counsel has a right upon a re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also, of the motive, by which the witness was induced to use those expressions: but I think, he has no right to go further and introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. 2 Brod. & Bing. 297. 2 Russ. 634.

It rests in the discretion of the court before whom a trial is had whether or not to permit the re-examination of a witness after the lapse of a day, and after the examination of other witnesses; the supreme court will not interfere with the exercise of such discretion but in a very flagrant case. *The People v. Mather*, 4 Wendell, 229.

A witness cannot be permitted to read his evidence, (5 St. Tr. 445. Hawk. b. 2, c. 46, s. 168,) but may refresh his memory from any book or paper, provided he can afterwards swear to the fact from his own recollection; though if he can only maintain its truth by finding it entered there, the papers must be themselves given in evidence. 3 T. R. 749. 11 Harg. St. Tr. 255. 3 T. R. 754. 2 Campb. 112. 8 East, 284, 389. Hawk. b. 2, c. 46, s. 168. Bac. Abr. Evidence, E. And he may be allowed to look at papers, in order to refresh his memory, which were not written by himself, but which he has repeatedly inspected. 1 Campb. 112. 8 East, 284, 289. Two or three lines of a letter may be exhibited to a wit-

The prosecutor is not bound to call all the witnesses on the back of the bill; but he must have them in court, in order that the prisoner may examine any of them whose evidence he may require.[2] If the prisoner call them, however, he makes them his witnesses.(a) On the other hand, the prosecutor is not confined to the evidence which was adduced before the committing magistrates, but at the trial he may call such other witnesses, and give such other evidence as he may think proper.(b)

In one case,(c) which was an indictment for stealing a piece of wood it appeared that when it was found in the prisoner's possession, he said he had bought it of one Nash, who lived about two miles off; but Nash was not called as a witness for the prosecution: Alderson, B., laid it down as a general principle, that where a man, in whose possession stolen property is found, gives a reasonable account how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person,—it is incumbent on the prosecutor to show that such account is false. And in a more recent case, Lord Denman,

(a) Per Alderson, B., in *R. v. Woodhead*, 2 Car. & K. 520, and stated to be the rule then lately laid down by the judges.

(b) *R. v. Ward*, 2 Car. & K. 759.

(c) *R. v. Crouhurst*, 1 Car. & K. 370.

ness, without exhibiting to him the whole; and the witness may be asked, whether he wrote the part exhibited. But if the witness deny that he wrote such part, he cannot be examined as to the contents of the letter. 2 Brod. & Bing. 286. It has been said, that it is necessary he should swear absolutely to the fact which he is called to prove, and that a mere persuasion and belief will not be sufficient proof for the consideration of a jury. 1 Dyer, 53, b. n. 15. Hawk. b. 2, c. 46, s. 167. Williams, J. Evidence, IV. See 1 Stark. Ev. 5th Amer. ed. 152, 153. But it is now settled, that there are cases which a belief will be available in evidence. Thus a subscribing witness to a deed may swear that he has totally forgotten that he signed it; but, on being shown his signature, he may depose that he believes he saw the execution, and the court will be satisfied with his answer. 3 Wils. 427. And though, in general, the opinion of an individual is no evidence, on questions of science, persons skilled in the art may be called to state what their sentiments are, respecting any point within the scope of their particular inquiries. Thus, a physician, in case of murder; a person skilled in detecting feigned hands, in case of forged writings; and a seal engraver, where a seal is suspected to be a forgery, may respectively give their opinions respecting the cause of the death, or the authenticity of the suspected instrument. 4 T. R. 498. 4 Esp. Rep. 117, 145. 2 Stark. Ev. (5th Amer. ed.) 376; 1 Id. 153, 154. On a trial, where the defence is insanity, a witness of medical skill may be asked whether such and such appearances proved by witnesses, are in his judgment symptoms of insanity; but it is questionable whether, he can be asked, whether, from the other testimony given, the act with which the prisoner is charged, is, in his opinion, an act of insanity, for that is the very point to be decided by the jury. Russ. & Ry. C. C. 456.

[2] In Massachusetts, it is usual for the grand jury to return generally the names of all the witnesses examined by them, without specifying the bills. In the case of *Com. v. Knapp*, 9 Pick. Rep. 498, where the prisoner's counsel requested that a list of the witnesses before the grand jury should be given, the court granted the application without doubt, it being remarked by Wilde, J., that such a request had never been refused.

It seems that in Mississippi, it is not necessary that the grand jury should return with the indictment, the names of the witnesses examined. *King v. State*, 5 Howard, Miss. Rep. 730.

C. J., said that he agreed with Mr. Baron Alderson, in what he had stated on that occasion, and that the case was correctly reported. (a) [169] Before the case above mentioned, however, it was the \*generally received opinion, that if a person set up that defence, either before the magistrate or at the trial, it was his duty to produce the witness to prove it, or if he were too poor to do so, the magistrate should send for the person named, and examine him if the prisoner wished it. However if the account given by the prisoner be not a reasonable one,—if for instance he say on one occasion that he bought the article, and on another that he and two others found it hid in a hayrick, (b) or the like,—this will impose no such burden on the prosecutor. [1]

(b) *Case stated and evidence for the defence.*

The defendant in all cases has, and at all times had, a right to address the jury in his defence. In misdemeanors he always was and still is allowed to do this by counsel. [2] In high treason he was first allowed to do so, by stat. 7 & 8 W. 3, c. 3, s. 1; which adds, that “in case any person or persons so accused or indicted shall desire counsel, the court before whom such person or persons shall be tried, or some judge of that court, shall and is hereby authorized and required immediately, upon his or their request, to assign to such person and persons

(a) *R. v. Smith*, 2 Car. & K. 208.

(b) *R. v. Dobby*, 2 Car. & K. 818.

[1] In prosecutions for larceny, where the goods have proved to have been stolen, it is a rule of law, applicable in these cases, that possession by the accused, soon after they were stolen, raises a reasonable presumption of his guilt. And unless he can account for that possession, consistently with his innocence, will justify his conviction. Evidence of this nature is by no means conclusive, and it is stronger or weaker, as the possession is more or less recent. Such evidence is sufficient to make out a *prima facie* case on the part of the state, to be left to the jury. But when, by opposing testimony, reasonable doubt is thrown upon a *prima facie* case of guilt, it can no longer be said that the party accused is proved guilty beyond a reasonable doubt. The jury are to judge upon the effect of the testimony taken together. Proof of good character, may sometimes be the only mode by which an innocent man can repel the presumption of guilt, arising from the recent possession of stolen goods. As for instance, where the party really guilty, to avoid detection, thrusts, unobserved in a crowd, the article stolen, into the pocket of another man. This may be done, and the innocent party be unconscious of it at the time. And yet good character is not proof of innocence, although it may be sufficient to raise a reasonable doubt of guilt. See *State v. Merrick*, 19 Maine Rep. 398.

[2] The constitution of the United States secures to the accused the privilege of the assistance of counsel in all criminal prosecutions. Const. of U. S. art. 6, of the Amend. And a similar provision is introduced into the constitutions or statutes of all the states. See 4 Am. Jurist, 17, 18; Const. of Mass. pt. 1, art. 12: Rev. Stat. of Mass. ch. 123, sec. 2; *Ib.* ch. 136, sec. 22; 1 Rev. Code of Va. ch. 169, sec. 27, p. 607; 6 Amer. Jurist, 249, *et seq.* In the state of New York, it is expressly provided by law that in all impeachments and indictments the party accused shall be entitled to the benefit of full counsel, as in civil actions. 1 N. Y. Rev. Sta. 93, 94, 165.

such and so many counsel, not exceeding two, as the person or persons shall desire, to whom such counsel shall have free access at all reasonable times." And by stat. 6 & 7 W. 4, c. 114, s. 1, "all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto, by counsel learned in the law, or by attorney in courts where attornies practise as counsel."

If however the defendant wish to address the jury, and to examine and cross-examine witnesses, he will of course be allowed to do so, and his counsel will be allowed to argue any points of law that may arise in the course of the trial, and to suggest questions to him for the cross-examination of the witnesses.(a) But he cannot have counsel to examine and cross-examine the witnesses, and reserve to himself the right of addressing the jury.(b)

As to the defendant's right to have a copy of the depositions,(c)

(c) *Witnesses in reply.*

If the defendant set up any defence, and call witnesses to prove it, the prosecutor may then give evidence in reply. This evidence must be strictly confined to the defence: the prosecutor will not be allowed to wander from that, even for the purpose of giving evidence on the original charge. Where upon an indictment for larceny, the prosecutor rested his case upon the prisoner's recent possession of the goods; the prisoner set up as a defence, that he bought the goods of J. T., and he called a witness to prove it; the prosecutor then proposed to call J. T. to prove, not only that he \*did not sell the goods to [170] the prisoner, but that he saw the prisoner steal them: it was holden however that he could not do this, but must confine his evidence to the defence merely.(d)[1]

Upon the plaintiff calling witnesses in reply, the defendant's counsel has a right again to address the jury, confining his observations however to the witnesses so called, and the testimony given by them. And the prosecutor's counsel is then entitled to the general reply.

(d) *Reply, &c.*

The attorney general, when prosecuting for the crown, has the privilege of replying, although no evidence has been given or witnesses called for the defendant;(e) and this, even upon the trial of collateral

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| (a) <i>R. v. Parkins</i> , Ry. & M., N. P. C. 166.   | <i>R. v. Hilditch et al.</i> , 5 Car. & P. 299. | <i>R. v.</i> |
| (b) <i>R. v. White</i> , 2 Camp. 98.                 | <i>Powell</i> , Car. & M. 500.                  |              |
| (c) See <i>ante</i> , p. 51.                         | (e) By the Judges, 2 Car. & K. 636 n.           |              |
| (d) <i>R. v. Stimpson</i> , 2 Car. & P. 415, and see |   |              |

[1] See *ante*, p. 168, note [1].

issues.(a) And so has any other counsel representing him.(b) In other cases, the counsel for the prosecutor is entitled to the general reply, upon the entire case, if the defendant call and examine witnesses; but if the witnesses be merely to character, the counsel for the prosecution seldom avails himself of this privilege. In one case, where the counsel for a defendant upon the trial of an indictment for a misdemeanor, opened new facts in his address to the jury, but afterwards declined to call witnesses to prove them, it was holden that the counsel for the prosecution was entitled to the general reply.(c) But this has since been frequently ruled otherwise at *nisi prius*.

(e) *Adjournment of the trial.*

If the trial cannot be concluded in one day, the court will adjourn it to the next day, or if that happen to be Sunday, to the Monday, until the trial is completed.[2] And in the meantime, in treason and felony, the court order the sheriff to provide proper accommodation for the jury at some tavern or other place; and a bailiff is sworn thus: "You shall well and truly keep this jury, and neither speak to them yourself, nor suffer any other person to speak to them, touching any matter relative to this trial: So help you God."(d)[3] And the undersheriff and bail-

(a) *R. v. Radcliffe*, 1 W. Bl. 3.

(b) *R. v. Gardner*, 2 Car. & K. 628.

(c) *R. v. Bignold*, 4 D. & R. 70.

(d) See *R. v. Stone*, 6 T. R. 530. *R. v.*

*Hardy*, 24 How. St. Tr. 414, 572.

[2] See *State v. Anderson*, 2 Bailey, 565.

[3] According to the forms anciently established at trials, an officer of the court should always be placed at the box where the jury sit, to prevent any one from having communication with them; and when they depart from the bar, they should be attended by a bailiff sworn for that purpose. 2 Hale's P. C. 296; Buller's N. P. 308. The form of the oath administered to the bailiff who takes charge of the jury, when they retire to consider of their verdict is as follows: "You shall swear that you shall keep this jury without meat, drink, fire, or candle; you shall suffer none to speak to them, neither shall you speak to them yourself, but only to ask them whether they are agreed." 2 Hale P. C. 296; Bac. Abr. Juries, G; 1 Chit. C. L. 632. In the case of *Rex v. Stone*, (6 T. R. 530,) the form of oath permitted the bailiff to speak to the jury, but not "touching any matter relative to the trial."

In many courts, however, at the present day, it is not unusual that officers are sworn at the commencement of the term, to take charge of all juries in civil cases, and probably there is no reason for greater caution in criminal cases. *Commonwealth v. Jenkins, et al.* Thach. C. C. 131. And so in regard to the restrictions upon the jury as to meat, drink, &c., they will be found to have been much modified, provided such refreshments are taken in moderation, and not at the expense of a party in the cause. 21 Vin. Abr. 448, Trial. (G. g.)

The trial by jury, so justly prized, should be scrupulously preserved inviolate, as guaranteed by the constitution, and protected against encroachment in all its essential attributes, and every change or modification of form should be admitted only when found to be absolutely necessary to meet the changes of society and the times. Its very forms, being designed to protect it from innovation, are said, in 4 Black. Com. 320, to be sacred and not to be dis-

iff accompany them the the next morning to court, and take care to have them there at the time appointed. But upon the trial of a misdemeanor, it is not usual to keep the jury thus together, but they are allowed to depart to their respective houses or lodgings, with a caution

persed with. The rule that requires a jury, after being impanelled, to be kept free from every improper communication or intrusion, was established to render more certain the formation of an impartial and secret verdict. Accordingly, anciently, great strictness was used in relation to the conduct of jurors, and but little consideration indulged for their comfort or convenience. In more recent times, the conduct of jurors has been viewed in different lights, and construed with different degrees of strictness, both as regards the jurors themselves, and its effect upon their verdict. 1 Cow. 221, note; *Commonwealth v. Roby*, 12 Pick. 496. In the case of the *Commonwealth v. Roby*, Chief Justice Shaw, speaking of the effect of an irregularity of the jury, or of other persons employed in the various departments and various duties connected with the trial, propounds the rule, that if the irregularity is of such a nature that it does not, and in its tendency cannot, affect the rights of a prisoner or other party, whatever other consequences may follow upon such irregularity, it shall not avoid the verdict, because it has no tendency to affect that verdict injuriously to the party against whom it is found." Thus, some modern authorities can be found of instances where juries have separated without authority of court, or jurors have separated from their fellows, or persons have intruded upon juries in their retirement, in which the irregularity has been held not to impair the verdict. 1 Dev. & Bat. 500; 1 Black. 25; 3 Cow. 355; 12 Pick. 496. But these are mostly cases where evidence excluded the presumption, that there was either influence, partiality, or undue excitement on the part of the jury—cases of a mere exposure to undue influences, but in which that exposure has been affirmatively shown to have produced no consequences of any kind. The effect of such an exposure, however, of which no explanation is given as to the extent of its influence, presents a subject of different consideration. Under such circumstances, the jealousy with which the purity of the verdict is watched becomes immediately aroused, for the latest authorities hold, that if the irregularity has a tendency to affect the rights of the party it is sufficient to warrant its being set aside. Such a conclusion may be legitimately deduced from the opinion in the case of the *Commonwealth v. Roby*, 12 Pick. Nor is this a new doctrine, for it was said by all the judges in *Lord Delamere's case* 4 Harg. St. T. 232, that "an officer is sworn to keep the jury, without permitting them to separate, or any one to converse with them, for no man knows what may happen; although the law requires honest men should be returned upon juries, and without a known objection, they are presumed to be *probi et legales homines*, yet they are weak men, and, perhaps, may be wrought upon by undue applications." The evil to be guarded against is improper influence, and when an exposure to such an influence is shown, and it is not shown that it failed of effect, then the presumption is against the purity of the verdict. 9 Smedes & Marsh. Rep. 467, 468, 469.

In New York where a jury, empanelled to try a prisoner upon an indictment for murder, were allowed to leave the court-house during the trial, under the charge of two sworn constables, and, having left the court house, two of them separated from their fellows, went to their lodgings, a distance of thirty rods, ate cake, took some with them on their return, and drank spirituous liquor, though not enough to effect them in the least, and one of them conversed on the subject of the trial; it was held, that though the mere separation was not, in itself, fatal, the drinking of spirituous liquor, and the conversing on the case, were sufficient for a new trial. *People v. Douglas*, 4 Cowen, 26. And see *State v. Prescott*, 7 New Hamp. Rep. 290; *State v. Babcock*, 1 Connect. 401; *State v. Miller*, 1 Dev. & Bat. 500; *Wyatt v. State*, 1 Blackford. 25.

It seems that in South Carolina, the jury are not required to remain together even after they are charged though the case is capital, and that it is within the sound discretion of the presiding judge to allow a juror to leave the jury box, for a brief time even during the trial of a capital case. *State v. McKee*, 1 Bailey, 651; *State v. McMurray*, 3 Strobb. 33.



however, to attend in court punctually at the time to which the trial is adjourned, and in the meantime not to hold communication with any person upon the subject of the trial.(a)[4]

(a) See *R. v. Kinnear*, 2 B. & Ald. 462.

[3] In *R. v. Woolf*, 1 Chitty, R. 401, it appeared that the trial (for conspiracy) had lasted two days; that on the first day the court sat from the morning till eleven o'clock at night; and that, on the adjournment, the jury separated, going to their several homes, and returned the next morning. The separation was without the knowledge of the defendant and his counsel, and without the consent of court. "I am of opinion," says the court "that there is no sufficient foundation for the present application. The application is grounded upon the suggestion of these two facts: First, that the jury had dispersed during the night. Secondly, that that fact was not known to the defendants until after the trial was over. Now, the trial began between nine and ten in the morning; it had proceeded until eleven o'clock at night, or later, before the evidence on the part of the prosecution was closed. Learned counsel were employed, separately, for several defendants. It must be assumed, that in that stage of the case, evidence would be laid before the jury on the part of the defendants. It became matter, therefore, of necessity, that the trial should be adjourned, and an adjournment, accordingly, took place from the necessity of the case, the jury being fatigued both in mind and body; and it would have been most injurious to the case of the defendants, even if the judge and jury had had strength enough to go on, till the trial came to a close, I say, most injurious to the case of the defendants, if their case was heard by persons whose minds were exhausted with fatigue, as it would have been, if an adjournment had not taken place. An adjournment of this nature is not necessarily followed by the dispersion of the jury, for, in many cases, they are kept together till the final close of the trial. But I am of opinion, that, in a case of misdemeanor, their dispersion does not vitiate the verdict; and I found my opinion upon the admitted fact, that there are many instances, of late years, in which juries, upon trials for misdemeanors, have dispersed and gone to their abodes, during the night for which the adjournment took, and I consider every instance in which that has been done, to be proof that it may be lawfully done. It is said, that, in some of those instances, the adjournment and dispersion of the jury have taken place with the consent of the defendant. I am of opinion, that that can make no difference. I think the consent of the defendant, in such case, ought not to be asked; and my reason for thinking so is, that if that question is put to him, he cannot be supposed to exercise a fair choice in the answer he gives, for it must be supposed that he will not oppose any obstacle to it; for if he refuses to accede to such an accommodation, it will excite that feeling against him which every person, standing in the situation of a defendant, would wish to avoid. I am also of opinion, that the consent of the judge would not make, in such case, that lawful which was unlawful in itself; for if the law requires that the jury shall, at all events, be kept together until the close of a trial for misdemeanor, it does not appear to me, that the judge would have any power to dispense with it. The only difference that can exist between the fact of the jury separating with or without the approbation of the judge, as it seems to me, is this, that if it be done without the consent or approbation of the judge, express or implied, it may be a misdemeanor in them, and they may be liable to be punished; whereas, if he gives his consent, there will be no such consequence of a separation. But though it may be a misdemeanor in them to separate without his consent, it will not avoid the verdict, in a case of this kind, as it would if the law required the jury to be absolutely kept together. It seems to me, that the law has vested in the judge the discretion of saying, whether or not, in any particular case, it may be allowed to the jury to go to their own homes, during a necessary adjournment throughout the night. For these reasons, it appears to me, that there is no ground for the present application; and, I conceive, we ought not to give any reason to suppose that any doubts exist, when none really exist in our minds.

"There is no doubt that, in cases not affecting life and limb, the court has such power,

\*(f) *Summing up.*

[\*171]

After the case has been closed on both sides, the judge at the assizes, or the chairman or recorder at sessions, then sums it up to the jury. He first states the substance of the charge against the prisoner; he then, if necessary, explains to them the law upon the subject; he next reads the evidence which has been adduced in support of the charge, making occasionally such observations as may be necessary to connect the evidence, to apply it to the charge, and to render the whole plain and intelligible to the jury; he then states the defence, and the evidence given on the part of the defendant; and he usually concludes by telling the jury, that if, upon considering the whole of the evidence, they entertain a fair and reasonable doubt of the guilt of the prisoner, they should give the prisoner the benefit of that doubt, and acquit him.[1]

and it is the constant practice throughout the Union, in such cases, to exercise it. The jury, it has been held, may even be discharged while the trial is proceeding." Wharton's Crim. Law, citing, *People v. Olcott*, 2 Johnson, C. 301; *People v. Goodwin*, 18 Johnson, 187; *People v. Green*, 13 Wendell, 55; *Com. v. Weems*, 1 Boston Law Rep. 257; *Hector v. State*, 2 Missouri, 135; *People v. Thompson*, (Gen. Court of Va.) 2 Wheeler's C. C. 473; *Com. v. Bowden*, 9 Mass. 494; *Com. v. Purchase*, 2 Pick. 521; *People v. Ellis*, 15 Wendell, 371; *Com. v. Cook*, 6 Serg. & R. 577; *Com. v. Chus*, 3 Rawle, 498; *Spier's case*, 1 Dever. 491; *State v. Garrigues*, 1 Hayw. 241; *U. S. v. Peres*, 9 Wheaton, 579; *U. S. v. Coolidge*, 2 Gallison, 364; *U. S. v. Shoemaker*, 2 M'Lean, 114; *Moore v. State*, 1 Walker, 124; *U. S. v. Huskill*, 4 Wash. C. C. R. 409; *Com. v. Olds*, 5 Little, 140; *Gerard v. People*, 3 Scammon, 363; *State v. Miller*, 1 Dev. & Bat. 500; *Tennessee v. Waterhouse*, Mart. & Yerger, 278; *State v. Hall*, 4 Halsted, 236; *State v. M'Kee*, 1 Bailey, 154; *Wyatt v. State*, 1 Blackford, 257; *Com. v. Merrill*, Thacher's C. C. 1.

[1] During the whole trial the court has power to punish any contempts of its authority, or obstruction of the course of justice. 6 Term Rep. 530; 3 Harg. St. Tr. 408. They may fine a person offending, and command the fine to be immediately levied; as for contempt in addressing the jury. 4 B. & A. 329. And if the defendants are guilty of any contemptuous behavior, they may be committed, or obliged to find sureties for the outrage on public justice, though acquitted of the original accusation. Cro. Car. 507; Comb. 40. The commitment should be for a time certain. 5 B. & A. 894.

When the evidence and the speeches on both sides are thus concluded, it becomes the duty of the judge, or presiding magistrate, to sum up the evidence to the jury. 6 Harg. St. Tr. 832, 833. Dick. Sess. 223. See form of Charge, 6 Harg. St. Tr. 832. In order to enable him to do this with accuracy, he ought to take notes of the proofs adduced in every part of the proceedings. And this is the more necessary, as these minutes frequently become important documents in a remoter stage of the prosecution: as where the cause is removed by certiorari before sentence; where a special case is carried up to the court above; or where an application is made for a pardon. In these, and many other cases, these notes are examined, to show the circumstances of the prisoner's guilt, and how far the aggravations or excuses of the case ought to operate in the dispensation of justice or the extension of mercy. Dick. Sess. 223, note. See form 11 Harg. St. Tr. 290, 1. Where the evidence affects several defendants differently, the judge will, as we have seen, select the evidence applicable to each, and leave their cases separately to the jury. 3 T. R. 106.

The judge has a right to express to the jury his own opinion in regard to the weight of evidence. *Commonwealth v. Child*, 10 Pick. 252. *People v. Rathbun*, 21 Wendell, 509; *Swift v. Stevens*, 8 Conn. 431; *Ware v. Ware*, 8 Greenl. 42. See also 3 Amer. Jurist, 328; *Ware v. Ware*, 8 Greenl. 42; *People v. Genung*, 11 Wendell, 18.

It may be necessary to state, that a bill of exceptions will not lie; it is never allowed in a criminal case.(a)[2]

(a) See *R. v. Preston-upon-the-Hill*, Burr. S. C. 77; 2 Str. 1040.

The court is bound to instruct the jury as to the law in any material point relative to the issue, when requested. *Jared v. Goodtitle*, 1 Blackford, 29; *Lewis v. State*, 4 Ohio, 397. A new trial, however, was refused, where the judge, though requested, declined to charge the jury when there was no dispute as to the law of the case. *People v. Gray*, 5 Wendell, 289. And where the court are not reminded of their neglect to charge on a particular point until the jury have returned their verdict, it is not error in the court then to refuse to charge on the point in question. *State v. Catlin*, 3 Vermont, 520. See also *Alsop v. Swathel*, 7 Conn. 500. *New Hampshire*.—It is not a ground for a new trial that the court omitted to instruct the jury as to the degree of evidence necessary to convict of perjury, where no question of that nature was raised at the trial. *State v. Hascall*, 6 N. Hamp. 352. The court is not bound to charge on abstract propositions of law submitted by counsel in the trial of a cause. *People v. Cunningham*, 1 Denio, 524; *Lewis v. State*, 4 Ohio, 389; *Etting v. U. States Bank*, 11 Wheat. 59. As to the province of the jury to decide on the whole case, law as well as fact, see 1 Chitty's Cr. Law, 626, n. See *Games v. Dunn*, 14 Peters, 322.

*New York*.—Should the jury in the trial of a criminal case, happen to be misled by the remarks or views of the testimony, presented by the presiding judge, it seems, there is no remedy for the accused, but by appeal to the pardoning power. *People v. Vane*, 12 Wendell, 78.

[2] The following are the provisions of the New York Revised Statutes: On the trial of any indictment, exceptions to any decision of the court may be made by the defendant in the same cases and manner provided by law in civil cases; and a bill thereof shall be settled, signed and sealed, and shall be filed with the clerk of the court, and returned upon a writ of error as now authorized in personal actions, or upon a *certiorari* as hereinafter provided, and the same proceedings may be had to compel the signing and sealing of such bill and the return thereof.

But no such bill of exceptions shall stay or delay the rendering of judgment upon any such indictment, or the execution of such judgment, or of any sentence thereon, except as hereinafter provided.

Such bill of exceptions being settled and signed, if the circuit judge who tried the cause, or a justice of the Supreme Court, shall certify on such bill, that in his opinion there is probable cause for the same, or so much doubt as to render it expedient to take the judgment of the Supreme Court thereon, such certificate, on being filed with the clerk of the court, shall stay judgment on such indictment, until the decision of the Supreme Court be had upon such exceptions.

If such bill of exceptions shall have been tendered to any court of sessions, and shall have been settled, signed and sealed, and the judge who presided on the trial, or any justice of the Supreme Court, shall grant a certificate as provided in the last section, upon the filing thereof with the clerk of the court, judgment shall be stayed upon such indictment, until the decision of the Supreme Court be had upon such exceptions.

But no certificate shall be granted by a judge of the Supreme Court, unless application therefor shall first have been made to the judge who presided at the trial, and the reasons of such judge refusing the same, be attached to the bill of exceptions.

Upon such certificate being granted, as provided in the three last sections, in any case where the offence charged is punishable by imprisonment in a state prison or in a county jail, the court in which the trial shall have been had, or any justice of the Supreme Court, may let the defendant to bail, upon a recognizance with sufficient sureties, conditioned that he shall appear in the court where such trial was had, at such time as the Supreme Court shall direct, and that he will obey any order or judgment the Supreme Court shall make in the premises.

In what cases the court have a power of amending at the trial,(a)  
As soon as the summing up is concluded, the clerk of arraigns, or

(a) See *ante*, pp. 99, 100.

When judgment shall have been stayed, upon any indictment as herein provided, it shall be the duty of the district attorney of the county, immediately to sue out a writ of *certiorari*, returnable in the Supreme Court, to remove such indictment with the bill of exceptions and other proceedings thereon, into such court; and the clerk of the court shall, without delay, make a return thereto, containing a transcript of the indictment, bill of exceptions, and the certificate staying judgment. 2 N. Y. Rev. Stat. p. 918, 919, s. 23-29.

In Massachusetts, the statute provides: Any person who shall be convicted of an offence before the court of common pleas, being aggrieved by any opinion, direction or judgment of the court, in any matter of law, whether he have a right to appeal therefrom or not, if an appeal be not actually taken, or, having been taken, if it be waived by leave of the court, may allege exceptions to such opinion, direction or judgment; which exceptions, being reduced to writing in a summary mode, and presented to the court, a convenient time before the end of the term, and found conformable to the truth of the case, shall be allowed and signed by the presiding justice thereof, and thereupon all further proceedings in the case, in that court, shall be stayed, unless it shall clearly appear to the presiding justice, that such exceptions are frivolous, immaterial, or intended only for delay, and in that case judgment may be entered, and sentence awarded, in such manner as the court may deem reasonable, notwithstanding the allowance of such exceptions. R. S. of Mass. p. 764, s. 11.

In Maine, any person convicted of an offence in the district court, may allege exceptions to any opinion, direction or judgment of the said court, and thereupon such proceedings shall be had in said court, and also in the supreme judicial court, as are prescribed in the nineteenth section of the ninety-seventh chapter, establishing the said district court.

In criminal trials in the supreme judicial court, any person convicted of any offence tried before any one justice of said court, may, in the manner mentioned in the preceding section, allege exceptions to any opinion, direction or judgment of such justice, to be allowed and signed by him; or any questions of law, which may be so reserved on exceptions, as above stated, may be reserved on a report signed by such justice, who may require such defendant to recognize with sufficient sureties to appear at the next term of said court, and abide the judgment which the full court shall render in the cause; or commit him, on his neglecting so to recognize. R. S. of Maine, p. 721, s. 40, 41.

In Mississippi, the statute is as follows: In the prosecution of any person or persons for any crime or misdemeanor, in any court of law of this state, it shall be the duty of the judge or justices, before whom such prosecution is pending, to sign and seal any bill of exceptions tendering to the court, during the progress thereof: Provided, The truth of the case be fairly stated in such bill of exceptions. And thereupon, the said exceptions shall, by the clerk of the said court, be entered in the record of such prosecution, and become, to all intents and purposes, a part thereof. Hutchinson's Miss. Code, p. 880, s. 146.

In Virginia, a party, in a criminal case or proceeding for contempt, for whom a writ of error lies to a higher court, may except to an opinion of the court and tender a bill of exceptions, which, (if the truth of the case be fairly stated therein,) the judge, judges or justices, or the greater part of those present, shall sign; and it shall be a part of the record of the case. This section shall not be construed to authorize a bill of exceptions to an opinion of an examining court. Code of Va. p. 779, sec. 1.

In Michigan, the Revised Statutes provide:—Any person who shall be convicted of any offence before any court of record, considering himself aggrieved by any opinion, direction or judgment of the court, in any matter of law, may allege exceptions to such opinion, direction or judgment, which exceptions being reduced to writing in a summary mode, and presented to the judge before the end of the term, and found conformable to the truth of the case, shall be allowed and signed by the judge.

clerk of the peace, says to the jury,—“Gentlemen, consider of your verdict.” The jury accordingly consult with each other upon the subject.

Upon the signing of such exceptions, all further proceedings in that court shall be stayed, unless it shall clearly appear to the judge, that such exceptions are frivolous, immaterial, or intended only for delay, and in that case, judgment may be entered, and sentence awarded in such manner as the court shall deem reasonable, notwithstanding the allowance of such exceptions.

If upon the trial upon indictment of any person who shall be convicted in any court of record, any question of law shall arise, which, in the opinion of the judge, shall be so important or doubtful, as to require the opinion of the supreme court, he may, if the defendant desires it or consents thereto, report the case so far as may be necessary to present the question of law arising thereon, and transmit the same with all convenient speed to the chief justice, or one of the associate justices of the supreme court, and thereupon all further proceedings in such court shall be stayed.

Any person who shall file exceptions, or for whose benefit a report shall be made by the judge, as is provided in the preceding sections, may, if the offence be bailable, recognize to the people of this state, in such sum as the court shall order, with sufficient sureties for his appearance at the next term of such court, and to prosecute his exceptions to effect in the supreme court, if exceptions are alleged as aforesaid, and to abide the further judgment or order of the court in the premises, in which such trial was had, and in the mean time to keep the peace and be of good behavior.

If such person shall not so recognize, he shall be committed to prison, to await the decision of the supreme court; and in that case the clerk of the court in which the conviction was had, shall file a certified copy of the record and proceedings in the case, in the supreme court; and such court shall have jurisdiction to hear and determine the questions of law arising on such exceptions or report, and shall certify their determination to the court in which the trial was had, together with directions as to a new trial, or such other proceedings as right and justice shall require; but the proceedings herein prescribed shall not deprive any party of his writ of error, for any error or defect appearing of record.

The court in which the party so convicted and recognized shall be bound to appear as aforesaid, shall have power to continue such recognizance, or require a new recognizance, with further or other sureties until the decision of the supreme court shall be had in the premises, and in default of compliance with any such requisition, such court may commit the party so convicted to close custody. Rev. Sta. of Mich. p. 702, 703, secs. 2-7.

In Vermont, exceptions to the decision of the county court, upon any motion in arrest of judgment made in a prosecution by indictment or information, may be allowed and placed upon the record, if such court, upon consideration of the difficulty and importance of the question, shall so direct, and not otherwise; and the same shall thereupon pass to the supreme court for a final decision; and judgment, sentence and execution shall thereupon be respited and stayed. Sec. 65 of R. S.

If, on inspection of the record in any such cause, the supreme court shall be of opinion that judgment ought to be rendered upon the verdict, such court shall proceed to render judgment and sentence thereon, according to law, and cause execution thereof to be done; otherwise the cause shall be removed to the county court for trial, or judgment of acquittal shall be rendered by the supreme court, as law and justice may require. Sec. 66 of R. S. Rev. Sta. of Vermont, p. 229, secs. 73, 74.

The provisions of the Code of Iowa, are as follows:—On the trial of an indictment exceptions may be taken by the defendant or prosecuting attorney to a decision of the court upon matters of law in any of the following cases:

FIRST—In disallowing a challenge to the pannel of the jury, or to an individual juror for a general disqualification or for actual or implied bias.

SECOND—In admitting or rejecting witnesses or testimony, or in deciding any question of law not a matter of discretion, or in charging or instructing the jury upon the law on the trial of the issue.

## SECTION III.

## THE VERDICT.

*(aa) Retiring of the jury.*

If the jury find any difficulty in coming to a conclusion, and wish to retire to the jury room for the purpose of discussing the matter more freely in private, they may intimate their wish to the clerk of arraigns or clerk of the peace; and the crier of the court will then swear a bailiff to attend them, thus:—"You shall swear that you will keep this jury, without meat, drink, or fire, (candle light only excepted;) you shall suffer none to speak to them; neither shall you speak to them yourself, but only to ask them whether they are agreed upon their verdict: So help you God."

After the jury have thus retired, they may come back for the advice or opinion of the court upon any point; or they may request the judge, chairman, or recorder, to read over to them again any particular part of the evidence; or they may get the court to ask any particular question of the witnesses. All this, however, must be done in open court.[3]

A bill of exceptions must be settled and signed by the judge who tried the cause and filed with the clerk.

The bill of exceptions must be settled at the trial unless the court otherwise direct. If no such direction be given the point of exception must be particularly stated in writing and delivered to the court and shall immediately be corrected or added to until it is made conformable to the truth.

The bill of exceptions must contain so much of the evidence only as is necessary to present the question of law upon which the exceptions were taken. Code of Iowa, p. 420, 421, ch. 179, secs. 3046-9.

[3] After the evidence is closed, and has been summed up by the respective counsel, and the court have charged the jury, they either give their verdict without leaving the box, or in cases of doubt, they retire, in charge of an officer, to deliberate. After they have retired, it is their duty to continue together, until they return into court, without having any communication with any person, either on the subject of the case, or on any other; and it is, accordingly, a part of the oath of the officer, into whose charge they are delivered, that he shall not suffer any person to speak to them, or speak to them himself, unless it be to ask them if they have agreed upon their verdict, without leave of the court. Although, where two jurors, (after the jury had retired to consider of their verdict,) separated from their fellows, and were gone some hours, but returned, and joined in the verdict, there appearing to have been no probability of abuse, the court refused to set aside their verdict. 1 Cowen, 221. So, if a juror leave his seat, for a short time, without the knowledge of the court, or parties, but no testimony is given during his absence, and he holds communication with no one, on the subject of the cause, though this is a contempt of the court, it does not avoid the verdict. 3 Cowen, 355. So, where, after a jury in a justice's court had retired, to deliberate on their verdict, they sent for the justice, and asked him whether they could add any thing to the charge of the plaintiff, and he answered *no*, and left them without any thing further being said, this was held not to be an irregularity, for which the verdict could be set aside. 5 Johns. 111.

(a) *In what cases the jury may be discharged.*

The general rule is, that the jury must be kept together from the time they are first charged with the prisoner or defendant, until they deliver their verdict, unless the prisoner consent to their being [\*172] \*discharged.(a) But cases occur, in which the judge from necessity is obliged to discharge them. If they cannot agree upon

(a) 2 Hawk. c. 47, s. 1.

And, as a general rule, the mere separation of a jury, after they have agreed upon their verdict unless there be some suspicion, (and the slightest is sufficient,) of abuse, will not prejudice the verdict; (2 Cowen, 589; 4 Cowen, 26;) but if they eat, or drink at the expense of the party, for whom they find a verdict, it avoids the verdict; (Co. Lit. 277; 4 B. & Adol. 681;) and where a jury, empanelled to try a prisoner upon an indictment for murder, were allowed to leave the court house during the trial, under the charge of two sworn constables, and having left the court house, two of them separated from their fellows, went to their lodgings, a distance of thirty rods, ate cakes, took some with them on their return, and drank spirituous liquors, though not enough to affect them in the least, and one of them conversed on the subject of the trial, and they returned, heard the trial through, and joined in a verdict of guilty, held that the verdict should be set aside and a new trial granted. 4 Cowen, 26. So, where a juror, after the cause was committed to the jury, drank brandy, though in a trifling quantity, and as he stated, to cure the *diarrhæa*, it was held, that the verdict should be set aside; (7 Cowen, 562;) and in this case, the court observe, "We cannot allow jurors, thus of their own head, to drink spirituous liquor, while engaged in the course of a cause. We are satisfied, that here has been no mischief: but the rule is absolute, and does not meddle with consequences. Nor should exceptions be multiplied. We have set aside verdicts on error, for this cause, even where the parties consented that the jury should drink."

See *Purington v. Humphreys*, 6 Greenl. 379; *People v. Douglass*, 4 Cowen, 26; *Commonwealth v. Roby*, 12 Pick. 496; *Fries' case*, 3 Dall. 515; *Harrison v. Rowan*, 4 Wash. 32.

The court will permit cider to be furnished to the jury. *Commonwealth v. Roby*, *supra*. But not ardent spirits. *Id.*; *Brant v. Fowler*, 7 Cowen, 562; *People v. Douglass*, and *Purington v. Humphreys*, *supra*. Unless by consent. *U. States v. Gibert*, 2 Sumner, 19.

*State v. Sparrow*, 2 Murphey, 487; *Commonwealth v. Roby*, 12 Pick. 517. *Cottle v. Cottle*, 6 Greenl. 140.

A new trial was granted, because the judge, after the court was adjourned, wrote a letter to the jury, respecting the cause which had been committed to them. *Sargeant v. Roberts*, 1 Pick. 336. *Burnham v. Low*, 10 Metcalf, where the case of *Sargeant v. Roberts*, is explained.

See *Benson v. Fish*, 6 Greenl. 141; *Hix v. Drury*, 5 Pick. 302; *Sheaffe v. Gray*, 2 Yeates, 273; *Mitchell's case*, 1 Rogers' Rec. 147. See *Whitney v. Whitman*, 5 Mass. 405; *Purington v. Humphreys*, 6 Greenl. 379; *Tatmadge v. Northop*, 1 Root, 522; *Price v. Warren*, 1 Hen. & Munf. 385; *Hackley v. Hustie*, 3 John. 252; *Lonsdale v. Brown*, 4 Wash. C. C. 148; *Alexander v. Jamieson*, 5 Binney, 238. In *Commonwealth v. Jenkins*, Thacher C. C. 118, the court suffered a volume of the Revised Statutes of Massachusetts to go to the jury, without consulting either party, the same containing the act on which the indictment was founded. In *U. States v. Gibert*, 2 Sumner, 21, the constable who had the jury in charge in a capital case, suffered them to read the newspapers during the trial, having first examined the same, and being sure that they contained nothing in reference to the trial. In *Burnham v. Low*, 10 Metcalf, several plans having gone unto the jury room by consent, the court without consulting either party, at the request of the jury, suffered the constable having them in charge, to hand in to them a pair of dividers. In all of these three last named cases, it was held that the verdict was not vitiated thereby.

their verdict, and they appear not likely to do so, the judge, chairman, or recorder, in the exercise of his discretion, may discharge them, as soon as it becomes a matter of necessity, of which he is to judge; (a) and he usually discharges them, after they have been one night locked up in their jury room, deliberating on their verdict. Where a jury retired to consider of their verdict between one and two in the afternoon, and were locked up all night, and being brought into court the next morning, declared that there was no likelihood of their agreeing, the judge discharged them, the business of the assizes being over, and the commission opened for the next county on the circuit: the court of Queen's Bench held, that he had properly exercised his discretion in doing so. (b) [1]

(a) *R. v. Newton*, 13 Shaw's J. P. 666.

(b) *Ib.*

[1] Lord Coke (1 Inst. 227, b. 3 Inst. 110,) lays it down as a general rule, that a jury sworn, and charged by the court, in cases of life or member, and so in all cases of felony, cannot be discharged by the court, or any other, but they ought to give a verdict. The only authority, however, that he cites in favor of this general position, is a case from 21 Edw. 111, 18, (*Foster*, 32; *Brooke's Corone*, 42,) in which it was adjudged that a person indicted for larceny, and who had pleaded not guilty, and put himself upon his country, should not, afterwards, when the jury was in court, be admitted to become an *approver*; because, by solemnly denying the fact by his plea, he had lost all credit, and ought not to be received as a witness against others. *Foster*, 32, 33; *Brooke's Corone*, 42. This authority, cited by Lord Coke, does not warrant, or add the least sanction to his general rule, and the authority itself was afterwards overruled; and the court used to exercise its discretion, in sometimes refusing, and sometimes admitting persons to the liberty of approving, after the jury were sworn, and evidence in part given. *Foster*, 33, 34. The same doctrine advanced by Coke, was afterwards engrafted by Serjeant Hawkins, (P. C. b. 2, c. 97, s. 1,) and by Mr. Justice Blackstone, (Com. vol. 4, p. 360,) into their elementary treatises on the criminal law; but their opinions rest solely upon the foundation of Lord Coke's authority. There is also a note in Carth. 465, in which it is stated to have been a resolution of all the judges of England, of which Ch. J. Holt was then one, that, in capital cases, a juror cannot be withdrawn, even with the prisoner's consent, nor in any case, civil or criminal, without it. In civil actions, the justices, upon causes, may discharge the jury. Bro. Inq. 39, 47, 68, &c. cited in 1 Tri. per Pais, 259.

With respect to the note in Carthew, it underwent a critical examination, in the case of the two Kinlochs, (*Foster*, 27, 28,) in the year 1746, and it was considered as a palpable mistake of the reporter. The case as corrected by a MS. report of Ch. J. Eyre, was on an indictment for perjury; and on the trial, the prosecutor finding his evidence defective, insisted on withdrawing a juror, and Ch. J. Holt refused it, saying, that in criminal cases, a juror cannot be withdrawn, but by consent; and in capital cases, not even with consent. This case, therefore, goes only in restraint of what was properly deemed an unreasonable and oppressive claim on the part of the prosecutor.

In the case of *The King v. Jeffs*, (Stra. 984,) Lord Hardwicke followed this example of Holt. He refused, in a case of barratry, to permit a juror to be withdrawn, on the motion of the prosecutor, after he had gone into proof, and found himself deficient, because the punishment annexed to that offence might be infamous; but he said it might be, and had been done, in other cases of misdemeanors. This, like the preceding case, controls an improper exercise of the power of the court, but does not deny its existence. It perhaps admits too much; for to allow the prosecutor, in any case, to withdraw a juror, because he finds himself not fully prepared in his proofs, is an unreasonable indulgence, unless it should be made



But this discharge of the jury has no effect on the prisoner; he has no right on that account to be discharged, but must, if in custody, re-

to appear, that some part of the testimony was wanting, through the contrivance or agency of the defendant.

It seems, then, that the position, generally denying the power of the court to discharge a jury sworn and charged in a criminal case, has originated (probably without further examination or inquiry) from a *dictum*, to be found in the Institutes of Lord Coke, and that this *dictum* rests upon his single authority, without the sanction of any judicial decision. None of the decisions go any further, than to prescribe a rule to the discretion of the court in particular cases. On the contrary, there are many authorities admitting and establishing the power of the court to discharge the jury, even in capital cases.

In the case of *Ferrara*, cited in Sir T. Raym. 84, which was on an information for forgery, it is said to have been held by all the justices, that after a jury was sworn and charged in a capital case, they may be dismissed, or a juror withdrawn, though this was said to be contrary to common tradition. Again, on a trial for larceny, reported in 1 Vent. (p. 69,) after the jury were sworn, as the witnesses did not appear, and were suspected to have been tampered with by the defendant, the jury were discharged, and the trial put off; and Sir John Strange produced the record of a case of *Hill*, 8, s. 7, (Foster, 271,) where, on an indictment for murder, the jury delivered a verdict handed to them by the prisoner, and they were in consequence of it discharged and committed, and the defendant tried again. In the spirit of these decisions, Sir John Holt (Salk. 646,) admitted that even a new trial might be granted in criminal cases, if the verdict was obtained by fraud or trick; and Sir M. Hale, (P. C. vol. 2, p. 295,) in direct opposition to Coke, says, that the practice had, in his time, become ordinary for the court, after the jury were sworn and charged, and evidence given, if it appeared that some of the testimony was kept back, or that there might be a fuller discovery, and the offence as notorious as murder or burglary, to discharge the jury, and remit the prisoner for another trial.

In the case of the two *Kinlocks*, (Foster, 22 to 40,) to which I have already alluded, the single point decided was, that the court might, in a capital case, on motion of the prisoner's counsel, and at his request, and with the consent of the attorney-general, before evidence given, discharge the jury, to let in a new defence, which the prisoner could not otherwise have; but the general question, touching the power of the court to discharge jurors, underwent a full and solemn discussion, and all the cases that I have mentioned, were cited and examined. Ten of the English judges gave their opinions *seriatim*, and according to the elaborate and able argument of Sir M. Foster, which he has preserved entire, and which we may consider as the opinion of all the judges, except one, as all but one agreed in the same principles and result, the court came to this decision; that the general rule, as laid down by Lord Coke, had no authority to warrant it, and could not be universally binding. That the question was not capable of being determined by any general rule, for that none could govern the discretion of the court, in all possible cases and circumstances, and that the case in *Carthew* was of little or no weight, and must have arisen from a mistake in the reporter. Sir M. Foster stated several exceptions to the general rule of Coke, and said that many more might be mentioned. Among other instances, he admitted the right of the court to discharge the jury after evidence given, because the indictment did not suit the case, and had been mistaken by the prosecutor; and this power is also recognized in several of the books. Comb. 401; *Kelynge*, 26, 52. He further admitted the right of the court, in the cases stated from *Ventris* and *Hale*, where practices had been used to keep the witnesses out of the way; though he reprobated, and very justly, the extent to which it had been carried, in other instances, where the evidence was not sufficient to convict. St. Tr. vol. 2, p. 710, 827.

The instances in which the court has exercised its discretion in discharging the jury, have multiplied since the time of Foster, and have now become very considerable in point of number and importance. If a prisoner be found to be insane, (1 Hale, 35,) or in a fit, (*Leach*, 443,) or be taken in labor, (Foster, 76,) or if a juror escape from his fellows and go off, (2

main imprisoned until another jury can be charged with him,(a) unless in the meantime he be bailed.

(a) *R. v. Newton, supra.*

Hale, 296,) or be taken in a fit, or be intoxicated; in all these cases it has been ruled, that the court may discharge the jury, and remand the prisoner for another trial.

The general rule, as laid down by Coke, and most of the cases on the subject relate to trials for capital offences, and even there we have seen how far the rule has been justly questioned, if not wholly done away; and the many exceptions which are conceded to exist against its universality. But the case now before the court is a case of misdemeanor only, and the precise question is, whether, in such case, it does not rest in the discretion of the court to discharge the jury, whenever they deem it requisite to a just and impartial trial. It is worthy of notice, that there is no general rule, nor any adjudged case, denying this power in the court, in the case of a misdemeanor. The resolution of Holt, as it appears in its correct and authentic state in Foster, and the decision of Lord Hardwicke, only go to restrict the undue exercise of this power, on trials for misdemeanors, by denying to the prosecutor the liberty of having a juror withdrawn, because he happens, after entering into his testimony, to find himself unprepared through his own default; and even this extraordinary indulgence is granted, according to Hardwicke, if the punishment annexed to the offence be not infamous.

If the question in capital cases be doubtful, there is nothing to render it so in cases of misdemeanor. The power of the court in those cases is analogous to their power in civil cases; and they seem, in many respects, to possess the same control over the verdict, in exercising the power of awarding new trials, (6 Term Rep. 688; T. Jones, 163; 1 Lev. 9; 21 Vin. 478; Loft. 147; 4 Bl. Com. 355; Ridg. 51; 1 Lev. 9,) and taking a privy verdict; (T. Raym. 193;) and the party is also entitled to a writ of error, as a matter of right. Laws of New York, vol. 1, 184.

I conclude, then, that as no general rule or decision that I have met with, exists to the contrary, in a case of misdemeanor; and as the rule, even in capital cases, abounds with exceptions, and is even questioned, if not denied by the most respectable authority, that of nine of the judges of England, it must, from the reason and necessity of the thing, belong to the court, on trials for misdemeanors, to discharge the jury whenever the circumstances of the case render such interference essential to the furtherance of justice. It is not for me here to say, whether the same power exists in the same degree, (for to a certain degree it must inevitably exist,) on trials for capital crimes, because such a case is not the one before the court; and I chose to confine my opinion strictly to the facts before me.

With respect to misdemeanors, we may, with perfect safety and propriety, adopt the language of Sir M. Foster, (p. 29,) which he, however, applies even to capital crimes; "that it is impossible to fix upon any single rule which can be made to govern the infinite variety of cases that may come under the general question touching the power of the court to discharge juries sworn and charged in criminal cases." If the court are satisfied that the jury have made long and unavailing efforts to agree; that they are so far exhausted, as to be incapable of further discussion and deliberation, this becomes a case of necessity, and requires an interference. All the authorities admit, that when any juror becomes mentally disabled, by sickness or intoxication, it is proper to discharge the jury; and whether the mental inability be produced by sickness, fatigue, or incurable prejudice, the application of the principle must be the same. So it is admitted to be proper to discharge the jury when there is good reason to conclude the witnesses are kept away, or the jury tampered with, by means of the parties. Every question of this kind must rest with the court, under all the particular or peculiar circumstances of the case. There is no alternative; either the court must determine when it is requisite to discharge, or the rule must be inflexible, that after the jury are once sworn and charged, no other jury can, in any event, be sworn and charged in the same cause. The moment cases of necessity are admitted to form exceptions, that moment a door is open-

There are other cases, also, where from necessity the judge is obliged to discharge the jury. Where, during a trial for murder, one of the

ed to the discretion of the court, to judge of that necessity, and to determine what combination of circumstances will create one. See *The People v. Olcott*, 2 Johnson's Cases, 300.

In Pennsylvania, (*Commonwealth v. Cook*, 6 Serg. & Rawl. 577,) it was decided, after great consideration, and a review of all the cases, ancient and modern, that a jury could not be discharged because they were unable to agree. And, in North Carolina, the doctrine has been carried to the extent of declaring, that when the jury did not agree within the time during which the court was authorized to continue, that the omission to return a verdict, was equivalent to an acquittal, and that the prisoner was entitled to be discharged, as he could never be legally tried by another jury. *Ex parte Spear*, 1 Dever. 491; *The State v. Garriques*, 2 Hayw. 241.

In the case of *The People v. Goodwin*, (18 John. Rep. 187,) the court, per Spencer, Ch. J., concluded, upon full consideration, that "although the power of discharging a jury, is a delicate and highly important trust, yet, that it does exist in cases of extreme and absolute necessity, and that it may be exercised without operating as an acquittal of the defendant; that it extends as well to felonies as misdemeanors; and that it exists and may be discreetly exercised in cases where the jury, from the length of time, they have been considering a cause and their inability to agree may be fairly presumed, as never likely to agree, unless compelled so to do, from the pressing calls of famine or bodily exhaustion."

In Alabama, in the case of *Ned v. The State*, (7 Porter Rep. 188,) the following points were made: 1st. That courts have not, in capital cases, a discretionary authority to discharge a jury after evidence given. 2d. That a jury is, *ipso facto*, discharged by the termination of the authority of the court to which it is attached. 3d. That a court does possess the power to discharge, in any case of pressing necessity, and should exercise it whenever such a case is made to appear. 4th. That sudden illness of a prisoner, or a juror, so that the trial cannot proceed, are ascertained cases of necessity, and that many others exist, which can only be defined when particular cases arise. 5th. That a court does not possess the power, in a capital case, to discharge a jury because it cannot or will not agree.

In *The State v. Ephraim*, (2 Dev. & Batt. Rep. 162,) it was held that a jury, charged in a capital case cannot be discharged before returning the verdict at the discretion of the court: they cannot be discharged without the prisoner's consent, but for evident urgent overruling necessity, arising from some matter occurring during the trial, which was beyond human foresight and control; and, generally speaking, such necessity must be set forth in the record.

In an early case in Tennessee (*State v. Waterhouse*, Martin & Yerger, Rep. 278,) it was held that it was discretionary with the court, even in capital cases, to discharge the jury. But in a later case (*Mahala v. The State*, 10 Yerger, 533,) where the jury were empaneled on Thursday evening, at 2 o'clock; they came in once or twice during the same evening, and declared that they could not agree; they were, however, kept together all night by the court, and, at 9 o'clock the next morning, upon their declaring they could not agree, the court discharged them. The term was not concluded until the next day, (Saturday.) It was held, that this was not such a case of necessity as authorized the court to discharge them. It was out of the power of the court, it was said, to discharge them without consent, except in case of sickness, insanity, or exhaustion, among themselves.

In Pennsylvania, North Carolina, Tennessee, and Alabama, it seems to have been held that where any separation of the jury, except by consent, or in case of such violent necessity, as may be considered the act of God, is held a bar to all subsequent proceedings. On the other hand, that the discharge of the jury is a matter of pure discretion for the court, and that when in the exercise of a sound discretion, it takes place, it presents no impediment to a second trial has been held by the supreme court of the United States, by Washington, J., Story, J., and M'Lean, J., sitting in their several circuits, and by the courts of Massachusetts, New-York, and Mississippi.

*See also the case of The People v. Goodwin, 18 John. Rep. 187.*

jury was seized with a fit, and was carried out of the court in a state of insensibility: and after the court had waited some time, it was deposed on oath that he was not in a fit state to return immediately: Lawrence, J., discharged the jury, and ordered another jury (consisting of the remaining eleven jurors, and a twelfth from the jury panel) to be sworn; and the prisoner was thereupon tried, convicted, and executed.(a) The same also occurred before Wood, B., in 1812, upon the trial of one Edwards, for maliciously shooting, and the point being reserved for the opinions of the judges, they were unanimously of opinion that the judge had acted rightly.(b) So where a defendant, in the case of a misdemeanor, became so ill, that he could not remain at the bar, the judge discharged the jury; and afterwards during the same assizes, upon his recovery, another jury were charged with him, and the whole of the proceedings were commenced *de novo*.(c) So, where on a trial for manslaughter, it was discovered, after the swearing of the jury, that the surgeon who had examined the body was absent: upon the prisoner requesting that the jury should be discharged, they were accordingly discharged, and the prisoner was tried on the next day by another jury.(d) And upon a trial for high treason, where after the jury was sworn, it was intimated by one of the judges, that the defence the prisoners intended to set up, could not be given in evidence under the general issue that was \*pleaded, the jury, with the consent of [173] the attorney-general, was discharged, and the prisoners allowed to plead *de novo*, specially; and they were afterwards tried by another jury.(e)[1]

(a) *R. v. Scalbert*, 2 Leach, 620.

(d) *R. v. Stokes*, 6 Car. & P. 151.

(b) *R. v. Edwards*, R. & Ry. 224, 3 Camp. 207, 4 Taunt. 309.

(e) *R. v. Alexander & Charles Kinloch*, Fost. 16, 1 Wils. 157.

(c) *R. v. Streck*, 2 Car. & P. 413.

[1] In cases of *absolute necessity*, the jury may be discharged. *Commonwealth v. Cook*, 6 Serg. & Rawle, 577; *Commonwealth v. Clew*, 3 Rawle, 498; in re Robert Spear, 1 Devereux, 491; *State v. McKee*, 1 Bailey, 154. See 2 Russell, 553, n. (A.); 1 Cowen, 225, 226, in notes. So where it is necessary for the purposes of justice. *United States v. Cooledge*, 2 Gall. 364; *United States v. Perez*, 9 Wheat. 579.

Where the term of the court expired, and the jury separated after they were charged with the trial, and before they returned a verdict, it was held that the prisoner could not be tried again. In re Robert Spear, 1 Devereux, 491. See *State v. Garrigues* 1 Hayw. 241. But when the jury in the trial of a capital case cannot agree upon a verdict, the court have discretionary power to discharge them, and the prisoner may be put on his trial before another jury. *Commonwealth v. Purchase*, 2 Pick. (2d ed.) 521, and notes to that case; *Commonwealth v. Knapp*, 9 Pick. 515; *People v. Goodwin*, 18 Johns. 200; *State v. McKee*, 1 Bailey, 651; *People v. Green*, 13 Wendell. 55. But see *Commonwealth v. Cook*, 6 Serg. & Rawle, 577; *Commonwealth v. Clew*, 3 Rawle, 498, *contra*. *Tennessee*.—The cases of necessity which will authorize the court to discharge a jury, are of three classes; 1st, where the court are compelled to adjourn before the jury agree; 2d, where the prisoner by his own conduct, places it out of the power of the jury to investigate his case correctly, or where, by the vis-

On the other hand, where a person is indicted for a misdemeanor, and upon the evidence it turns out to be a felony, the judge may discharge the jury, and order the party to be indicted for the felony;(a) or the jury may find him guilty of the misdemeanor.(b) And lastly, where an indictment for a misdemeanor was clearly bad upon the face of it, Abbott, C. J., discharged the jury from giving any verdict upon it.(c)

(a) 14 & 15 Vict. c. 100, s. 12.

(b) *Id.*

(c) *R. v. Deacon*, Ry. & M. N. P. C. 27. *R. v. Hollis*, 2 Stark. 536.

itation of Providence, he is prevented from attending to his trial; and 3d, where there is no possibility for the jury to agree and return a verdict. *Mahala v. State*, 10 Yerger, 232.

The discharge of a jury, in a criminal case, without agreeing on a verdict, rests in the sound discretion of the court in which the trial is had; and the exercise of such discretion will not be reversed on writ of error. So held when the jury were discharged after being out only 30 minutes. 13 Wend. 55. If a jurymen be taken ill, so as to be incapable of attending through the trial, the jury may be discharged and the prisoner tried *de novo*, or another jurymen may be added to the eleven; but in that case the prisoner should be offered his challenges over again, as to the eleven, and the eleven should be sworn *de novo*. *Russ. & Ry. C. C.* 224; 4 Taunt. 309. So if during the trial the prisoner be taken so ill that he is incapable of remaining at the bar, the judge may discharge the jury, and on the prisoner's recovery another jury may be returned, and the proceedings commenced *de novo*. The court, on a trial for a misdemeanor, doubted whether in such a case the consent of counsel was sufficient to justify the proceeding with the trial in the absence of the defendant. *Roscoe's Cr. Ev.* 177; 2 Car. & P. 432.

In cases not capital, where there is no prospect of agreement, a juror may be withdrawn without the defendant's consent. 9 Mass. R. 494; 12 *id.* 316; 2 John. Cas. 301, 275; 2 Caines' Rep. 100. And in capital cases, the court may discharge a jury in case of necessity; (4 Wash. C. C. Rep. 402; 6 Serg. & Rawle, 580;) but mere inability to agree, is not such a case, nor does it arise from the illness of some of the jury, if such illness can be removed by permitting refreshments, and the court, against the consent and prayer of the prisoner, refuses such refreshments, unless a majority of the jury agree to receive them. If, under such circumstances the jury are discharged, the prisoner may plead it in bar to another trial. 3 Rawle, 498.

If it should appear in the course of a trial that the prisoner is insane, the judge may order the jury to be discharged, that he may be tried after the recovery of his understanding. 1 Hale's P. C. 34; *Russ. & Ry. C. C.* 431, (n). In this state, it is not a matter of discretion with the court, whether it will try a person who is insane, or not; for by statute, no insane person can be tried or punished for any crime or offence, while he continues in that state. 2 R. S. 697, § 2.

When the evidence on both sides is closed, or after any evidence has been given, the jury can not be discharged, unless in case of evident necessity, (as in the cases above mentioned,) till they have given in their verdict, but are to consider of it and deliver it in open court. But the court may adjourn, while the jury are withdrawn to confer, and may return to receive the verdict in open court. 4 Black. Com. 360; *Roscoe's Cr. Ev.* 177. And when a criminal trial runs to such length that it can not be concluded in one day, the court, by its own authority, may adjourn till next morning. But the jury must be kept together, (at least in a capital case,) so that they may have no communication but with each other. 6 T. R. 527; *Steph. Sum. Cr. L.* 313. It is a general rule, that upon a criminal trial, there can be no separation of the jury after the evidence is entered upon, and before a verdict is given. *Roscoe's Cr. E.* 178; 1 Hayw. 241.

(b) *Delivery of the verdict.*

If the jury retire, then, upon their afterwards returning into court, the clerk of arraigns at the assizes, or the clerk of the peace at sessions addresses them thus: "Gentlemen of the jury, answer to your names;" he then calls over their names, and the jurors respectively answer. They should all be in court at the time the verdict is given.

As soon as the jury are ready to deliver their verdict, the clerk of arraigns or clerk of the peace addresses them thus: "Gentlemen, have you agreed upon your verdict? Who shall say for you? Your foreman. How say you, do you find the prisoner [*or defendant*] A. B. guilty of the [*felony*] whereof he stands indicted, or not guilty? Do you find the prisoner C. D. guilty of the [*felony*] whereof he stands indicted, or not guilty."

The jurors answer "guilty," or "not guilty;" or they may say, "We find him guilty of stealing, but not in the dwelling house to the value of five pounds," or "not guilty of burglary, but guilty of the stealing," or the like. The verdict must be delivered openly in court.(a)[2]

(c) *For a less offence than is charged.*

There are several cases where a greater offence includes a less; and upon an indictment for the greater offence, the jury may find the prisoner guilty of the less. As for instance,—

Upon an indictment for murder, the jury may find the prisoner not guilty of the murder, but guilty of manslaughter.(a)

(a) 2 Hawk. c. 47, s. 2; Co. Lit. 227; 3 Inst. 110. (b) 2 Hawk. c. 47, ss. 4, 5.

[2] The verdict in all cases of felony and treason, must be delivered in open court, in the presence of the defendant. 1 Chit. Cr. Law, 636; 1 Wend. Rep. 91; 1 Term Rep. 434. But in all trials for inferior misdemeanors, or where no corporal punishment is to be inflicted, a privy verdict may be given, and there is no occasion for the presence of the defendant. 1b. And it seems that in England, by consent of parties, it may be delivered at the house of the judge, even where it is situated beyond the limits of the county in which the trial was had, 5 Burr. 2667. But no such rule exists here.

Upon the trial of an indictment, the concurrence of the whole jury is necessary to a conviction, and the jury may be polled to ascertain the fact of concurrence. *State v. Harden*, 1 Bailey, 3.

The practice of permitting the jury to be polled, is not uniform through the states. That they may be polled, see the following cases. *State v. Allen*, 1 M'Cord, 525; *Martin v. Maverick*, id. 24; *Nomaque v. People*, 1 Breese, 111; *People v. Perkins*, 1 Wendell, 91; *Fox v. Smith*, 3 Cowen, 23; *Jackson v. Hawks*, 2 Wendell, 619; *State v. Harden*, 1 Bailey, 3; *Sargent v. State*, 11 Ohio, 472.

The court does not permit the jury to be polled in Massachusetts, either in civil or criminal cases. *Ropps v. Barker*, 4 Pick. 239; *Commonwealth v. Roby*, 12 Pick. 496. So in Maine, *Fellowes's case*, 5 Greenl. 333.

*Jury may be polled in criminal cases in California & viz. in 1869*

Upon an indictment for burglary and larceny, the jury may find the prisoner not guilty of the burglary, but guilty of the larceny.(a)

Upon an indictment for breaking a house, shop, or warehouse, and stealing therein, the jury may find the prisoner not guilty of the breaking and entering, but guilty of the simple larceny, or (in the case of a dwelling-house) of stealing in the dwelling-house to the value of 5*l*.

[\*174] \*Upon an indictment for stealing from a dwelling-house to the value of 5*l*, or some person therein being put in fear, the jury may find the prisoner guilty of the simple larceny.(b)

Upon an indictment for robbery, the jury may find the prisoner not guilty of the robbery, but guilty of the stealing from the person,(c) or guilty of an assault with an intent to rob.(d)

Upon an indictment for any felony or misdemeanor, the jury may find the prisoner not guilty of the felony or misdemeanor, but guilty of an attempt to commit it.(e) Formerly, upon all indictments on stat. 1. Vict. c. 85, for stabbing, cutting, wounding, &c., or for any felony which included an assault, the defendant might be acquitted of the felony, and found guilty of the assault;(g) but that section is now repealed; indeed it was no longer necessary, when the more general enactment above-mentioned was made, that upon an indictment for any felony, &c., the defendant may be found guilty of an attempt to commit it.[1]

(d) *For another offence than that charged.*

Upon an indictment for embezzlement, the jury may find the pris-

(a) 2 Hawk. c. 47, s. 11.

(d) 14 & 15 Vict. c. 100, s. 11.

(b) See 2 Hawk. c. 47, s. 12.

(e) 14 & 15 Vict. c. 100, s. 9.

(c) *R. v. Walls et al.*, 2 Car. & K. 214.

(g) 1 Vict. c. 85, s. 11.

[1] The New York Revised Statutes provide that upon an indictment for any offence consisting of different degrees, the jury may find the accused not guilty of the offence in the degree charged in the indictment and may find such accused person guilty of any degree of such offence inferior to that charged in the indictment, or of an attempt to commit such offence. 2 N. Y. Rev. Sts. 4th ed. p. 886, sec. 31.

In Massachusetts it is enacted, that whenever any person indicted for a felony shall on the trial be acquitted by verdict of part of the offence charged in the indictment and convicted of the residue thereof, such verdict may be received and recorded by the court; and thereupon the person indicted shall be adjudged guilty of the offence, if any, which shall appear to the court to be substantially charged by the residue of such indictment, and shall be sentenced and punished accordingly. Rev. Stat. ch. 137, § 11. Under this section of the statute of Massachusetts, it has been decided, that the prisoner under an indictment for a rape committed upon his own daughter, may be acquitted of the rape and convicted of incest. *Commonwealth v. Goodhue*, 2 Metcalf, 193.

A defendant indicted for assault and battery with intent to murder, may be convicted of a simple assault and battery. Greater offences include the lesser of a kindred character. *State v. Stedman*, 7 Porter, 495. See *Stewart v. State*, 5 Ohio, 242; *State v. Gaffney*, Rice, 431; *Commonwealth v. Drum*, 19 Pick. 479; *Same v. Hope*, 22 Pick. 1, 7; *Same v. Griffin*, 21 Pick. 523; *People v. Jackson*, 3 Hill, 92.

71 Same in *Salisbury* 10 Dig. 414 1865

ner not guilty of the embezzlement, but guilty of simple larceny, or guilty of larceny as a clerk or servant.(a)

Upon an indictment for larceny, the jury may find the prisoner not guilty of the larceny, but guilty of embezzlement.(b) 2]

Upon an indictment for a larceny at one time, the jury may find the prisoner guilty generally, although the prosecutor gave evidence of three different takings of parcels of the goods within six months.(c)

Upon an indictment against two or more for jointly receiving stolen goods, the jury may find all or any of them guilty, who shall be proved to have separately received any portion of the goods, knowing the same to have been stolen.(d)

Upon an indictment against a woman for murder of her child, the jury may find her not guilty of the murder, but guilty of concealing its birth.(e)

(e) *For the offence charged, though another proved.*

Upon an indictment for obtaining money by false pretences, the jury may find the prisoner not guilty, although the offence upon the evidence turn out to be larceny.(g) But if he be indicted for a larceny, the jury cannot find him guilty, if the offence upon the evidence turn out to be an obtaining of money or goods by false pretences.

\*Upon an indictment for a misdemeanor, the jury may find [\*175] the defendant guilty, though the evidence prove a felony.(h) The court, however, may in such a case discharge the jury, and order the defendant to be indicted for the felony.(i)

Upon an indictment against a party as principal in a felony or misdemeanor, the jury may find him guilty, although the evidence prove that he was not present at the time the offence was committed, but merely incited, procured, or advised another party to commit it.(k)

(a) 14 & 15 Vict. c. 100, s. 13.

(g) 7 & 8 G. 4, c. 29, s. 53.

(b) *Ib.*

(h) 14 & 15 Vict. c. 100, s. 12. See *ante*,

(c) See 14 & 15 Vict. c. 100, s. 17. See *ante*, p. 95.

(i) *Id.*

(d) 14 & 15 Vict. c. 100, s. 14.

(k) See *ante*, pp. 16, 96.

(e) 9 G. 4, c. 31, s. 14.

[2] In Massachusetts, in *Com. v. Simpson*, (9 Metc. Rep. 138,) the court were of opinion that the two offences of larceny and embezzlement were so far distinct in their character, that under an indictment charging merely a larceny, evidence of embezzlement was not sufficient to authorize a conviction; and that in cases of embezzlement, the proper mode was to allege sufficient matter in the indictment to apprise the defendant that the charge was for embezzlement. The statute of Massachusetts, (R. S. c. 126, s. 30,) in terms says that the person doing certain acts, "shall be deemed, by so doing, to have committed the crime of simple larceny." The court, in the foregoing case, say: "Treating this statute as one defining the offence of larceny, and embracing within it a larger range of offences, to be hereafter known as larcenies, we do not feel authorized to give so broad a construction to this statute, as would entirely merge the crime of embezzlement in that of larceny."



Upon an indictment against a man as principal in the first degree, the jury may find him guilty, though the evidence prove him to have been a principal in the second degree; and upon an indictment against a man as principal in the second degree, the jury may find him guilty, although the evidence prove him to have been a principal in the first degree.<sup>(a)</sup>

Where two were indicted for murder, A. in the first count being indicted as principal in the first degree, and B. as being present aiding and abetting, and in the second count B. was indicted as principal in the first degree, and A. with being present aiding and abetting; and the jury found them guilty, but said that they were not satisfied as to which of them actually committed the murder: the judges (Maule, J., *dis.*) held that the jury were not bound to find the defendants guilty on one of the counts only, but might find them guilty on both.<sup>(b)</sup>

(f) *On several counts.*

By stat. 11 & 12 Vict. c. 46, s. 3, which enables a prosecutor to include a count for stealing money or goods, and a count for receiving the same knowing them to have been stolen, in the same indictment against the same person or persons,—it is enacted, that “where any such indictment shall be preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury, who shall try the same, to find a verdict of guilty, either of stealing the property or of receiving it knowing it to have been stolen; and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same, to find all or any of the said persons guilty, either of stealing the property or of receiving it knowing it to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving it knowing it to have been stolen.”[1]

(a) *Ante*, p. 13.

(b) *R. v. Downing et al.*, 1 Den. CC. 52.

[1] See *Harman v. Com.*, 12 Serg. & Rawle, 69; *Com. v. Gillespie*, 7 Serg. & Rawle, 476; *U. S. v. Peterson*, 1 W. & M. 305; *People v. Costello*, 1 Denio, 83; *Baker v. State*, 4 Pike's (Ark.) 56; *People v. Rynders*, 12 Wend. 425; *Edge v. Com.*, 7 Barr. 275; *Coulter v. Com.*, 5 Met. 532; *State v. Kirby*, 7 Miss. 317; *Com. v. Manson*, 2 Ashm. 31; *Res. v. Hevice*, 2 Yeates, 114; *Carlton v. Com.*, 5 Metc. 532; *Kane v. People*, 9 Wend. 203; *Cory v. State*, 3 Porter, 186; *State v. Anderson*, 1 Strobh. 445; *State v. Thompson*, 2 Strobh. 12; *Buck v. State*, 2 Harr. & John. 426; *State v. Montague*, 2 M'Cord, 287; *State v. Gaffney*, Rice's Rep. 531; *State v. Nelson*, 29 Maine, 324.

The introduction of several counts which merely describe the same transaction in different ways, cannot, in general, be made the subject of objection. Nor will the defect of some of the counts affect the validity of the remainder, for judgment may be given against the defendant upon those which are valid.

In other cases, where there are two or more counts in the indictment if the prosecutor be not put to his election to say on which he will proceed, the jury may convict on any one of them, or on all. If, however, they find a general verdict of guilty on all, and one count turns out to be bad,—although \*this cannot be made [\*176] matter of objection in arrest of judgment,(a) it will be bad on error.(b) In order to avoid this, it is usual to have a separate judgment on each count, and as all will take effect at the same time, the punishments will not be cumulative, and if one of the counts be bad, it will not affect the others. Where in one count A. B. was indicted for the murder of J. N. by a blow of a stick, and C. D. and E. F. indicted as being present aiding and abetting, and in a second count C. D. was indicted for the murder by throwing a stone, and A. B. and E. F. as being present aiding and abetting, and a general verdict given: this was objected to, as it left it uncertain whether the stick or stone caused the death; but the judges held it immaterial, the mode of death in both counts being substantially the same.(c)[1]

(a) *Grant v. Astle*, 2 Doug. 730. *Ayrey et al. v. Fearnside et al.*, 4 Mees. & W. 168. *Lewin v. Edwards*, 1 Dowl. N. C. 639. *Chadwick v. Trower et al.*, 8 Law J. 286 ex.

(b) *O'Connell's case*, Ho. Lords, 1844.  
(c) *R. v. O'Brien et al.*, 1 Den. CC. 9. See also *R. v. Downing et al.*, *supra*.

[1] The jury may acquit the defendant of a part, and find him guilty as to the residue. Thus, they may convict him upon one count of the indictment, and acquit him of the charge contained in another; or upon one part of a count capable of division, and not guilty of the other part, as on a count for composing and publishing a libel, the defendant may be found guilty of publishing only. 1 Chit. Cr. L. 637. But if, upon an indictment containing two distinct charges of different offences, punishable differently, a general verdict of guilty is rendered, a new trial will be granted. 2 McCord, 257. Yet, in general, where, from the evidence, it appears that the defendant has not been guilty to the extent of the charge specified, he may be found guilty as far as the evidence warrants, and be acquitted as to the residue; as where he is charged with engrossing one thousand quarters of wheat, and the evidence amounts to but seven hundred. 1 Chit. Cr. L. 637; 2 Camp. 583.

And where the accusation includes an offence of inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the less atrocious. Thus, upon an indictment for burglariously stealing, the prisoner may be convicted of the theft, and acquitted of the nocturnal entry; upon an indictment for murder, he may be convicted of manslaughter; on an indictment for stealing privately from a person, he may be found guilty of larceny only; on an indictment for grand, the offence may be reduced to petit larceny; robbery may be softened into felonious theft; and on an indictment founded on a statute, the defendant may be found guilty at common law. 1 Chit. Cr. L. 638, 639.

So, under the revised statutes, on an indictment for an offence consisting of different degrees, the jury may find the accused not guilty of the offence in the degree charged in the indictment, and guilty of such offence in any inferior degree, or of an attempt to commit such offence. 2 R. S. 702, s. 27.

This provision of the statute has not affected the common law rule respecting the right to convict of an inferior offence, on an indictment for a superior one. *The People v. Jackson*, 3 Hill, 92. Hence, it has been held, that under an indictment for producing an abortion of a quick child, which, by the revised statutes, is a felony, the prisoner may be convicted,

*(g) Against some of several.*

If several be jointly indicted for an offence, which in its nature may be committed by one person or several, the indictment is considered in law as a several indictment against each, and one may be convicted on it and the rest acquitted.(a)[2]

(b) 2 Hawk. c. 47, s. 8; *R. v. Tuggart*, 1 Car. & P. 201.

though it turns out that the child was not quick, and the offence was therefore a mere misdemeanour. *Ib.*

If there are three counts in an indictment, and the jury convict the prisoner on the second, finding nothing as to the first and third, the verdict should not be set aside on that account, but the court should enter a verdict of acquittal on those two counts, although a verdict of conviction may be entered on the second. 2 Vir. Cas. 235.

Each count in an indictment is a distinct charge, and a general verdict will be sustained, although the counts are inconsistent. 5 Wheat. 184. It is not material of what part of the charge the defendant is acquitted, if that part of which he is found guilty constitutes a specific indictable offence. *Durham v. State*, 1 Blackf. 33.

Where, upon an indictment containing three counts, the jury find the defendant not guilty on the first, and cannot agree on the others, the court may refuse to receive the verdict and have it recorded. *Harley v. State*, 6 Ham. 399.

[2] Although several are frequently included in the same indictment, yet, as the charge is distinct against each of them, the jury may on the evidence, acquit some of them and find the others guilty. 2 St. Tr. 526; 3 T. R. 105. So where the jury have agreed as to one or more of several prisoners, their verdict, as to them, ought to be received, though they cannot agree as to the rest, and are from necessity discharged by the court. 6 Serg. & R. 577; 12 Mass. Rep. 313. Even where they are all charged with the same offence, some of them may be acquitted and others convicted. 3 T. R. 105.

So, where two defendants are charged, one as principal in the first and the other in the second degree, as being present, aiding and abetting, the latter may be found guilty, though the former is acquitted. 1 Leach, 360. And they may be convicted of different degrees of crime arising out of the same circumstances; as one of them of murder, and the other of petit treason, on any indictment against both for the latter, (Fost. 104;) but it has been considered that one of several defendants cannot be found guilty of burglary and the others of larceny, when all are accused of the former. 1 Chit. Cr. L. 640.

And where the charge is of such a nature that one, as in case of conspiracy, or two, in that of riot, cannot be guilty without the union of others, if all the rest are acquitted, and the indictment does not charge the offence to have been perpetrated in company with any persons unknown, the verdict of guilty would be altogether repugnant and void. *Ib.*: 2 Hawk. c. 47, s. 8: Poph. 202. But where one is indicted for a conspiracy, or two for a riot, with others, the conviction will be valid, though the others never come in to be tried, or die before the time of trial. *Ib.* 641.

If an accessory be indicted at the same time with the principal, if the latter be acquitted, the former must also be acquitted, since his guilt is entirely inconsistent with the innocence of him who is charged as principal. Stark. 332.

Where a count in an indictment contains only one charge against several defendants, the jury cannot find any one of the defendants guilty of more than one charge. Where, therefore, a count charged several defendants with conspiracy together to do several illegal acts, and the jury found one of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts, such finding is bad, as amounting to a finding that one defendant was guilty of two conspiracies, though the count charged only one. *O'Connell v. The Queen*, 11 Clark & Fin. 155; 9 Jur. 25.

But there are certain offences which cannot be committed by less than a certain number of persons: for instance a riot, which cannot be committed by less than three persons; and a conspiracy, not by less than two. And therefore if several be indicted for a riot, and the jury acquit all but two, they must acquit those two also, unless it be charged in the indictment and proved, that they committed the riot together with some other person not tried upon that indictment.(a)[3] So, if upon an indictment for a conspiracy, the jury acquit all the defendants but one, they must acquit that one also, however criminal they may think him, unless it be charged in the indictment and proved, that he conspired with some other person, not tried upon that indictment.(b) So, if a principal, and accessory either before or after the fact, be tried together upon the same indictment, if the jury acquit the principal, they must acquit the accessory also; but they may acquit the accessory, and find the principal guilty.

(h) *Special verdict.*

The jury may find a special verdict in criminal cases, as well as in civil actions; they may do so even in capital cases.(c) But in modern practice this is very unusual.[4]

(a) 2 Hawk. c. 47, s. 8.

(c) 2 Hawk. c. 47, ss. 3, 9.

(b) *Ib.*

Upon a count in an indictment against eight defendants, charging one conspiracy to effect certain objects, a finding that three of the defendants are guilty, generally; that four of them are guilty of conspiring to effect some, and not guilty as to the residue of the objects, is bad in law, and repugnant; inasmuch as the finding that the three were guilty, was a finding that they were guilty of conspiring with the other five to effect all the objects of the conspiracy; whereas, by the same finding, it appeared that the other five were guilty of conspiring to effect only some of those objects. *Ib.*

[3] In Illinois, if two or more persons being together do an unlawful act, with force and violence against the person or persons of another, or a lawful act in a violent or tumultuous manner, this constitutes a riot. *Dougherty v. The People*, 4 Scam. Rep. 179. Two or more persons should actually be engaged in some physical act of violence, to constitute a riot in Iowa. *Scott v. U. S.*, 1 Morris. 142.

In Tennessee, the act of 1833 provides, that "if any person shall sell, or offer for sale, fruits, breadstuff, confectionaries, fermented liquors, or other articles of whatsoever kind or description, within one mile of any worshipping assembly, so as to interrupt said worshipping assembly, they shall be dealt with as rioters at common law," &c. See *West v. State*, 9 Humph. Rep. 66.

Under a count charging several defendants with a riot, and assault and battery, though there be a general acquittal of all of the riot, a conviction of one, of the assault and battery, will be sustained. *Shouse v. Com.*, 5 Barr. 83.

[4] Verdicts are either general as to the whole charge—partial as to part of it—or special where the facts of the case alone are found, and the legal inference is referred to the judges, 4 Black. Com. 361.

No jury can be compelled to give a general verdict, so that they find a special verdict showing the facts respecting which issue is joined, and therein require the judgment of the court upon such facts. 2 R. S. 421, § 68; 1 Chit. Cr. L. 637.

A good finding on a bad count, and a bad finding on a good count, stand on the same footing; both being nullities. *O'Connell v. The Queen*, 11 Clark & Fin. 155; 9 Jur. 25.

A general verdict of guilty is valid, if one count of the indictment is good, although the others are defective. 1 John. 320; 1 Chit. Cr. L. 640; 1 Blackf. 319; 1 Stew. 231; 7 Ham. R. 240; Breese, 197; 8 Greenl. 113; 3 Hill, 194.

No particular form of words is necessary to be followed with technical exactness in drawing up a special verdict. It must positively state the facts themselves, and not merely the evidence adduced to prove them. 1 Chit. Cr. L. 643. And all the circumstances constituting the offence must be found, in order to enable the court to give judgment. 2 Stra. 1015. For the court cannot supply a defect in the statement made by the jury on the record, by any intendment or implication whatever. 2 East's P. C. 708, 784. Therefore, where the indictment set forth that the defendant discharged a gun against the deceased, and thereby gave him a mortal wound, and the jury only stated that he discharged a gun and thereby killed him; omitting that it was against him, it was adjudged that the court could not give any judgment against the prisoner. Kel. 111, Cowp. 830; 4 Burr. 2073; 2 Com. Rep. 486. And a verdict, on an indictment for a conspiracy, that there was an agreement between A. and the defendant, to obtain money from B., but with intent to return it again, is bad, and the court cannot give judgment upon it. 2 John. Cas. 311. So where the jury, on an indictment against an officer for taking unlawful fees, find that he took more than his legal fees, but not corruptly, such finding was held tantamount to a verdict of acquittal. 2 Car. Law Repos. 634.

To authorize the court to pronounce judgment on a special verdict, the legal affirmative or negative conclusion must follow as a necessary consequence from the facts stated. 2 McCord. 129. It is sufficient, however, if the jury find all the substantial requisites of the charge without following the technical language used in the indictment. 1 Chit. Cr. L. 644. Where a fact is of a transitory nature, the jury may find it to have occurred in another place within the county than that named in the proceedings. Ibid. But they cannot find anything essential to the charge to have occurred beyond the jurisdiction of the grand jury. 6 Coke 47. Neither can they vary from the time and place laid when it was material to have proved them in evidence. Com. Dig. Plead. S. 15. And it has been said that they ought expressly to find all the material facts to have occurred within the county to which the province of the court is limited. 1 Leach, 382; 6 Co. 47.

It does not seem necessary that the jury, after stating the facts, should draw any legal conclusion. But if they do so, the court will reject the conclusion as superfluous, and pronounce such judgment as they think warranted by the facts. 1 Chit. Cr. L. 645.

It is said to be the better opinion that though a special verdict cannot be amended in matters of fact, yet the court may amend a mere error in form, even in capital cases, where there are any notes or minutes by which it can be amended. Where the alteration is merely to fulfill the evident intention of the jury, the court will in all cases allow it to be effected. 1 Chit. Cr. L. 645. But it will not amend by supplying facts incompatible with those found by the jury. 2 McCord, 129.

A general like a special verdict, may be amended in matter of form, though not in any substantial degree. 5 Burr. 2663; Dougl. 375.

If the jury, through mistake, or evident partiality, deliver an improper, (1 And. 104; Alleyne, 12; 2 Hale, 299, 300; 2 Hawk. ch. 47, § 11,) or an informal or insensible verdict, or one that is not responsive to the issue submitted, (2 Murphy, 571,) they may be directed by the court to reconsider it, and be recommended to make an alteration. Thus where the decision is repugnant, as if they find one alone guilty of a conspiracy, and acquit the other, they will, on explanation that they cannot find that one person alone was guilty of a conspiracy, withdraw, and may on reconsideration, find both the defendants guilty. Bro. Abr. Jurors, 7; Bac. Abr. Verdict, (G.) But it is said this has been seldom done in modern times when the decision is in the defendant's favor. 2 Hawk. ch. 47, §§ 11, 12; 1 Chit. Cr. L. 648.

Where the verdict is so imperfect that no judgment can be given upon it, it will be set aside and a *venire de novo* awarded, in misdemeanors. 1 Chit. Cr. L. 646; 2 McCord, 129;

## SECTION IV.

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## JUDGMENT, &amp;c.

I shall treat of the proceedings from the verdict to the judgment and allowance of costs, &c., under the following heads :—

1. *Motion for a new trial*, p. 177.
2. *Motion in arrest of judgment*, p. 178.
3. *Judgment*, p. 180.
4. *Costs*, p. 186.
5. *Restitution of stolen goods*, p. 192.
6. *The record*, p. 193.

1. *Motion for a New Trial*

A new trial cannot be granted in a case of felony, even by the court of Queen's Bench.(a)[1] That court may indeed grant it in the case of

(a) *R. v. Mawbey*, 6 T. R. 638.

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4 Leigh, 686. But it seems doubtful whether this ought to be done in capital cases; (*Id. ib.*; 1 *Ld. Raym.* 141; 2 *id.* 1585,) and at all events the court may enter a judgment of acquittal. 1 *Ld. Raym.* 1586. Such a discharge, however, by reason of an imperfect verdict will be no bar to another prosecution for the same felony. 3 *P. Wms.* 439.

When the jury are agreed, they deliver their verdict to the clerk of the court who records it. In cases of felony, after the verdict is recorded the clerk, addressing the jury says, "Gentlemen of the jury, hearken to your verdict as the court hath recorded it. You say that A. B. is guilty (of murder in the first degree) in manner and form as in the indictment against him is alleged; and so say you all." When this is done, if none of the jury express their dissent the verdict will stand as recorded. Until it is done the verdict is not perfected. 3 *Robinson's Cr. Prac.* 268. After the verdict is recorded it is a general rule that it cannot be amended; (1 *Chit. Cr. L.* 648; 2 *Hale*, 299; *Co. Lit.* 227, b.,) unless indeed the mistake appear and be corrected promptly. 1 *Ry. & Moo. C. C.* 45. Before it is recorded, however, the jury may themselves rectify the verdict, and it will stand as amended. *Co. Litt.* 227, b.; 2 *Hale*, 299, 300. A verdict may be received by the court on Sunday. 2 *R. S.* 205, § 7.

The revised statutes contain a general provision that the proceedings prescribed by law in civil cases, in respect to the manner of rendering the verdict, shall be had upon trials of indictments. *Id.* 735, § 14.

[1] The English rule that in no case of felony can a new trial be granted has no foundation in reason, and has never been established as authority in our courts. There is no reason why a man, who has been by surprise, by failure in proof, or for any of the numerous causes for which new trials are granted in circuit suits, should be permitted another opportunity to establish the right, which does not exist and cannot be applied with more force for allowing an innocent man, who has been wrongfully convicted, the right to assert and prove his innocence by another trial. A pardon may indeed terminate his imprisonment, and restore him to the rights of citizenship, but he is yet a convict, by the unreversed judgment of his peers. Cases may exist in which a new trial ought to be granted, where a pardon

a misdemeanor;(a) but they have always refused to do so, where the defendant has been acquitted;(b) and this even in the case of an indict-

(a) *Id.* See *R. v. Simmons*, 1 Wils. 329. 516; *R. v. Præd*, 4 Burr. 2256; *R. v. Ray-*

(b) *R. v. Brice*, 2 B. & Ald. 606; *R. v. nell*, 6 East, 315.  
*Mann*, 4 M. & S. 337; *R. v. Cohen*, 1 Stark.

would be improper. In England, "if by the error of the jury or the judge, an innocent man is condemned, he is sent to the mercy of the crown for redress. This mercy is but a miserable relief, for the injury he has suffered. It may save his property from forfeiture, and himself from the ignominy of the gallows, but the foul blot remaining on his reputation, time does not obliterate it; the grave does not cover it; it is an inheritable curse that must and will be, the portion of his posterity. It is mockery to tell a man who has been unjustly convicted that his redress is in a pardon. He feels and ever will feel that he has received an incurable wound from that sword, which he, in common with his fellow citizens, had put into the hands of the magistracy for their protection. The policy in respect to new trials which the English courts have pursued, has never been countenanced by our courts, and would never be tolerated by our people." Marcy, J., in *The People v. Stone*, 5 Wend. 42. See also, *The People v. The Judges of the Dutchess Oyer & Terminer*, 2 Barb. Supm. C. Rep. 282.

"The question whether a motion for a new trial ought to be entertained," say the British commissioners, in their eighth report, pages 18, 24, "is one of high importance to the due administration of justice. It involves two main points: first, whether such a course is material for the purpose of distinguishing between guilt and innocence, and if so, whether any reason warrants the rejection of such a test. If any doubt should exist on the first question, it is one which would most properly be decided by experience. On this point, however, there is no room for doubt. Actual experience, not only in respect of civil, but even of criminal proceedings, where the test is allowed to operate, proves its importance. In truth, so long as human judgment is fallible, it must be necessary to use means for the correction of error and mistake. It may be said that this cannot be done without delay and expense. It cannot, however, be doubted that deliberate justice, although necessarily attended with more or less delay, is preferable to the injustice incident to improvident haste, and necessarily resulting from the neglect of reasonable means for the exclusion of error. The expenditure of labor and cost in criminal investigations, can scarcely be placed in competition with the evils which must inevitably result from want of due caution. The question resolves itself mainly into this, whether the cost of correction can fairly be placed in competition with the evils likely to result from the want of correction.

"We apprehend that the right, even of the legislature, to inflict capital punishment, rests on the grounds of strict and cogent necessity, and that to go beyond that limit, involves a transgression in *foro caeli*, which is criminal in the legislator himself. The Divine prohibition plainly extends to every unwarranted destruction of human life. There is no authority to control or limit it beyond that which may be inferred from strict necessity; no hypothesis which can be framed as to the origin of civil society, and the duty of obedience to its laws, can warrant the conclusion that the legislator has, either expressly or impliedly, the power to direct capital punishment on any other ground.

"If this principle be applicable to the infliction of capital punishment, where, from the nature of the offence, the infliction of a less penalty would be equally beneficial to society, it is, *a fortiori*, applicable, if reasonable and practicable means be not provided for ascertaining, previously to the infliction of capital punishment, and the accused is really guilty of a crime to which such a penalty is annexed by the law. Errors of the former kind apply only to such as are actual delinquents; those of the latter involve the destruction of the innocent.

"The observations thus applicable to capital punishment, are obviously applicable also, although in an inferior degree, to the minor penalties of transportation, or loss of liberty, or

ment for non-repair of a highway.(a) In these latter cases, indeed, instead of granting a new trial, the court stayed the entry of judgment,

(a) *R. v. Silvorton*, 1 Wils. 268; *R. v. Bur-* 1 B. & Ald. 63; *R. v. Sutton*, 5 B. & Ad. 52. *bon*, 5 M. & S. 392; but see *R. v. Wandsworth*,

even property; the right to inflict the latter as well as the former, rests upon the principle of necessity for the prevention of wrong.

"It appears to us, that the law of England is at present very defective, as regards the means afforded for the correction of errors in criminal proceedings; and especially such as are frequently, and indeed are almost necessarily, incident to the trial by jury. In this respect, indeed, the law is inconsistent, in entertaining the motion for a new trial in some instances, and denying it in others, without any adequate reason for the distinction; and is thus faulty, either in denying a new trial where it would be consistent with justice to grant one, or in granting a new trial where it ought properly to be withheld. The instances in which a new trial is grantable, are confined to those where the prosecution is for a misdemeanor only, and is pending in the court of Queen's Bench. We cannot but observe that the distinction thus made in the first instance, between indictments for felony and those for misdemeanor pending in the court of Queen's Bench, is one not warranted by any intelligent principle. It would indeed seem to be more reasonable that, as the penalties for felony are usually more severe than those which attach to a mere misdemeanor, larger means for the correction of error should be afforded in the former case than in the latter. The distinction between cases of misdemeanor, pending in the court of Queen's Bench, and those pending in other criminal courts, seems also to be destitute of any sound principle. It may perhaps, as to prosecutions removed from inferior courts into the court of Queen's Bench, be said, that it is presumed that they are of more difficult investigation, and therefore that more ample means ought to be allowed, for accurate inquiry and for the correction of errors. This may occasionally be so; but the presumption cannot possibly warrant so wide a distinction as that which is made in practice; the difficulties which give rise to the application for a new trial, are frequently of a nature not to be foreseen, and often depend on the conduct of witnesses, or of the jury, or of the direction of a judge or presiding magistrate, and not at all on the nature of the cause itself. Besides, as a defendant in a cause depending in the higher court, has always the benefit of being tried before one of the judges of the superior courts, the proceedings are less likely to stand in need of correction, than they are when the trial is had before an ordinary magistrate.

"It is also to be observed, that the distinction has been some times received with jealousy, as operating in favor of such as can well afford to remove the indictment into the higher court, by writ of *certiorari*.

"A brief reference to the ancient law may not be unimportant, to show that the present distinction is not warranted by any principle recognized by that law, but is in truth the casual result of change in circumstances. Formerly, as appears from the ancient text writers and authorities, jurors were not persons who, like those of the present day, decided as judges of facts upon the testimony of others; they were themselves the very eye and ear witnesses of the facts, or were persons likely, from proximity to the place in question, to possess the best means of judging accurately; and they determined according to their own actual or presumed knowledge. There could therefore be no new trial, on the ground that the testimony on which the verdict was founded was false or insufficient to warrant the verdict. In doubtful cases, recourse was had to the trial by ordeal, or to a process of compurgation; and it was not until after the abandonment of the former superstitious modes of trial, that juries began to exercise the important duty of deciding upon evidence. The great intrinsic defects incident to such a tribunal, and the inconvenience and injustice experienced for want of due means of correction, at last occasioned a most important change in the law as regarded civil causes, in admitting motions for new trials—a great improvement; but which was not extended to criminal proceedings, beyond the narrow limits to which we



until the prosecutor should have an opportunity of preferring and trying a fresh indictment, to prevent the parish from pleading the former acquittal in bar; and even this they have done in very few cases.

A court of oyer and terminer or general jail delivery, however, or the court of quarter sessions, have no power to grant a new trial; at least such is generally understood to be the case. And where, upon an indictment for the non-repair of a bridge being tried on the crown side at the assizes, and the defendants convicted, they moved for a *certiorari* to remove the record into the court of King's Bench, in order that they might move for a new trial, the court refused it, Lord Ellenborough, C. J., saying—"I would not have the notion for a moment entertained, that we have the power of entering into the merits of verdicts, and granting new trials, in proceedings before inferior jurisdictions.(a)

But where two persons were indicted at sessions for stealing oats, and convicted; and it appearing afterwards that, upon the jury [\*178] \*retiring, one of the jurors separated himself from the rest,

(a) *R. v. Inhabitants of Oxfordshire*, 12 East, 411.

have already alluded. It is notorious, that at the present day, the hearing of motions for new trials in civil causes is one of the most important and frequent occupations of the common law courts; and it cannot be doubted that without the means of correcting errors and mistakes thus afforded, the trial by jury would be regarded as unsatisfactory and unsafe.

"A new trial in civil proceedings, is now allowed on the plain and simple ground that the practice is essential to justice, for the purpose of correcting errors and miscarriages in its administration, which cannot be excluded, but which require remedy. These, however, are not peculiar to civil proceedings. Some of them are even more likely to occur in criminal than in civil proceedings. Questions of civil right are for the most part dependant on facts, the effect rather than the existence of which is disputed. Criminal questions, on the contrary, frequently depend on transactions of a hidden and secret nature, the truth of which is oftentimes difficult to unravel; and, in consequence, resort must often be had to a chain of presumptive or circumstantial evidence. Looking therefore to the nature of the inquiry, it is quite as likely that error or mistake should occur in the investigation on a criminal charge, as on that of a mere civil claim. As regards the consequences of error in the one case and the other, it cannot be denied that a failure of justice in a criminal case, where it may concern not only property, liberty, but even life itself, is of much more serious importance than in civil cases, where a mere question of property is concerned. These positions and their consequences are too obvious to be dwelt upon; yet admitting them to be true, the conclusions must necessarily be, that the precautions necessary to exclude error in the one case are *a fortiori*, necessary in the other. If, with a view to exclude the possibility of injustice, a man is to be allowed the benefit of a new trial, where property to the amount of £20 is at stake, it is hard to deny him protection to the same extent, where his life is in jeopardy. If the question whether a pauper be legally settled in parish A., or parish B., is not to be determined without power of appeal to the court of Queen's Bench, it is harsh to condemn him to be transported for life to a penal settlement, without power of appeal. The law in this respect is at variance with itself, and several evil consequences naturally result.

"Great injustice is often done to an innocent party, who, but for the technical rule, would entitle himself to a new trial; for it cannot be doubted that cases not unfrequently occur, when the convict is either altogether innocent, or not guilty of the aggravated offence charged.

and conversed with a stranger on the subject of the trial, the sessions quashed the verdict, and awarded a *venire de novo* to the next sessions; and at the next sessions the prisoners were again tried and again convicted: they then brought a writ of error, and objected, first, that the sessions have no authority to grant a new trial; and secondly, that there had been no new arraignment and plea, before the second trial: as to the last point, the court held that the parties having once pleaded and put themselves upon the country, it was unnecessary for them to do so a second time; and as to the first point, the court said that this could not be deemed a new trial; the first trial was either good or bad; if good, the second trial was *coram non judice*, and might be deemed a nullity; if bad, it must be deemed a mistrial and a nullity, and therefore as the prisoners had put themselves upon the country, they might as well be tried at the next sessions; in either view of the case the judgment was right.(a)[1]

(a) *R. v. Fowler & Sexton*, 4 B. & Ald. 273.

#### NEW TRIAL IN CRIMINAL CASES.

[1] The subject of new trial in criminal cases is of paramount importance to the ends of justice, as well as to the accused personally. If the defendant have been improperly convicted, he should neither suffer the punishment, nor the disgrace which attaches to his conviction. The law should supply the means of correcting the error; and if it fail to do so, it is remiss in its highest duty—that of full protection to the rights of the citizen.

I propose to treat of new trial under the following heads:—

1. DEFINITION OF NEW TRIAL.
2. POWER OF THE UNITED STATES COURTS AND COURTS OF THE SEVERAL STATES IN GRANTING.
3. ON ACCOUNT OF THE IMPROPER ADMISSION OR REJECTION OF EVIDENCE.
4. ON ACCOUNT OF MISDIRECTION OF THE JUDGE.
5. THAT THE VERDICT IS CONTRARY TO LAW.
6. THAT THE VERDICT IS CONTRARY TO EVIDENCE.
7. ON ACCOUNT OF IRREGULARITY IN IMPANNELLING THE JURY.
8. ON THE GROUND OF IMPROPER JURY.
9. BY REASON OF MISCONDUCT OF JURY.
10. ON THE GROUND OF NEWLY DISCOVERED EVIDENCE.
11. OF THE MOTION FOR NEW TRIAL.

#### 1. DEFINITION OF NEW TRIAL.

By a new trial is meant, a re-examination by jury, according to the forms of the common law, of the facts and legal rights of the parties upon disputed facts, which it is in the discretion of the courts to grant or refuse, but which is claimable as a right when evidence has been improperly received, or rejected, or incorrect directions in law, have been given. 4 Chitty's Gen. Pr. 31.

Causes of suspending the judgment by granting a new trial, are at present wholly *extrinsic*, arising from matter foreign to, or *dehors* the record. Of this sort, are want of notice of trial; or any flagrant misbehavior of the party prevailing, towards the jury which may have influenced their verdict; or any gross misbehavior of the jury themselves; also, if it appears by the judge's report, certified by the court, that the jury have brought in a verdict, without,

or contrary to evidence; or if they have given exorbitant damages; or if the judge himself has misdirected the jury, so that they found an unjustifiable verdict: for these, and other reasons of the like kind, it is the practice of the court to award a *new* or *second* trial. But if two juries agree in the same, or a similar verdict, a third trial is seldom awarded; for the law will not readily presume that the verdict of any one subsequent jury can countervail the oaths of the two preceding ones. 3 Blk. Com. 387.

## 2. POWER OF THE UNITED STATES COURTS, AND COURTS OF THE SEVERAL STATES, IN GRANTING.

In the *United States v. Gibert, et al.* (2 Sumner's Rep. 19,) it was held that the prohibition in the constitution of the United States, "nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb" means, that no person shall be tried a second time for the same offence, after a trial by a competent and regular jury, upon a good indictment, whether there be a verdict of acquittal or conviction. Therefore the circuit court of the United States, cannot grant a new trial in a capital case, after a verdict regularly rendered upon a sufficient indictment. Per Story, J. *Davis, J. dissenting*, held that the privilege intended to be secured by the prohibition, might be waived by the prisoner. In *United States v. Fries*, (3 Dallas 515,) on a trial for treason the circuit court of the United States for the district of Pennsylvania, on a motion for a new trial, after conviction, on the ground that a mistrial had been produced by the fact of a juror having expressed an absolute and decisive opinion on the case before he was sworn, the court were at first equally divided; but ultimately a new trial was ordered. In *United States v. Keen*, (1 M'Lean, 429,) it was held that the courts of the United States have power to grant new trials in criminal cases as well those that are capital as others. See also *U. S. v. Conner*, 3 M'Lean, Rep. 573.

NEW YORK:—In New York, under the provisions of the revised statutes allowing the defendant, on the trial of *any* indictment, to take exceptions to any decision of the court in order to bring a writ of error or certiorari to the supreme court, (2 R. S. 736, §§ 21 to 27,) there can be no doubt that a new trial may be granted to the defendant, in all cases where he takes exceptions on the trial and brings a writ of error. But there is no provision authorizing the public prosecutor to file a bill of exceptions, or to bring a writ of error or certiorari on the part of the people, in case the defendant is acquitted. Either party, however, may remove the indictment into the supreme court, before trial, by *certiorari*; (2 R. S. 732, § 83,) and where an indictment, after having been so removed, was tried at the circuit and the defendant acquitted, the supreme court decided that for offences greater than a misdemeanor, a new trial cannot be granted, on the merits, whether the accused be acquitted or convicted. 8 Wend. 549. In misdemeanors, it seems a new trial may be granted where the defendant has been improperly convicted, but not where he has been acquitted. *Id. ib*; 5 Barn. & Adol. 52; 4 McCord, 255; 1 Chit. Cr. L. 656; See 4 Wend. 229.

Inferior courts, as courts of sessions, have no power to grant new trials upon the merits. 1 Chit. Cr. L. 653; 2 Caines' Cas. in Err. 319; S. C. 1 John. Cas. 179; 15 Wend. 581. But they may for irregularity. 13 East, 416; 1 Chit. Cr. L. 653; 12 Wend. 272.

It has been decided that the oyer and terminer is not a superior court of general jurisdiction; and that it has no power to grant a new trial, on the merits, after a defendant has been convicted of a felony. 2 Barb. S. C. Rep. 282.

At common law a new trial could not be granted on the merits, by any court, in a case of felony, nor by an inferior court of limited jurisdiction in any criminal case. 1 Chitty's Cr. Law, 532. In New York, the power to do so is expressly and for the first time, conferred upon the supreme court, on a bill of exceptions to the general sessions, or oyer and terminer by the revised statutes of 1830. 2 N. Y. Rev. Stat. 736, secs. 21, 23, 24, 25, 26, 27; *Id.* 741, sec. 24. Then, it is confined to cases where the inferior tribunal has committed some error in point of law. This limitation of the power, and the omission to grant it in any other case, or to any other court, are significant to show, the intention of the legislature to adhere, in all other respects, to the common law rule. Per Strong, J. in *People v. Judges, of Dutchess Oyer & Terminer*, 2 Barb. Sup. Ct. Rep. 282.

MASSACHUSETTS.—In Massachusetts, the supreme court and court of common pleas have

power to grant new trials, at the term in which the trial of any indictment is had, or within one year thereafter. Rev. Sta. of Mass. ch. 138, sec. 10.

In *Com. v. Green*, 17 Mass. Rep. 515, the supreme court say: "That a prisoner who has been tried for a felony and acquitted, should not be subjected to a second trial for the same offence, seems consistent with the humane principles of the common law in relation to those whose lives have been once put in jeopardy. But the same humane principles would appear to require that after a conviction a prisoner should be indulged with another opportunity to save his life, if any thing had occurred upon the trial which rendered doubtful the justice or legality of his conviction. *Nemo bis debet vexari, pro una et eadem causa*, is a maxim of justice, as well as of humanity; and was established for the protection of the subject against the oppressions of government. But it does not seem a legitimate consequence of this maxim, that one, who has been illegally convicted, should be prevented from having a second inquiry into his offence, that he may be acquitted if the law and the evidence will justify an acquittal. We think there is a power in this court, to grant a new trial, on the motion of one convicted of a capital offence, sufficient cause being shown therefor; notwithstanding the English courts are supposed not to exercise such authority." In this case, the merits of the application were limited to the fact of the alleged erroneous admission, by the court, of a witness convicted of an infamous crime in another state; and the motion for a new trial was refused on the following grounds: 1st. That objections to the competency of a witness, founded on a conviction of crime, must be made at the trial, and when the witness is offered to be sworn; 2d. The conviction of an infamous crime in any other state does not render the subject of such conviction an incompetent witness in the courts of Massachusetts.

PENNSYLVANIA.—"In Pennsylvania," says Mr. Wharton, (Cr. Law, p. 873,) "it has been the constant and unquestioned practice in the courts to exercise the right of granting new trials in criminal cases, after convictions of every grade. Thus, at a very early period, the supreme court granted a rule to show cause why a new trial should not be granted after a conviction of murder in the first degree, because the verdict was against law and evidence; and though the rule was ultimately refused, no doubt appears to have been suggested of the perfect authority of the court to determine it. *Com. v. O'Hara*, 7 Smith's Laws, 694. Some time subsequently, a few months after the extreme construction already noticed was given to the term *jeopardy* by Gibson, C. J., (*Com. v. Chue*, 3 Rawle, 500,) the same learned judge entertained a motion for a new trial after a conviction of burglary, the full power of the court to dispose of the application being no where questioned. *Com. v. Brown*, 3 Rawle, 207. The same practice has been followed in several cases of capital conviction in the court of oyer and terminer, &c., of Philadelphia county; (*Com. v. Murray*, 2 Ashmead, 41; *Com. v. Williams*, *ibid.* 69; *Com. v. Green*, 1 Ashmead, 289;) and in a very late case, after a conviction of murder in the first degree, a new trial was refused on the merits by the supreme court, without any suggestion of its incapacity to adjudicate the question." *Com. v. Flannagan*, 7 Watts & Serg. 415.

NEW JERSEY.—In New Jersey, it seems that courts of inferior jurisdiction, may grant a new trial on the merits. In *The State v. Parker*, (1 Halsted's Rep. 148,) where the defendant had been indicted for having a counterfeit note in his possession and convicted before the quarter sessions of the county of Monmouth; the defendant's counsel moved for a new trial upon the ground, that the prosecutor for the state did not prove that the defendant knew the note to be counterfeit; and the court of quarter sessions granted a rule for a new trial, upon that ground. The supreme court, upon motion of the attorney-general for a rule to show cause why a *mandamus* should not issue to the quarter sessions, commanding them to render judgment on the verdict of the jury, and forbidding them to proceed on the rule for a new trial, denied the motion, remarking that it had been so long the practice of the courts of common pleas and quarter sessions to grant new trials that it deemed it inexpedient at this time, to deny their right so to do, even if it might have been questionable at first.

VIRGINIA.—In Virginia, the cases on the subject of new trials have settled the following principles:

That new trials are grantable at the instance of the accused, in all criminal cases; and that

motions for new trials are governed by the same rules in criminal as in civil cases. That a new trial will be granted:

1. Where the verdict is against law. This occurs when the issue involves both fact and law, and the verdict is against the law of the case on the facts proved.

2. Where the verdict is contrary to the evidence. This occurs when the issue involves matter of fact only; and the facts proved require a different verdict from that found by the jury.

3. Where the verdict is without evidence to support it. This occurs when there has been no proof whatever of a material fact, or not sufficient evidence of the fact or facts in issue.

Where some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances and presumptions, a new trial will not be granted merely because the court, if upon the jury, would have given a different verdict. To warrant a new trial in such cases, the evidence must be plainly insufficient to warrant the finding of the jury. And this restriction applies to an appellate court.

In all these cases, the judgment granting or refusing a new trial, may be the subject of a writ of error or *supersedeas* and is reversible.

4. Where the evidence is contradictory, and the verdict is against the weight of evidence. A new trial may be granted by the court which presides at the trial; but its decision is not the subject of a writ of error, or *supersedeas*, or examinable by an appellate court. Nor can an inferior court be required to state in a bill of exceptions, either the evidence or the facts proved by the witnesses respectively. It is enough to state that the evidence was contradictory.

See *Grayson's case*, (1 Gratt. Va. Rep. 712,) where the principles which govern new trials in Virginia, are stated by Judge Scott, with great clearness.

NEW HAMPSHIRE.—In *State v. Prescott*, (7 N. H. Rep. 287,) the supreme court declared that it had no hesitation in holding the right of the court to grant the prisoner a new trial in a capital case, and *Com. v. Green*, (17 Mass. Rep. 515,) was cited with approbation.

ILLINOIS.—In *Wickersham v. The People*, (1 Scam. Rep. 128,) the right of the supreme court to set aside a verdict, and grant a new trial, was recognized, but the court remarked that it would interfere with reluctance where the proceedings had been regular. It seems that in criminal cases, motions for new trials rest entirely in the discretion of the circuit courts where they are made, and the propriety of their decisions in refusing them, cannot be reviewed in the appellate court. *Pate v. The People*, 3 Gilman's Rep. 644; *Baxter v. The People*, 3 Gilman's Rep. 368; *Holliday v. The People*, 4 Gilman's Rep. 111.

INDIANA.—In Indiana, a new trial may be granted to a defendant in any criminal case. *Weinzorpfstin v. The State*, 7 Blackf. Rep. 186.

GEORGIA.—In *The State v. Henley*, (R. M. Charlton's Rep. 505,) the supreme court of Georgia seemed to doubt whether a new trial on the merits could be granted in any case beyond a misdemeanor, but it held that it certainly would not be granted when the presiding judge is satisfied of the correctness of the verdict.

NORTH CAROLINA.—In *State v. Jeffreys*, (3 Murphey, 480,) on an indictment for a felony, it was intimated that when a question of evidence was fairly submitted to a jury, and they determined it on the merits, their finding would not be disturbed. It seems, however, that instances of new trials in felonies in North Carolina, are frequent, on account of mistake of law, or irregularity in trial. Wharton's Cr. L. citing *State v. Miller*, 1 Dev. & Bat. 500; *State v. Barton*, 2 Dev. & Bat. 196; *State v. Sparrow*, 3 Murphey, 487; *State v. Lipsey*, 3 Dev. 485.

IOWA.—In Iowa, a motion for a new trial, based upon facts, is a motion addressed to the sound discretion of the court. While all the facts upon which a conviction has been obtained are fresh in the recollection of the court, if the court, in the exercise of its sound discretion, think that the verdict of the jury is contrary to law, or is not the legitimate result of testimony, and that manifest injustice will be done by inflicting the punishment to which the verdict is but the precursor, the court should always interpose and grant a new trial. *Cook v. U. S.*, 1 Green's Iowa Rep. 56.

ALABAMA.—In *State v. Sleek*, (6 Ala. Rep. 676,) the court said, "The English courts, in modern times, do not grant new trials in cases of felony, but accomplish the same object by

a recommendation to the crown for a pardon, which is always granted. It does not, however, follow that it is against the principles of the ancient common law, that the court should have power to grant a new trial where a doubt exists as to the correctness of the verdict. It would seem to be more consistent with the spirit of humanity which pervades it, that a new trial should be granted by the court, than that the prisoner should depend on the mercy of the executive. It cannot be questioned that the clause in our bill of rights, upon which we have commented, was intended for the protection of the citizen, and it would be a mockery to put such a construction on it as will make it operate to his prejudice. We are, for these reasons, of the opinion that the court may, with the consent of the prisoner, grant a new trial after a conviction for a felony."

### 3. NEW TRIAL ON ACCOUNT OF THE IMPROPER ADMISSION OR REJECTION OF EVIDENCE.

The rule in civil cases seems to be, that though there is exceptionable testimony, yet, if there is sufficient legal evidence to support the verdict, and justice has been done, the verdict will not be set aside; and so also where legal evidence has been excluded, but where, had it been admitted, the result would have been the same. *Stiles v. Tylford*, 10 Wend. 338; *Prince v. Shepherd*, 9 Pick. 176; *Smith v. Harmanson*, 1 Wash. Rep. 6; *Landon v. Humphrey*, 9 Conn. Rep. 209; *Fitch v. Chapman*, 10 Conn. 8.

But in criminal cases, courts seldom presume that the particular evidence which had been wrongfully admitted or improperly rejected, could have no influence on the deliberations of the jury. It may therefore be stated as a general rule, that under such circumstances the defendant will be allowed a new trial.

In Tennessee, in *Peck v. The State*, (2 Humph. Rep. 78,) Greene, J., says, "the rule that although incompetent evidence was received, yet, if the court see that there was enough independent of such evidence, to convict the prisoner, it will not disturb the verdict, does not prevail in this state. It has been uniformly held here, that if incompetent evidence has been received, that *might* have influenced the jury, a new trial will be awarded; for it cannot be seen how far such evidence did influence them, and we cannot say that the prisoner has been convicted by a jury of his peers, or evidence competent for that purpose." See also, *State v. Allen*, 1 Hawk's Rep. 6. But in South Carolina, in *The State v. Ford*, (3 Strobb. 517,) it was held, that if a prisoner's guilt be clearly made out, by proper evidence, in such a way as to leave no doubt in the mind of a reasonable man, his conviction ought not to be set aside, because some other evidence was received, which ought not to have been.

Where a witness called for the defence was so much intoxicated at the time, as to be incapable of comprehending the obligation of an oath, and the court refused to permit him to testify, but told the prisoner that he might recall him afterwards, but he was not so recalled, it was held that this was not ground for granting a new trial, the granting or refusing a new trial, in such case, being in the discretion of the judge. *State v. Underwood*, 6 Ired. 96.

### 4. NEW TRIAL ON ACCOUNT OF MISDIRECTION OF JUDGE.

It seems that any misdirection of the court trying the case, in point of law, on matters material to the issue, is a good ground for a new trial. *Young v. Spencer*, 10 Barn. & C. 145; *Holiday v. Atkinson*, 5 Barn. & C. 501; *Boyden v. Moore*, 5 Mass. 365; *Wardell v. Hughes*, 3 Wendell, 418; *Baylies v. Davis*, 1 Pick. 206; *Lane v. Crombie*, 12 Pick. 177; *Doe v. Paine*, 4 Hawks, 64; *West v. Anderson*, 9 Conn. 107; *M'Faden v. Parker*, 3 Yeates, 496; *People v. Cogdell*, 1 Hill's N. Y. R. 95; *People v. Thomas*, 3 Hill's N. Y. R. 169; *People v. Townsend*, id. 479; *Com. v. Parr*, 5 Watts & Serg. 345; *People v. Bodine*, 1 Denio, 282; *Doe d. Bath v. Clarke*, 3 Hodg. 49; *Doe d. Read v. Harris*, 1 Will. Wol. & D. 106; *Haine v. Davey*, 4 Ad. & El. 892; 6 Nev. & Man. 356; 2 Har. & Wol. 30; *Lyens v. Tomkies*, 1 Mee. & W. 603; *Anon.* 6 Mod. 242; *How v. Stride*, 2 Wils. 269; 10 Johns. R. 447; 5 Day, 479; 5 Mass. 487; *Wilson v. Rastall*, 4 T. R. 753; 4 Connec. 356; 3 Cranch. 298; *Cakraft v. Gibbs*, 5 T. R. 19; *Crofts v. Waterhouse*, 3 Bingham, 319.

But a verdict, in accordance with the weight of evidence, and with justice ought not to be set aside on account of an erroneous instruction given by the court to the jury. *Harris*

v. *Doe*, 4 Blackf. 369; *Howard v. Miner*, 7 Shepl. 325. It is sufficient objection to a charge to the jury that it might convey to the mind of any man of ordinary capacity an incorrect view of the law applicable to the cause. *Sumner v. The State*, 5 Blackf. 579.

The due degree of weight to be given by a judge directing the jury, to particular evidence which has been properly admitted, must be left to his own discretion; and his discretion, in that respect, will not be revised by the court above, (*Attorney-General v. Good*, M'Clel. & Y. 286; 4 Ch. Gen. Practice, 42; *People v. Genung*, 11 Wendell, 18,) though if the court instruct a jury that they may indulge a presumption not warranted by the evidence, a new trial will be awarded. *Harris v. Wilson*, 1 Wendell, 511; *Haine v. Davey*, 4 Ad. & El. 899; 4 Wendell, 639; 10 Wendell, 461; *Levingsworth v. Fox*, 1 Bay, 520; *Handly v. Harrison*, 3 Bibb, 481. Thus, where the judge charged, that the non-production, by the defendant, of evidence of good character should weigh against the defence, it was held error; (*People v. Bodine*, 1 Denio, 283; but see *People v. White*, 22 Wendell, 167,) and where, on a trial for murder, there was evidence that a murder had been committed, and that the house in which the dead body was, had been subsequently set on fire under such circumstances as to raise a suspicion that the same was done by the perpetrator of the murder, to conceal that offence, and the evidence left it doubtful whether the prisoner was in the vicinity of the house where the fire was set, and the court charged the jury, that if the prisoner might have been at the scene of the fire "the onus was cast upon her to get rid of the suspicion which thus attached to her," and that she was bound to show where she was at the time of the fire, the presumption was held erroneous, and ground for a new trial. *People v. Bodine*, 1 Denio, 282. Wharton's Cr. Law, p. 882.

In the case of *The People v. Gray*, (5 Wend. Rep. 289,) a new trial was refused where the complaint was, that the judge, although requested, declined to charge the jury, there being no dispute as to the law of the case; the trial closing so late on Saturday night, that, had the jury been charged, they must either have been dismissed, or kept over during Sunday: and the verdict being fully supported by the evidence.

It has been held that a judge has a right to express his opinion to the jury, on the weight of evidence and to comment thereon as much as he deems necessary for the course of justice. And it is said that an erroneous opinion on matter of fact, expressed by the judge in his charge, is no ground for new trial, unless the jury are thereby led to believe that such fact was withdrawn from their consideration. *Com. v. Child*, 10 Pick. 252; *Swift v. Stevens*, 8 Com. Rep. 431; *Ware v. Ware*, 8 Greenl. 42; *Hinklock v. Palmer*, 1 Rep. Con. Ct. 216; *Riddle v. Murphy*, 7 Serg. & Rawle, 237. In South Carolina, the act of assembly relative to the duty of a judge in charging, forbids him "to give an opinion whether a fact is fully, or sufficiently proved, such matter being the true office and province of a jury;" and it directs him, "to state in a full and correct manner, the facts given in evidence, and to declare and explain the law arising thereon." *Reel v. Reel*, 2 Hawk's Rep. 63.

Courts are under no obligation to listen to abstract propositions from counsel, and are not bound to explain them upon the trial of causes. It is enough that they should respond to objections made by either party to the admission of evidence upon the trial, and give in charge to the jury the law, which under a given state of facts governs the case. Per Jewett, J., 1 Denio, 524. But if incorrect abstract propositions are propounded by the court, and the jury are misled by them the verdict will be avoided. In *Etting The Bank of the U. S.*, (11 Wheat. Rep. 59,) Chief Justice Marshall, said: "That a judge cannot be required to declare the law on hypothetical questions which do not belong to the cause on trial, has been frequently asserted in this court, and is, we believe, incontrovertible. The court, may, at any time, refuse to give an opinion on such a point; and if the party propounding the question is dissatisfied with it, he may except to the refusal, which exception will avail him, if he shows that the question was warranted by the testimony, and that the opinion he asked, ought to have been given. But if the judge proceeds to state the law, and states it erroneously, his opinion ought to be revised; and if it can have had any influence on the jury, their verdict ought to be set aside." See *Hamilton v. Russell*, 1 Cranch's Rep. 309, 318.

The omission, by the judge in summing up, specifically to leave to the jury a point made in the course of the trial (his attention not being expressly called to it,) is no ground for a

motion for a new trial, if the whole of the case was substantially left to them. *Den. v. Sinnickson*, 4 Halst Rep. 149. But although the omission of the court, to charge the jury, on important questions of law, involved in the case is not, in itself, a reason for granting a new trial; yet the court will exercise a discretion; and if they think the justice of the case will be promoted, they will grant it. *Calbreath v. Gracy*, 1 Wash. C. C. Rep. 198. And where from the absence of proper instructions the jury fall into error a new trial will be granted. *Dunlap v. Patterson*, 5 Cowen, 243; *Scott v. Lunt*, 7 Peters, 596; *Page v. Pattee*, 6 Mass. 459.

In England, in an action for maliciously and without reasonable or probable cause, charging the plaintiff with felony before a magistrate, it appeared that the plaintiff had lived in the service of the defendant, and, on being discharged took away with her a trunk and bag, the property of the defendant; that on the following day, the defendant wrote to desire the plaintiff to return those articles, stating, that unless she did so, he would, on the following Monday, cause her to be apprehended; that the letter being, in consequence of the plaintiff's absence, unanswered, the defendant obtained a warrant for the apprehension of the plaintiff, and carried her before a magistrate, who dismissed her, the defendant declining to press the charge; the judge before whom the cause was tried, left it to the jury to say, whether or not, the defendant had reasonable or probable cause for apprehending the plaintiff, and whether he was actuated by malice or not, and it was decided that this direction was proper, and that the judge was not bound to take upon himself to decide as to whether or not there was reasonable or probable cause, it being a mixed question of law and fact. *Mudonald v. Booke*, 2 Scott, 359.

But in *Munns v. Dupont et al.* (3 Wash. C. C. Rep. 31,) Judge Washington laid it down as settled that, while it must be referred to the jury to decide whether the circumstances which amount to probable cause are proved by credible testimony or not; on the other hand, what circumstances are sufficient to prove a probable cause, must be judged of, and decided by the court. See also *Nelson v. Jacques*, 1 Greenleaf's Rep. 139.

In *The People v. White*, (22 Wend. 167,) the supreme court of New York, held that if a judge in his charge to a jury in a criminal case, calls their attention to the want of proof of a good character of the criminal, alluding to the influence of good character in doubtful cases, it is no ground for granting a new trial. But the court of errors in the same case, (on appeal) thought otherwise, and a new trial was granted. 24 Wend. 520; see *The People v. Vane*, 12 Wend. 78.

In an indictment for a larceny, of several articles, if the court instruct the jury that if they find the accused guilty as to one of the articles, they should find a general verdict of guilty, it is erroneous, and the verdict will be set aside and a new trial granted, although the punishment would be the same in both cases. *The State v. Somerville*, 21 Maine Rep. 20. A general verdict of guilty applies to all the material allegations in the indictment, and finds the prisoner guilty of stealing all the goods named and alleged to be stolen. And although the punishment may be the same, whether the prisoner be found guilty of stealing a part only, or the whole of the goods alleged to have been stolen, yet his rights in other respects, as well as the rights of others, may be affected by the finding of a general verdict upon proof, which would not authorize it.

Where the facts in a case of capital felony, are not absolutely conclusive of the defendant's guilt, and it is apparent, from the charge of the court, that it may have misled the jury from its want of accuracy and explicitness, a new trial will be granted, though the charge may not be unequivocally erroneous. *Troxdale v. The State*, 9 Hump. Rep. 411.

A new trial will not be granted on account of an erroneous charge by the court, if it did not materially influence the jury in coming to their decision. *Smith v. Kerr*, 1 Barb. 155; *Branch v. Doane*, 17 Conn. 402; *Greenup v. Stoker*, 3 Gilm. 202; *Crawley v. Littlefield*, 3 Strobh. 154; *McCready v. S. C. R. R. Co.*, 2 Strobh. 356; *Pritchard v. Myers*, 11 Smedes & Marsh. 169; *Wilkinson v. Griswold*, 12 Smedes & Marsh. Rep. 669.

On a motion for a new trial, upon a case stated, for the misdirection of the judge in his charge to the jury, it is not necessary that it should have been excepted to; otherwise, on a bill of exceptions to the rule. *Vallance v. King*, 3 Barb. Sup. Ct. Rep. 548.



## 5. NEW TRIAL ON THE GROUND THAT THE VERDICT IS CONTRARY TO LAW.

The jury are to receive as binding, the law laid down by the court, and after a conviction if the verdict is against the law, it will be set aside.

The question how far the jury are judges of the law in criminal cases, though formerly a fruitful subject of discussion, seems now to be well settled.

The first case I have met with, in which the question arose between the jurisdiction of the court and jury, was upon the trial of Lilburne for high treason, in 1549. 2 St. Tr. 68, 81, 92. He insisted, in coarse but intelligible language, that the jury were judges of law and fact, but the court, in language equally rude, denied it. He insisted upon the privilege of reading law to the jury, but the court refused it. The jury, however, acquitted him, and they declared that they took themselves to be judges of the law as well as of the fact, notwithstanding the court had said otherwise. *Bushell's case* followed soon after, and it is in every view, important. Vaughan, 135; Sir T. Jones, 13. He was one of the jurors, on the trial of an indictment for a misdemeanor, before the court of oyer and terminer in London, and was fined and committed, because he and the other jurors acquitted the defendant against full proof, and against the direction of the court in matter of law. He was brought into the court of C. B. upon habeas corpus, and discharged; and Lord Ch. J. Vaughan delivered, upon that occasion, in behalf of the court, a learned and profound argument in favor of the rights of the jury. He admitted that where the law and fact were distinct, the provinces of the court and jury were exclusive of each other, so that if it be demanded what is a fact, the judge cannot answer it, and if what is the law, the jury cannot answer it. But that upon all general issues, where the jury find a general verdict, they resolve both law and fact completely, and not the fact by itself.

Upon the trial of Algernon Sidney, (3 St. Tr. 817,) the question did not distinctly arise, but Lord Ch. J. Jeffries, in his charge to the jury, told them it was the duty of the court to declare the law to the jury, and *the jury were bound to receive their declaration of the law*. They did, in that case, unfortunately, receive the law from the court, and convicted the prisoner; but his *attainder* was afterwards reversed by parliament; and the law, as laid down on that trial, was denied and reprobated, and the violence of the judge, and the severity of the jury, held up to the reproach and detestation of posterity. 3 Johns. Cas. 369, 370.

In every criminal case, upon the plea of not guilty, the jury may, and, indeed, they must, unless they choose to find a special verdict, take upon themselves the decision of the law, as well as the fact, and bring in a verdict as comprehensive as the issue; because, in every such case, they are charged with the deliverance of the defendant from the crime of which he is accused. The indictment not only sets forth the particular fact committed, but it specifies the nature of the crime. Treasons are laid to be done traitorously, felonies feloniously, and public libels to be published seditiously. The jury are called to try, in the case of a traitor, not only whether he committed the act charged, but whether he did it *traitorously*; and in the case of a felon, not only whether he killed such a one, or took such a person's property, but whether he killed with *malice prepense*, or took the property *feloniously*. So in the case of a public libeller, the jury are to try, not only whether he published such a writing, but whether he published it *seditiously*. In all these cases, from the nature of the issue, the jury are to try not only the *fact* but the *crime*, and in doing so, they must judge of the *intent*, in order to determine whether the charge be true, as set forth in the indictment. Dagge on Cr. Law, b. 1, c. 11, s. 2. The law and fact are so involved, that the jury are under an indispensable necessity to decide both, unless they separate them by a special verdict.

This right in the jury to determine the law as well as the fact, has received the sanction of some of the highest authorities in the law.

The inquest, says Littleton, (s. 368,) may give a verdict as general as the charge, if they will take upon themselves the knowledge of the law. The same principle is admitted by Coke, and other ancient judges, (Co. Lit. 228, a.; 4 Co. 53, b.; Wrey, Ch. J. Hob. 227;) although they allege it to be dangerous for the jury to do so, because, if they mistake the law, they run the hazard of an *attainder*. As the jury, according to Sir Matthew Hale, assist the judge in determining the matter of fact, so the judge assists the jury in determining points

of law. And it is the *conscience of the jury*, he observes, that must pronounce the prisoner guilty or not guilty. It is they, and not the judge, that take upon them his guilt or innocence. Hist. Com. Law, c. 12, H. H. P. C. vol. 2, 313.

Blackstone, in his Commentaries, (vol. 4, p. 354,) when speaking of the verdict of the jury in criminal cases, says, that the jury may find a special verdict, where they doubt the matter of law, and, therefore, choose to leave it to the determination of the court: though they have an unquestionable *right* to determine upon all the circumstances, and find a general verdict, if they will hazard a breach of their oaths. The statute of Westm. 2, (13 Edw. 1,) which declared that the justices of *assize* should not *compel the jurors* to say precisely, whether it be a disseisin or not, so as they *state the truth of the fact and pray the aid of the justices*, was in affirmance of the common law, (9 Co. 13, a. Plowd. 92;) and was intended for the relief of the jurors, and that they should not be compelled to find, at their peril, things doubtful to them in law. This indulgence to the jury, and which extended to all cases civil and criminal, is the most decisive proof that on a general verdict, the jury were obliged to judge of the whole matter in issue, and that the direction of the court upon the point of law, was not conclusive upon their judgments, or binding on their consciences. The twelve judges, in their opinion, to which I have alluded, "disclaim the folly of endeavoring to prove that a jury, who can find a general verdict, cannot take upon themselves to deal with matter of law arising on a general issue, and to hazard a verdict made up of the fact and of the matter of law, according to their conception of the law, against all direction by the judge."

To meet and resist directly this stream of authority, is impossible. But while the *power* of the jury is admitted, it is denied that they can *rightfully* or *lawfully* exercise it, without compromising their consciences, and that they are bound implicitly, in all cases to receive the law from the court. The law must, however, have intended, in granting this power to a jury, to grant them a lawful and rightful power, or it would have provided a remedy against the undue exercise of it. The true criterion of a legal power, is its capacity to produce a definitive effect liable neither to censure nor review. And the verdict of not guilty, in a criminal case, is, in every respect, absolutely final. The jury are not liable to punishment, nor the verdict to control. No attainder lies, nor can a new trial be awarded. The exercise of this power in the jury, has been sanctioned, and upheld in constant activity, from the earliest ages. It was made a question by Bracton, (fol. 119, a. b.) who was to sit in judgment upon and decide points of law, on appeals in capital cases. It could not be the king, he says, for then he would be both prosecutor and judge; nor his justices, for they represented him. He thinks, therefore, the *curia and pares* were to be judges in all cases of life and limb, or disherison of heir, where the crown was the prosecutor. And, indeed, it is probable that in the earlier stages of the English juridical history, the jury, instead of deciding causes under the direction of the judge, decided all causes, without the assistance of the judge. Barrington on the Statutes, 18, 26, 311.

As a general proposition, it is not denied that it is the province of the judges to expound the law, and of the jury to ascertain the facts. But when it is admitted that the judges may *advise* the jury as to the law, it does not follow that the jury are bound in all things to conform to that *advice*, whether in their opinion it be right or wrong. On the contrary, it is insisted that, though the jury should conform to the court's opinion of the law in civil cases, yet that in criminal causes they have an absolute right to follow their own opinion in opposition to that of the court, whenever the consequence of so doing will be a verdict for the accused. This right the jury may lawfully exercise, and the court cannot lawfully control it. The court may pronounce an opinion upon the law, which, if it were followed, would be decisive of the case against the accused. And yet the jury, if they differ from the court upon the law, may find a verdict of acquittal in direct opposition to the opinion so pronounced, and their verdict will be forever binding. It is entirely beyond the power of the court, and can never be set aside. This much is incontrovertible; and so far it is admitted that the jury "*may decide upon the law as well as fact*," even by Hargrave, in the note wherein he draws a distinction between the *immediate* and *direct* right of the court to decide the law, and the *incidental* right of the jury. 3 Tho. Co. Lit. 461, n. 7. This distinction is wholly un-

Important, as to the question now to be considered. It is enough that the *right itself* be established. It matters not whether it be termed *immediate* and *direct*, or *incidental*.

It will not be going too far to say, that the right of the jury in a criminal cause, to determine the whole matter involved in the general issue of guilty or not guilty, both law and fact, is constantly practised upon, throughout our land. It is incorporated into the systems of government which have been adopted in a large number of the states, and cannot, with propriety, be departed from in those states, while their systems remain unchanged. True, the general proposition is not laid down in positive terms, that in all criminal causes, the jury have a right to determine both the law and the fact; and this for the plain reason that the general proposition was uncontroverted. But the proposition is applied particularly to that class of cases which in England were once regarded as exceptions to the general rule, and by consequence embraces others. The declaration of rights adopted in Maine provides that "in all indictments for *libels*, the jury, after having received the direction of the court, shall have a right to determine, at their discretion, the law and the fact." The constitutions of Pennsylvania, Kentucky, Tennessee, Ohio, Indiana, and Illinois, declare that "in all indictments for *libels*, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases." A similar provision exists in the constitution of Delaware, with this difference, that it omits the words "under the direction of the court." And in Connecticut, Mississippi, Alabama, and Missouri, there is an omission of the words, "as in other cases." The constitution of New York is yet more unqualified. In the article treating of prosecution for libels, the provision in regard to the jury is simply that they "shall have the right to determine the law and the fact."

These constitutional provisions speak a language which is not to be misunderstood. They repudiate the idea that any peculiar doctrine is applicable to prosecutions for libel; and they acknowledge the rule that in these as in all other criminal causes, the jury are the judges of the law and the fact. In the states wherein no such specific provisions have been ingrafted in their constitutions, it is believed, notwithstanding, that the principle is regarded as a fundamental one. In every state, the trial by jury is secured; and with that is adopted the common law right which the jury have to acquit the accused, and thus decide finally upon the law and the fact.

In *The People v. Bradford*, (1 Wheeler's Cr. Cas. 221,) the court held that whether the act of the defendants, was a trespass, fraud, or felony, was a question to be left to the jury; they were, in a criminal case, judges of the law; and if the jury were of opinion the conduct of the defendants amounted to a fraud, it was sufficient to sustain the indictment. And in *The People v. Moore*, (3 Wheeler's Cr. Cas. 97,) the court said to the jury: "In any direction of the court as to principles of law, you have a right to differ with them, and it may be your duty, gentlemen, in some cases, to differ with them. A decent respect to their direction, is only expected."

In the United States, as well as in England, it is now the prevailing sentiment that the court are as much the judges of the law in criminal as in civil cases with the qualification that a criminal *acquittal* cannot be reviewed.

The circuit court of the United States, third circuit, in their charge to the jury on the trial of an indictment for robbing the mail, use the following language on the subject:

"In repeating to you what was said on a former occasion to another jury,—that you have the power to decide on the law as well as the facts of this case, and are not bound to find according to our opinion of the law,—we feel ourselves constrained to make some explanations not then deemed necessary, but now called for from the course of the defence.

"You may find a general verdict of guilty or not guilty as you think proper, or may find the facts specially and leave the guilt or innocence of the prisoner to the judgment of the court. If your verdict acquits the prisoner, we cannot grant a new trial, however much we may differ with you as to the law which governs the case; and in this respect a jury are the judges of law, if they choose to become so. Their judgment is final, not because they settle the law, but because they either think it not applicable, or do not choose to apply it to the case.

"But if a jury find a prisoner guilty against the opinion of the court on the law of the case,

a new trial will be granted. No court will pronounce a judgment on a prisoner against what they believe to be the law. On an acquittal there is no judgment; the court do not act, and cannot judge, there remaining nothing to act upon.

"This, then, you will understand to be what is meant by your power to decide on the law; but you will still bear in mind, that it is a very old, sound, and valuable maxim in law, that the court answers to questions of law and the jury to facts. Every day's experience evinces the wisdom of this rule." *United States v. Wilson et al.* 1 Baldw. 108.

In the case of *United States v. Battiste*, (2 Sumner Rep. 243,) Story, J. in summing up to the jury, said: Before I proceed to the merits of this case, I wish to say a few words upon a point, suggested by the argument of the learned counsel for the prisoner, upon which I have had a decided opinion during my whole professional life. It is, that in criminal cases, and especially in capital cases, the jury are the judges of the law, as well as of the fact. My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact; and includes both. In each they must necessarily determine the law, as well as the fact. In each, they have the physical power to disregard the law, as laid down to them by the court. But I deny, that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen: and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views, which different juries might take of it; but in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law, as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain, what the law, as settled by the jury, actually was. On the contrary, if the court should err, in laying down the law to the jury, there is an adequate remedy for the injured party, by a motion for a new trial, or a writ of error, as the nature of the jurisdiction of the particular court may require. Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it. If I thought, that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing, as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege and truest shield against oppression and wrong; I feel it my duty to state my views fully and openly on the present occasion.

The same doctrine is laid down in *Montee v. The Commonwealth*, 3 J. J. Marsh. 150; by Durfee, C. J. in *Dorr's Trial*, 121, 122, 130; and by Scott and Holman, Js. in *Townsend v. The State*, 2 Blackf. 158. In the latter case, it is said that, if the jury find the law contrary to the instructions of the court, they thereby violate their oath. See also 4 Bl. Com. 361. 4 Stephens' Com. 432. Foster, 256. *Montgomery v. The State*, 11 Ohio, 427. *Pennsylvania v. Bell*, Addison, 160. *Kellon v. Bevins*, Cooke, 107. In the case of *The King v. Dean of St. Asaph*, (3 T. R. 431, note,) Lord Mansfield says, the jury "do not know, and are not presumed to know the law; they are not sworn to decide the law; they are not required to do it. Upon the reason of the thing, and the eternal principles of justice, the jury ought not to assume the jurisdiction of the law. They do not know, and are not presumed to know any thing of the matter. It is the duty of the judge, in all cases upon general issues, to tell the jury how to do right, though they have the power to do wrong, which is a matter between God and their own conscience. To be free, is to live under a government by law. Miserable is the condition of individuals, dangerous is the condition of the State, if there is no certain law, or (which is the same thing) no certain administration of law, to protect individuals, or to guard

the State." See also 3 Johns. Cas. 405, per Lewis, C. J. Worthington on Power of J. 120, 125, 173. Eunomus, Dial. 3, § 53. 2 Hume Crim. Law, (2d. ed.) 423.

In *Hardy v. The State*, (7 Missouri Rep. 607,) a jury, who were told by a subordinate that they were the judges of the law and of the evidence, found the defendant guilty. The court passed judgment upon him. The supreme court reversed the judgment, from misinformation given to the jury.

As the jury have only the power, without the right, to decide questions of law against the instructions of the court, it seems to follow that counsel should not be permitted to argue the jury against the correctness of those instructions. And so it was held in *Dunlap v. The Commonwealth*, 1 Leigh, 588; in *Commonwealth v. Garth*, 3 Leigh, 761; and in *Leitch v. The Commonwealth*, 77, 81, 82.

In the case of *The People v. Pine*, (2 Barb. Supm. Ct. Rep. 566,) which was a trial for murder, Judge Barculo in the course of his charge to the jury, said: "It is often said, and has been said in the progress of this trial, that the jury in criminal cases, are judges of the law as well as of the facts. If by this is meant that the jury are to assume the prerogative of the court as exercised in civil cases, adopt their own views of the law without regard to those entertained by the court, I am bound to say to you, that such is not the law of this land. This proposition is perfectly untenable, and has been distinctly repudiated on more than one occasion by the judges of the supreme court of the United States. If, however, by this expression is meant merely that whatever decision the jury make, whether of law or fact, in favor of the prisoner, is final and cannot be reviewed—then the declaration is true. This is all that can be properly understood by the phrase "the jury are judges of the law as well as fact;" and the reason of this is, that the constitution does not permit a new trial in case of acquittal. But if the decision of the jury should be *against* a prisoner contrary to the law as laid down by the court, a remedy can be applied. In this state the jury is presumed to receive the law from the court. The prisoner has the benefit of exceptions to the opinion of the court; and if they are well founded, he can obtain a new trial. The jury, it is true, have the power to disregard the law, and to disregard their oaths—to render a verdict contrary to both law and evidence; and in this respect they are the judges of the law; and if in so doing they acquit a prisoner when he is guilty, the public is without redress. But it can hardly be contended that the jury has the right to do all this. The question has recently been discussed and decided by the supreme court of the state of Massachusetts, in the case of the *Commonwealth v. Porter*, Law Rep. for 1847, p. 455. In delivering the opinion of the court, Chief Justice Shaw makes the following observations: "We consider it a well settled principle and rule, lying at the foundation of jury trial, admitted and recognized, ever since jury trial has been adopted as an established and settled mode of proceeding in courts of justice, that it is the proper province and duty of judges to consider and decide all questions of law, which arise, and that the responsibility of a correct decision is placed finally on them: that it is the province and duty of the jury to weigh and consider evidence, and decide all questions of fact, and that the responsibility of a correct decision is placed upon them. And the safety, efficacy, and purity of jury trial depend upon the steady maintenance and practical application of this principle. It would be alike a usurpation of authority and violation of duty, for a court on a jury trial, to decide authoritatively on the questions of fact, and for the jury to decide ultimately and authoritatively upon the questions of law." "This, as a general principle, is applicable alike to civil and criminal cases." "It is presumed that the jury followed the instruction of the court, in matter of law, because it was their duty so to do, and therefore if the instruction was wrong the verdict was wrong." "It is the duty of the court to instruct the jury on all questions of law which appear to arise in the cause, and also upon all questions pertinent to the issue, upon which either party may request the direction of the court, upon matters of law. And it is the duty of the jury to receive the law from the court, and to conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the facts to be found by them; and it is not within the legitimate province of the jury to revise, reconsider, or decide contrary to such opinion or direction of the court in matter of law. To this duty, jurors are bound by a strong social and moral obligation, enforced by the sanction of

an oath, to the same extent, and in the same manner as they are conscientiously bound to decide all questions of fact according to the evidence."

"In Pennsylvania," says Mr. Wharton, (Whart. Cr. Law, 2d ed. pp. 892, 893) "though there has been no reported decision on the express point, yet it has not been usual, to say the least, to leave the jury the law to decide. A very strong leaning to the contrary is shown by Gibson, C. J. in closing a charge in a capital case: 'If the evidence on these points fail the prisoner, the conclusion of his guilt will be irresistible, and it will be your duty to draw it.' *Com. v. Harman*, 4 Barr. 269. So, in a homicide case, in which the popular sentiment, excited by the recent riots in Kensington, set so strongly against the prisoner, as to make possible a conviction on insufficient evidence, Rogers, J. in charging the jury, told them that they were merely bound to find the law according to the court's charge; and that though they had the *physical* capacity to do otherwise, yet by so doing they could commit a moral wrong, as much as if they should convict when their consciences told them the evidence was the other way. Not varying much from this, is the language of Sergeant, J. in a charge in a case of misdemeanor: 'The point, if you believe the evidence on both sides, is one of law, on which it is your duty to receive the instructions of the court. If you believe the evidence in the whole case, you must find the defendant guilty.' *Com. v. Vansyckle*, Brightly Rep. 73."

In Ohio, in *Montgomery v. The State*, (11 Ohio Rep. 424,) the court says: "By the last clause of the 6th sec. of the 8th Article of the constitution of this state, it is declared, that, 'in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.' It would seem, from this, that the framers of our bill of rights, did not imagine that jurors were rightfully judges of law and fact in criminal cases, independently of the directions of courts. Their right to judge of the law, is a right to be exercised only under the direction of the court; and, if they go aside from that direction, and determine the law incorrectly, they depart from their duty, and commit a public wrong; and thus in criminal, as well as in civil, cases. The jury are the judges of the facts, both in civil and criminal cases; but they are not, in either, the judges of the law. They are bound to find the law as it is propounded to them by the court. They may, indeed, find a general verdict, including both the law and the facts, but if, in such verdict, they find the law contrary to the instructions of the court, they thereby violate their oath. *Townsend v. The State*, 2 Blackf. Rep. 151.

In *Montee v. Commonl.* (3 J. J. Marsh. Rep. 132,) the court of appeals of Kentucky, said: "The circuit judge would be a cypher, and a criminal trial before him, a farce, if he had no right to decide all questions of law, which might arise in the progress of the case.

"The jury are the exclusive judges of *the facts*. In this particular, they cannot be controlled, and ought not to be instructed by the court. They are also '*ex necessitate*,' the ultimate judges, in one respect, of the law. If they acquit, the judge cannot grant a new trial, how much soever, they have misconceived or disregarded the law.

"They have the right, in all cases, to find a general verdict of guilty or not guilty. As guilt or innocence, is a deduction from the law and facts of the case, the jury must, therefore, necessarily decide the law, *incidentally*, as well as the facts, before they can say, that the accused is guilty or not guilty. The facts prove the nature and motive of the act, which has been done. Whether the act, when its character shall be ascertained and fixed, be a breach of the law, must be determined before it can be known, whether the offence charged, has been committed. And hence, the jury must not only decide the facts, but also, the law which is charged to have been violated by the act, which these facts establish; and by comparing the facts with the law, decide whether the offence charged in the indictment has been proved. It is necessary, before this can be done, that the jury shall ascertain, and decide what the law is.

"But, as the judge is the organ and expositor of the law, and is placed on the bench to explain it to the jury, it is not only his *privilege*, in all cases, but it is his *duty*, when called on, to state what the law is. And the jury should yield a respectful deference to the legal opinions of the court. They have the *legal* power to condemn, and overrule them, but they have *no moral right* to do so.

"In I. Institutes, 155, b. in a note, Hargrave says, 'Upon the whole, the result is, that the immediate and direct right of deciding upon questions of law, is intrusted to the judge; that in a jury, it is only incidental; that in the exercise of this incidental right, the jury are not only placed under the superintendence of the former, but are, in some degree, controllable by them; and, therefore, that in all points of law, arising on a trial, juries ought to show the most respectful deference, to the advice and recommendation of judges; nor is any small merit in this arrangement, that, in consequence of it, every person accused of a crime, is enabled, by the general plea of not guilty, to have the benefit of a trial, in which the judge and jury are a check upon each other.'

"Wynne, in his Eunomus, Dialogue, 3, s. 53, says, 'all that may here be said, upon the subject of juries, is agreeable to the established maxim, '*ad questionem facti*.' It is undoubtedly true, that the jury are judges, the only judges of the fact. Is it not equally within the spirit of the maxim, that judges *only*, have the competent cognizance of the law?" "Every verdict is compounded of law and fact, but the law and the fact are always distinct in their nature."

"The jury are sworn 'well and truly to try the issue, and a true verdict to give, according to the evidence.' The court decides the law, on the indictment. If the act charged, does not amount to an offence, according to law, the indictment is not good. If the act charged be a breach of the law, the jury try the fact, and ascertain whether the act has been committed, with an illegal intent. '*The issue*,' therefore, is *chiefly* one of fact, and the verdict must be according to the evidence."

"Many incidental questions of law, may arise, during the trial, which it is impossible that the jury can decide, and which, therefore, must be decided by the court."

"The controversy, as to the right of the court to instruct the jury on the law, has arisen from the odious, and now abolished practice, in state libels, of restricting the jury to a special verdict, finding the fact of publication only. This was subversive of personal security, and contrary to the great end of trials by jury. And this grievous error, has been rectified by tolerating general verdicts of guilty or not guilty. A better security ought not to be desired; more would not be compatible with the public interest, nor reconcileable with the integrity of the laws. If the court erroneously decide the law, and the jury, in consequence thereof, improperly convict, a new trial may be awarded. But if the jury err in their construction of the law, and in consequence of it, improperly acquit, there is no correction. The accused may then safely rely on the maxim, '*nemo bis punitur, aut vexatur procedendo de facto*.' He should always be entitled to the benefit of an instruction by the court, when his interest or safety may require it. The right of the commonwealth must be reciprocal."

"If the court had no right to decide on the law, error, confusion, uncertainty and licentiousness, would characterize the criminal trials; and the safety of the accused might be as much endangered, as the stability of public justice, would certainly be."

"But the 8th section of the constitution of the state, 10th article, would remove all doubt, if otherwise there might be any. It declares, that 'in all indictments for libels, the jury shall have a right to determine the law and the facts, *under the direction of the court, as in other cases*.'"

"This needs no commentary. It clearly defines how the jury may determine the law and the facts; and what shall be the province of the court. It presupposes, that in all cases, except prosecutions for libels, (for which it provides) the court had a pre-existing acknowledged right, to direct the jury, as to the law; but leaves the jury then to decide the whole case, compounded of law and fact."

"The court did not, therefore, in this case, err in giving the law to the jury. There is no complaint, that the law was not correctly expounded. The objection is, that the court usurped the prerogative of the jury, in presuming to advise as to the law."

In Texas, it has been held, that "the jury are the exclusive judges of the facts. The judge may not charge them as to the weight of evidence. 1 Stat. 209, sec. 43; Acts of 1846, 390. It is then peculiar and exclusive province to weigh the evidence; and it is then duty to find the facts *alone from the evidence*; and to look for them to no other quarter whatever. For the law, it is their duty to look to the court." *Nels v. The State*, 2 Texas Rep. 280.

The weight of the authority in this country is that the jury must take the law from the court. It has been so held in New York. *People v. Pine*, 2 Barb. Rep. 566; *Carpenter v. The People*, 8 Barb. 610; In Pennsylvania, *Penn. v. Ball*, Add. 160; Massachusetts, *Com. v. Porter*, 10 Metc. 286; *Com. v. White*, 10 Met. 14; *Com. v. Abbott*, 13 Metc. 120; In New Hampshire, *Pierce v. State*, 13 New Hamp. Rep. 536; In Rhode Island, *Dorr's trial*, 121; In Virginia, *Davenport v. Com.* 1 Leigh, 588; *Com. v. Graith*, 3 Leigh, 761; *Howell v. Com.* 6 Grat. 664; In Ohio, *Montgomery v. State*, 11 Ohio Rep. 424; In Kentucky, *Montee v. Com.* 3 J. J. Marsh. 150; In Texas, *Nels v. State*, 2 Texas Rep. 280; And in Missouri, *Hardy v. State*, 7 Missouri Rep. 607.

But in Maine, it has been held that if the jury believe they can be justified in deciding contrary to the ruling of the judge, they have a right to take upon themselves that responsibility. *The State v. Snow*, 18 Maine Rep. 346. So also in Alabama, it has been held that the jury are judges of both the law and the fact, and may, if they think proper to do so, disregard the opinion of the court upon the law. *The State v. Jones*, 5 Ala. Rep. 666.

The penal code of Georgia, declares, that "on every trial of a crime or offence, contained in this code, or for any crime or offence, the jury shall be judges of the law and the fact, and shall, in every case, give a general verdict of guilty or not guilty, and on the acquittal of any defendant or prisoner, no new trial, shall, on any account be granted by the court." Prince, 660. The juries in Georgia can find no special verdict at law. They are declared to be the judges of the law and the facts, and are required in every case to give a general verdict of *guilty or not guilty*. In *Holden v. State of Georgia*, (5 Geo. Rep. 445,) the court per Nisbet, J. says: "I would not be understood as holding, that it is not the province of the court to give the law of the case distinctly in charge to the jury—it is unquestionably its privilege and its duty to instruct them as to what the law is, and officially to direct their finding as to the law, yet, at the same time, in such way as not to limit the range of their judgment. In short, the court, in the full exercise of its own functions, must still obey the behest of the statute, and concede to the jury the exercise of their judgment on all the law of the case." A similar doctrine has been held in Indiana. *Warren v. The State*, 4 Blackf. Rep. 150.

#### 6. NEW TRIAL ON THE GROUND THAT THE VERDICT IS CONTRARY TO EVIDENCE.

It may be difficult to lay down any precise rule, by which courts, in all cases, are to be governed in applications for new trials for verdicts against evidence. They are, at common law, as well as by our own statute, addressed to our *discretion*, which is to be exercised so as to subserve the great end of all trials, a fair and impartial administration of justice. Each case must, in a measure, stand on its own proper ground. While, on the one hand, courts will be careful not to interfere arbitrarily, or in doubtful cases, with the appropriate province of the jury, on questions which our constitution and laws have placed peculiarly under their jurisdiction, they will, on the other, exercise the power which the same authority has conferred on them, when the substantial ends of justice require it. *Fox v. Clifton et al.*, 6 Bing. 754; *S. C.* 9 id. 115.

If, therefore, it does not clearly appear that the finding of the jury is against the weight of evidence; or that it is necessary to the justice of the cause, that there should be a new trial; or that the result would or ought to be different, the court will not disturb the verdict. *Deacle v. Hancock*, 13 Price, 226.

The power of the court to grant a new trial for a verdict against evidence, is not to be exercised, unless "in clear cases." *Bartholomew v. Clark*, 1 Conn. Rep. 472. "The verdict ought to be manifestly and palpably against the weight of evidence, to a *venire facias de novo*. The granting a new trial, merely because, in the opinion of the court, the verdict is rather against the weight of evidence, would reduce the trial by jury to an expensive and useless form, and take away the power vested in the jurors by the constitution." *Palmer v. Hyde*, 4 Conn. Rep. 426; *Eagle Bank v. Smith*, 5 ib. 71; *Johnson v. Scribner*, 6 ib. 185.

In the last case, the court suggest the general rule which governs them on the subject, and the reason on which it is founded. Where the verdict is manifestly and palpably against the weight of evidence, the facts ought to be submitted to another jury, that they may be



investigated and considered with great deliberation and attention, in order to correct any mistake that may have intervened. Nothing is more preposterous than the idea, that a mistaken decision of one jury, a fallible tribunal, may not be corrected by the re-examination and determination of another.

In *Nichols v. Alsop*, (6 Conn. Rep. 480,) a new trial was granted because the verdict was against the justice of the cause, and unsupported by evidence.

In *Newell v. Wright*, (8 Conn. Rep. 519,) we said, we feel no disposition to invade the province of the jury. They are constituted judges of the facts, in every case, with the aid of the court; and this should be conceded to them. At the same time, it must be yielded, as the prerogative of the court, to grant new trials, in cases where the verdicts are not only against the weight of evidence, but against the evidence. The rule is settled, that a new trial may be granted, where the verdict is manifestly against the weight of evidence. *Kear v. Kinne et al.*, 9 Conn. Rep. 102. *Laflin v. Pomeroy*, 11 Conn. Rep. 446-447.

In *Davis v. The State*, (2 Humph. Tenn. Rep. 439,) the court say: "The rule that this court will not grant a new trial upon the facts, unless the jury shall appear to have been guilty of great rashness, does not apply to criminal cases. In such cases, new trials have been constantly granted by this court, upon its conviction that the verdicts were not warranted by the proof." See *Kirby v. The State*, 3 Humph. Rep. 289; *Bedford v. The State*, 5 Humph. Rep. 552; *Copeland v. State*, 7 Humph. 479; *Cochran v. State*, 7 Humph. 544.

In *The State v. Fisher*, (2 Nott. & McCord's Rep. 261,) where the defendant had been convicted of highway robbery, the constitutional court of South Carolina said: "Unless a verdict is clearly and manifestly against evidence, or wholly without evidence, the court will not set it aside. It is the peculiar and exclusive privilege of the jury to decide on the weight of evidence, and also, on the degree of credit to which the witnesses shall be entitled."

In Virginia, in *Ball's case*, (8 Leigh. Rep. 726,) the principle settled was that the court, as a preliminary to its interposition, must be satisfied that a clear and palpable error has been committed by the jury. And in *M'Cune's case*, (2 Robinson's Rep. 771,) this limitation is imposed, and in language still more clear and decided. See also *Hill's case*, 2 Gratt. Rep. 594. In Virginia, where the evidence is contradictory and the verdict is against the weight of evidence, a new trial may be granted by the court which presides at the trial; but its decision is not the subject of a writ of error or *supersedeas*, or examinable by an appellate court. *Grayson's case*, 6 Gratt. Rep. 712.

After the conviction of a prisoner, a new trial will not be granted, where the evidence, though circumstantial, tends strongly to show that he was guilty, and is not contradicted or explained. *Blevin's case*, 5 Gratt. 703; nor though it is circumstantial and not conclusive and warrants the finding of the jury by the force of inferences and no explanation appears. *The State v. Scates*, 3 Strobb. Rep. 106.

In Georgia, where a new trial has been refused in the court below when asked on the ground that the verdict was contrary to evidence, the supreme court will not interfere, except in cases strong and unequivocal. *Roberts v. State*, 3 Kelly, 310.

Where, upon a conviction for arson, the court refused to grant a new trial, on the ground that the verdict was against the evidence, and the testimony was conflicting, it was held that such refusal was no ground for a reversal. *McLane v. State of Georgia*, 4 Geo. Rep. 335.

In Mississippi, the court of errors and appeals may grant new trials when there is a great preponderance of evidence against the verdict. *Kethler v. The State*, 10 Smedes & Marsh. Rep. 192. But where an accessory was found guilty on the testimony of the principal alone, a new trial for that cause, was refused, although his testimony was somewhat contradictory and inconsistent; his credibility being for the exclusive consideration of the jury. *Ib.*

#### 7. NEW TRIAL ON ACCOUNT OF IRREGULARITY IN IMPANNELLING THE JURY.

A new trial will be granted at common law, where it appears after verdict, that some one of the jurors should not have been permitted to sit upon the trial, on account of an entire legal incapacity; as where it is discovered that one of the jurors was not a freeholder; (*State v. Babcock*, 1 Conn. 401,) or had been taken from the debtor's prison for the purpose,

(*Stanton v. Beadle*, 4 T. R. 473,) or was an infant. *Russell v. Ball*, Barnes, 455; *King v. Tremayne*, 7 Dowl. & Ryl. 684. It is a good ground of objection, at common law, to the jury, that they have been improperly chosen, or chosen by an unauthorized officer, or that the officers in attendance had permitted irregularities. Where one who had been challenged on the principal pannel, was afterwards sworn in under another name as a talesman; (*Parker v. Thornton*, 2 Lord Raymond, 1410,) and where talesmen were summoned and returned, and set on the trial, who had not been drawn according to the statute, a new trial was ordered. *Kennedy v. Williams*, 2 Nott & McCord, 79; see *Com. v. Sallagher*, 4 Pa. Law Jour. 520. If the party, however, is aware of the objections to the talesman, and neglects his challenge, no new trial will be granted; (*Jordan v. Meredith*, 3 Yeates, 318; *Howland v. Gifford*, 1 Pick. 38; 2 Bay, 150,) as the objection that the juror had not been drawn and returned according to law, comes too late after verdict. *Amherst v. Hadley*, 1 Pick. 38. Thus, where one of the jury had been drawn more than twenty days before the time when the venire was made returnable, exception not having been made until after verdict, a new trial was refused. *State v. Hascall*, 6 N. Hamp. 352. A new trial will not be granted because the clerk, in calling over the jury, pursued the order in which they were empaneled, instead of that in which their names appeared in the venire. *State v. Slack*, 1 Bailey, 330. Wharton's Cr. Law, pp. 93, 94.

In *Hill v. Yeates*, (12 East, 229,) the court of king's bench refused to set aside a verdict in a civil cause, where the son of one of the jurymen answered to the name of his father, when called on the panel, and actually served as one of the jury, in lieu of his father, though he had never been summoned. I must confess that that case carries the doctrine to an extent which I should be unwilling to go. It appears to me to have been the verdict of but 11 men; the 12th man was no juror; he was not upon the panel; he was not the man intended to be summoned, nor was he even in fact summoned. Lord Ellenborough put it upon the ground, that it was a matter within the discretion of the court to grant or refuse a new trial in such a case; and that as no injustice was pretended to have been done, the court would not interfere in this manner, but leave the party to get rid of the verdict in some other way, if he could. He also observed, if they were to listen to such an objection, they might set aside half the verdicts given at every assizes, where the same thing might happen from accident, or inadvertence, and possibly sometimes from design, especially in criminal cases. This case marks, emphatically, the strong reluctance of that court to interfere with the verdict of a jury upon any objection of form, not affecting the substantial merits of the case. With great deference and respect, however, I must say, that I think the court in that case pushed the principle to a dangerous extent. The case upon which they mainly relied, differed from it most essentially. It is stated in a note, page 230. That was the case of one Robert Curry, who answered to the name of Joseph Curry, in the plaintiff's panel, and was sworn and served by that name. Robert, however, was the man actually summoned by the bailiff, and was qualified to serve as a juror. The court held that this was a mere misnomer in the panel of the jurymen, and was but cause of challenge, which, on being stated, would have been instantly remedied, by altering the panel, and refused to interfere on the ground of irregularity, although it was a case of conviction for a capital felony. There the jurymen who served was the man who was intended to be summoned, and who was actually summoned; and the mistake was simply in his christian name, as put on the panel. The case of *Wray v. Hearn & Hancock*, Willes, 488, was also a case of misnomer merely. One of the jurors was named Henry in the venire, the *habeas corpora*, and the *postea*, whereas his real christian name was Harry. He was, however, the man intended, and was a competent juror; and the court refused to set aside the verdict. But the case of *Norman v. Beaumont*, Willes, 484, was, in its circumstances, precisely like the case of *Hill v. Yeates*, 12 East; one of the jurymen was not returned on the *nisi prius* panel, but answered to the name of a person who was, and the verdict was set aside on that ground. So, also, in the recent case of *The King v. Tremain*, (7 Dowl. & Ryl. 684,) a son personated his father, as a juror and joined in a verdict of guilty against a person indicted for perjury. The son was under age, and was not qualified by property to serve as a juror. It was held that this was a mistrial, and a new trial was granted. The judges all attach great importance to the

circumstance that the intruding jurymen had not the legal qualifications of a juror. They consider it as the verdict of only 11 jurors, on that ground. But it is evident that the decision in *Hill v. Yates*, did not meet their approbation. *Dewey v. Hobson*, 6 Taunt. 460, was precisely like the case of *Hill v. Yates*; a man not summoned answered to the name, and served in the place of one of the jurors summoned. The fact was discovered before the verdict, and the plaintiff, notwithstanding, insisted upon retaining the juror, and a verdict was rendered in his favor. The verdict was set aside; and the court endeavor to distinguish it from *Hill v. Yates*, on the ground that the plaintiff was apprised that he took the verdict at his peril. But it is apparent that they did not approve of the decision in that case.

The case of *The King v. Hunt*, (4 Barn. & Ald. 430,) was an information for a libel before a special jury. Only ten of the special jury attended, and two talesmen were sworn, and the defendant was convicted. He moved for a new trial, on the ground that the officer had omitted to summon the two special jurymen, who had not attended; and it was contended that it was absolutely necessary that all should be summoned; that the act of parliament was imperative, for it required all to be summoned; and if two might be omitted, so might any other number. But the court unanimously refused the motion, saying that it would be an alarming principle to establish, that a verdict could be set aside, because the sheriff had omitted to summon one jurymen out of the whole panel; that applications, of this sort were addressed to the discretion of the court; that if the officer had not done his duty, he might be punished for it; and if his omission has actually produced prejudice to the party, then the court in its discretion might prevent injustice being done, by granting a new trial. In that case the omission had not been shown to have been prejudicial to the defendant, and therefore the motion was refused. This, I apprehend, is the true rule to be collected from all the cases.

In the *People v. McKay*, (18 Johns. 412,) the defendant was tried for murder, and convicted. He was brought into this court by *habeas corpus*, and the indictment and proceedings against him in the court of oyer and terminer were also returned, in obedience to a certiorari, directed for that purpose. Upon the papers thus before the court, the counsel for the prisoner moved in arrest of judgment, on the ground that no venire had been issued to summon the petit jury; and it appeared that the venire issued was not under the seal of the court, and that no official return had been made to it by the sheriff. It was admitted by the counsel for the people that the case stood precisely as though no venire had been issued, it having no seal, and therefore was absolutely void; but they contended that no venire was necessary. The only question then, was, whether the judgment could be sustained, when the record showed that no venire had been issued. Judge Spencer says: "Inasmuch, then, as a venire was necessary at the common law, and as the statute yet requires it to be issued, the omission to issue it, we must consider an error apparent on the record; and in such a case affecting life, we do not feel ourselves authorized to dispense with a process required by the common law, and also by the statute, although we may not be able to perceive much use in continuing it." The decision proceeded on the ground that the error was apparent on the record, and the court could not disregard it.

A non-compliance by the clerk to put the names of all the persons returned as jurors into a box, from which juries for the trial of issues are to be drawn according to the statute, is not sufficient ground for setting aside a verdict, either in a criminal or civil case, where the court are satisfied that the party complaining has not, or could not have sustained any injury from the omission; and it was accordingly held, where on the trial of a capital case, after twenty-eight jurors had been called, eleven of whom were approved and sworn, and seventeen peremptorily challenged, it was discovered that the ballot containing the name of a juror who had answered on the calling of the general panel, was not in the box containing the names of the jurors returned for the court, and which on search was found and put into the box, and drawn out of it by direction of the court, and the juror sworn to serve on the jury, that the irregularity or neglect of the officer, was not such as to entitle the prisoner to a new trial, it appearing to the court that the omission to put the ballot into the box proceeded from neglect, and not from design.

The conclusion from the cases seems to be this: That any mere informality, or mistake of

an officer in drawing a jury, or any irregularity, or misconduct in the jurors themselves, will not be a sufficient ground for setting aside a verdict, either in a criminal or civil case, where the court are satisfied that the party complaining has not sustained any injury from it.

In the state of New York, the revised statutes provide that no verdict shall be affected for any imperfect or insufficient return of any sheriff or other officer, nor because the name of such officer is not set to any return actually made by him; nor for any other default or negligence of any clerk or officer of the court, or of the parties, or their counsellors or attorneys, by which neither party shall have been prejudiced. All such omissions and defects, and all others of the like nature, shall be supplied and amended by the court. 2 N. Y. Rev. Sta. 425, sec. 7.

In Pennsylvania, by act of 21st Feb. 1814, no verdict can be set aside, nor any judgment arrested, for any defect or error in the jury process; but a trial, or an agreement to try on the merits, or pleading guilty, or the general issue is a waiver of all errors and defects, in or relative and appertaining to the said precept, venire, drawing and summoning of jurors.

#### 8. NEW TRIAL ON THE GROUND OF IMPROPER JURY.

Incompetency of a juror, if known to the defendant before trial, and no objection made, is not ground for a new trial. *Lisle v. The State*, 6 Missouri Rep. 426; 3 Marsh. 330; 1 Binney, 27; 4 Bibb, 272; 4 Littell, 118. But an objection to a juror which would be good cause of challenge, if not discovered till after verdict will be good ground for a new trial. *Cain v. Cain*, 1 B. Monroe, 213.

A defendant who is found guilty, is not entitled to a new trial, on the ground that a juror was taken from the panel on the erroneous supposition that there was good cause to challenge him, and another juror substituted, if the defendant did not object at the time. *Com. v. Slowele*, 9 Met. 572. In the trial of a capital case, the original venire should be first drawn and tendered; but if the judge should, where there are only eleven of the original panel direct tales jurors to be drawn with them the prisoner has no right to a venire de novo on this account, if he has had an opportunity of accepting or rejecting all of the original venire. *The State v. Lytle*, 5 Iredell, 58. And where one of the venire upon being called was challenged by the state and directed to retire until the panel was gone through with, and was not afterwards recalled, the prisoner making no motion to that effect, and it being known that the juror was a witness for the prisoner, it was held that this was no ground for a venire de novo on the part of the prisoner. 1b It is no ground for a new trial, that a challenge of a juror by a party for cause has been improperly, where the party has been tried by a jury to whom he had no objection, not having been prevented from exercising his privilege of challenging peremptorily. *Whitaker v. Carter*, 4 Iredell, 461.

The expression of an opinion by a juror before trial, with regard to the guilt or innocence of the accused, although good ground of challenge is not good cause for granting a new trial after conviction. *Com. v. Flanagan*, 7 Watts & Serg. 415. But if the juror prejudged the case, leaving his mind unopen to conviction, it would be good ground for setting aside the verdict. 1b. See *Simpson v. Pitman*, 13 Ohio, 365. Where a juror had formed and expressed a decided opinion on the merits of the case adverse to the defendant, and the fact was not known to the party or his counsel, after the exercise of proper diligence, by asking the juror before he was sworn whether he had formed and expressed an opinion, it was held that the defendant was entitled to a new trial. *Vennum v. Harwood*, 1 Gilman Rep. 659; *Monroe v. State of Geo.* 5 Geo. Rep. 85.

Loose impressions and conversations of juror as to the prisoners guilt or innocence, founded upon rumour, where they are disclosed after verdict, will not be a cause of new trial. *Howerton v. The State*, 1 Meig's Tenn. Rep. 262. In North Carolina, in a capital case a new trial was refused, where a juror said on oath that he had not formed an opinion of it, and after the verdict it was proved that he had said that he had made up his opinion, which was unknown to the prisoner. *The State v. Scott*, 1 Hawk. 24. But in Illinois, where a juror at different times before the trial of a prisoner for murder, said he believed the prisoner "would be hung," that he ought to be hung, that nothing could save him, that salt could not save

him, and that there was no law to clear him; and subsequently went to the jail where the prisoner was confined and told him that he ought not to be hung, and if he were on the jury he should not be hung; but afterwards when sworn on the trial touching his competency as a juror he stated that he had formed no opinion, and, no objection being made, he was sworn on the jury, and the prisoner convicted, a new trial was granted on the ground of the incompetency of the juror. *Sellers v. The People*, 3 Scam. 412. In Virginia, after a verdict of guilty, in a capital case, the prisoner offered testimony that two of the jurors who tried the case, and who on their *voir dire* declared that they had not formed or expressed an opinion as to the guilt or innocence of the prisoner, had in fact previous to the trial, expressed decided opinions that the prisoner was guilty and ought to be hung; of which circumstance the prisoner alleged that he had no knowledge, until since the verdict was rendered; and on this ground he moved for a new trial. Held, that the inquiry was open, and the evidence admissible for the purpose of showing perjury and corruption in the jurors, but that it belonged exclusively to the judge who presided at the trial to weigh the conflicting credibility of the witnesses adduced by the prisoner and of the jurors, and to decide whether, in justice to the prisoner, and upon all the circumstances of the case, a new trial ought or ought not to be granted. *Heath's case*, 1 Robinson 735.

Where a juror is charged with having pre-judged the case, it seems his affidavit may be read in self exculpation. *Taylor v. Greely*, 3 Greenleaf, 204.

#### 9. NEW TRIAL ON ACCOUNT OF MISCONDUCT OF JURY.

SEPARATION OF JURY.—“The general rule,” says Mr. Wharton, (Cr. Law, 895,) “is that the verdict will not be set aside on account of the misconduct or irregularity of a jury, even in a capital case, unless it be such as might affect their impartiality, or disqualify them for the proper exercise of their functions. An exception, however, formerly existed in England, and is still recognized in several of the United States, in felonies where the jury separate after the opening of the evidence. While on the one hand the present practice in England, and in a portion of the American courts, is to sustain the verdict when the separation has been inadvertent, and no abuse has resulted from it, on the other hand it has been considered in several instances that the mere separation without permission is in itself *prima facie* reason for a new trial.

“The latter doctrine was pressed with great rigor by the early common law authorities, in all cases, both civil and criminal; it being agreed that by “the law of England, a jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drink, fire or candle, which some books call an imprisonment, and without speech with any, unless it be the bailiff, and with him only if they be agreed.” A more humane system has since been recognized; and in all cases not capital, it appears that juries are permitted to separate whenever in the discretion of the court it seems proper. In capital cases, however, it would seem that under no circumstances will separation be permitted until a verdict is agreed on; and so far, as has been seen, has this doctrine been pushed in several instances in this country, that it has been held that if the jury be discharged, except in case of such necessity as may be considered as the act of God, such discharge is a bar to a second trial. In England, no case occurs, however, of an application for a new trial under such circumstances, the practice there being, as has been shown, after convictions for felony, for the judges, in case of irregularity, to recommend a pardon. In this country a different course has been followed, and the question has in several cases received the consideration of courts of the highest judicature.”

In an early case in Virginia (*Com. v. McCaul*, 1 Va. Cas. 271,) where the defendant had been convicted of grand larceny, it appeared that one of the jurymen, during a temporary adjournment of the court went to the house at which he boarded, without the officer of the court, and was absent fifteen or twenty minutes. The person with whom the jurymen boarded stated that he was in his room when he was called to dinner, and that the jurymen, except whilst dining, remained in his own room. Another jurymen on the morning of another day of the trial, attended by the officer, went to visit a sick child. They were absent

about twenty minutes and the officer remained below, whilst the jurymen went up stairs to see his family, and was absent from the officer about five minutes. There was no proof of any actual tampering or conversation on the subject of the trial with the jurymen; and the court held that it was not necessary that this should be proved, in order that the verdict should be set aside, and a new trial granted. In Tennessee, in the case of *M'Lain v. The State*, (10 Yerger, Rep. 241,) where the defendant had been convicted of murder, a new trial was granted under similar circumstances, and the case of *Com. v. M'Caul* was cited and approved. In a still later case however in Tennessee (*Stone v. The State*, 4 Humph. Rep. 27,) it was held that a new trial would not be granted in a capital case because the jury separated and mingled with the rest of the community, and because the sheriff who was not a sworn officer if the jury had charge of them for a time, where it is satisfactorily shown that the jury were not tampered with. In a very late case in Tennessee (*Hines v. The State*, 8 Humph. Rep. 597,) the court laid down the following principles as the settled law of the state:—1. That the fact of separation having been established by the prisoner, the possibility that the juror has been tampered with, and has received other impressions than those derived from the testimony in court, exists, and *prima facie*, the verdict is vicious. 2. But this separation may be explained by the prosecution, showing that the juror had no communication with other persons, or that such communication was upon subjects foreign to the trial, and that in fact, no impressions, other than those drawn from the testimony, were made upon his mind. 3. In the absence of such explanation the mere fact of separation, is sufficient ground for a new trial, approved in *Luster v. The State*, 11 Humph. Rep. 169.

See also *Whitney v. The State*, 8 Mis. Rep. 165. In the state of New York, (in *The People*, agt. *Douglass*, 4 Cowen's Rep. 26,) (1825,) it was held that the mere separation of a jury, though impanelled to try a capital offence, and though they separate contrary to the directions of the court, will not of itself be sufficient cause for setting aside the verdict, but that if there was the least suspicion of abuse, the verdict should be set aside. And see also *The State v. Lytle*, 5 Iredell, 58; *Pulaski v. Ward*, 2 Rich. 119; *Graves v. Monet*, 7 Smedes & Marsh. 45.

In Mississippi, where jurors were taken, with the consent of the prisoner, to a hotel, and ate at the public table, though separated by an officer from other guests, and were shaved by a barber, admitted to their room, though an officer was present and heard no talking, it was held to be a violation of the common law rule, which requires the jurors to be kept together, and that no person shall speak with them; and a new trial was granted. *Boles v. State*, 13 Smedes & Marsh. 398.

Whether the mere separation of the jury in a criminal case, is of itself sufficient to set aside a verdict, is an open question, and one by no means authoritatively settled. In civil suits and small misdemeanors, the prevalent authority in England is, that the separation of the jury is not sufficient to set aside the verdict. *The King v. Wool and others*, 1 Chit. 401. In cases of felony, however, many of the courts, especially in this country, seem inclined to adopt a stricter rule. It is frequently stated in the authorities, that in modern times, the antiquated strictness of the law has been much relaxed in this regard, and that in no case is it necessarily wrong, for a jury to disperse with or without the permission of the court, during the progress of the trial. 11 Ohio Rep. 474; 13 ib. 492; 15 ib. 72; 4 Cowen, 26; 1 Pennsylv. Rep. 278; 1 Halst. 110; 1 Gallison's C. C. R. 360; 2 South Caro. Rep. 827; 1 Conn. 232, 238; in note 3 Cowen, 355; 8 Pick. 170; 4 Johns. 487; 1 Chit. Cr. L. 629; 2 B. & A. 426; 2 Wend. 352; 3 Johns. 252.

And yet in the oldest case reported, to wit: the *Earl of Kent's case*, in the year-book, in the reign of Henry VII., it was decided that the dispersion of a jury by reason of a thunderstorm, and a conversation held with some of them, in which it was suggested that the matter in controversy was better for the Earl of Kent than the Bishop, upon great consideration, the verdict was sustained and pronounced good, notwithstanding the irregularity.

In a note to *Smith & Thompson*, (1 Cowen, 221,) by the learned reporter, all the cases, English and American, are collated, and the conclusion of this review is, that the propriety or impropriety of keeping the jury together in each particular case, is a matter resting pretty much in the sound discretion of the court.

**MISBEHAVIOR OF JURORS.**—In New York, *The People v. Douglass*, (4 Cowen, 26,) was a capital case, and the jurors were only allowed to leave the court room under the charge of two sworn constables, with the direction of the court to keep together and return speedily. Contrary to their duty, two of the jurors separated from their fellows and the officers, and while so separated, ate, drank spirituous liquor, and conversed with by-standers on the subject of the trial. The jurors knew that they were disregarding the instructions of the court and doing that which the officers could not rightfully permit to be done; and for this misbehavior, the verdict was set aside.

So, too, in *Brant v. Fowler*, (7 Cowen, 562,) the jurors were not allowed to separate, but were permitted to leave the court room, accompanied by an officer. One of the number separated from the officer, and drank brandy; and for that cause, the verdict was set aside. This case certainly goes very far, for it appears that the juror did not intend to disregard his duty. He mistook the charge of the judge, and only drank a small quantity of brandy as a remedy for disease. But still the jurors were not, as in this case, at liberty to go where they pleased; nor had they the right to take either food or drink, without the permission of the court. It should also be added, that the judge had delivered his charge, and the trial, as to every thing but the verdict, was at an end, before the jurors were permitted to retire.

In a late case (*Williams v. Abrahams*, 1 Hill's R. 207,) the supreme court of New York, per Bronson, J. in commenting upon the foregoing cases, said: "The case of *Brant v. Fowler* cannot, I think, be supported. The mere fact that some of the jurors, 'of their own head' drink spirituous liquor in the course of a cause, if, as was admitted in that case, there 'has been no mischief,' cannot be a sufficient ground for setting aside the verdict. There is no authority, ancient or modern, so far as I have observed, which goes far enough to uphold such a doctrine. The case of *The People v. Douglass*, must be considered as having turned upon all the grounds of irregularity which were urged against the verdict, and not on the single objection that some of the jurors drank spirituous liquor. In addition to the fact of drinking, two of the jurors contrary to their duty, separated from their fellows, and one of them conversed with the by-standers on the subject of the trial.

"It is worthy of remark, that in the two cases which have just been noticed, not a single authority, or even *dictum*, was referred to for the purpose of showing that the drinking of the jurors at their own expense, where there is no reason to suppose there has been any excess, is, in itself, a sufficient ground for disturbing the verdict. The earlier cases in this court had gone upon the principle, that notwithstanding a trifling irregularity on the part of the jury, the verdict should stand, unless there was some reason to suppose that the party moving might have suffered by the misconduct of which he complained. *Smith v. Thompson*, 1 Cowen, 221; *Horton v. Horton*, 2 id. 589; *Ex parte Hill*, 3 id. 355. This rule is in accordance with the ancient cases to which I have already referred.

"When, in the course of the trial, a juror has in any way come under the influence of the party who afterwards has the verdict, or there is reason to suspect that he has drunk so much, at his own expense, as to unfit him for the proper discharge of his duty, or where he has so grossly misbehaved himself in any other respect as to show that he had no just sense of the responsibility of his station, the verdict ought not to stand. But every irregularity which would subject the juror to censure, whether in drinking spirituous liquor, separating from his fellows, or the like, should not overturn the verdict, unless there be some reason to suspect that the irregularity may have had an influence on the final result."

In *The State v. Prescott*, (7 N. Hamp. Rep. 287,) the superior court of New Hampshire did not seem prepared to follow the New York decisions of *The People v. Douglass*, and *Brant v. Fowler*, even in a capital case. Nor were they followed in Massachusetts, in *Com. v. Roby*, (12 Pick. Rep. 510, 516, 520,) which was also a capital case.

In Tennessee, a new trial will not be granted upon affidavits that the jury drank ardent spirits at their meals during the progress of the trial, without proof that they were thereby disqualified from duly considering the case. The irregularities charged, must be stated positively and specifically, and be sustained by oath. *Stone v. The State*, 4 Humph. 27.

But see *Gregg v. McDaniel*, 4 Harring. Del. Rep. 367; *Pelham v. Page*, 1 Eng. Ark. Rep. 535.

In Tennessee, in the case of *Hogshead v. The State*, (6 Humph. Rep. 59,) the plaintiff in error was indicted for a felony in passing and offering to pass a counterfeit Mexican dollar. The defendant below elected as one of the jury an individual, who, it seems from the affidavits made to procure a new trial after his conviction, was of intemperate habits. The general state of these habits was known to defendant and his counsel, but the latter did not know, and it does not appear that the former knew, that these habits had frequently produced the bodily and mental disease called delirium tremens, or *mania a potu*. It appears from the affidavits referred to, that during the investigation of the cause in court, the manner of the juror indicated him to be in a state of dull and stupid abstraction. At night the jury were taken in care of an officer to some room in town to consider of their verdict and to be kept together. About eleven o'clock at night, the juror became much indisposed, and was threatened with spasm and on the verge of an attack of *delirium tremens*.

The physician who usually attended him on such occasions, was sent for; and he testifies, that from the condition in which he found his patient, and from the knowledge he had of his case in general, and from attendance on him during former attacks, that he would not have been, during the investigation of the cause in court, in a condition to have possessed himself intelligently, of the facts and circumstances of the case, so as to have performed in a rational manner the duties of a juror. In the morning the juror continued dull and stupid, but on taking a draught of ardent spirits and breakfasting, he seemed pretty well. Some of the jury testified that he manifested more intelligence than they had expected in discussing with them the testimony; but whether his knowledge in this respect was the result of attention in court or was picked up in the jury room, they did not know. It does not appear that before the verdict was given, the prisoner or his counsel knew of the condition of the juror during the preceding night.

*By the court.* Upon the whole case, we think, the prisoner is entitled to a new trial; not on the ground that the juror may have been under the influence of ardent spirits as stated by one of the witnesses, when he first entered the jury box, or that he took a draught of ardent spirits on the morning the verdict was rendered; nor on the ground of the slight separation of the jury, which became necessary when the physician visited the juror; when we think it is shown nothing improper took place; but upon the ground that it is probable that during the investigation of the cause in court and the deliberations of the jury upon their verdict, the juror in question was not in a state of mental and bodily health, enabling him to perform his duties intelligently; and that this fact was unknown to the court, to the counsel on both sides and to the prisoner, until after the verdict.

In Illinois, during the progress of a trial for murder, one of the jurors, while one of the counsel for the prisoner was addressing the jury, had a chill, and was, by order of the court, placed upon a pallet. During a part of the time, he was in a slumber, and did not fully comprehend the whole of the argument, though he had understood the whole of the evidence, and all that had been said by counsel previously. The fact that he was asleep, was known to the prisoner at the time, but the attention of no one was called to it. Held, that this was not sufficient cause for setting aside the verdict. *Baxter v. The People*, 3 Gilman's Rep. 368.

Any communication, even from the judge, not made in open court, and before the parties will avoid the verdict. Thus the sending in by the judge of a prior written charge to a grand jury, was held to avoid the verdict. *Holton v. The State*, 3 Florida Rep. 476. But where, after the jury had retired to consult on their verdict, they sent a note in writing to the court in absence of parties and counsel, requesting advice on certain points in the case, and the judge returned the writing without reply, and directed the officer to hand a volume of reports to the foreman, and to request him to read a part of a decision, to the effect that a jury in such circumstances, could not communicate with the judge, except in open court; it was held that this was not a sufficient reason for a new trial. *Com. v. Jenkins*, Thacher's C. C. 118. The former practice was, that if the jury send for a book, after departure from the bar, and read it, the verdict is avoided; and, on one occasion, Lord Tenterden, though the counsel on both sides consented, refused to send out to the jury, on their request, a copy of "Selwyn's Law of Nisi Prius," observing that the proper course for the jury to adopt was for them to come into court, state their question, and receive the law from the court. *Burrows v. Unwin*,



3 Carr. & Payne, 310. But in *Commonwealth v. Jenkins*, (Thacher's Cr. Cas. 118,) it was held that it was not a sufficient ground for a new trial, that, on the trial of a case in which the jury were to decide upon both law and fact, the officer in attendance delivered to them, at their request, without application to the court, after they had retired to consult upon a verdict, a volume of the laws of the commonwealth containing the act upon which the indictment was founded, which act had been commented by the counsel and by the court, and which volume the court would have given them leave to take with them if requested. But see *Lott v. Macon*, 2 Strobb. Rep. 410.

If a jury after retiring to consider of their verdict hear other testimony it will vitiate the whole procedure. *Knight v. Freeport*, 13 Mass. 218; *Bennett v. Howard*, 3 Day. 211; *Perkins v. Knight*, 2 New Hamp. Rep. 474; *Hudson v. State*, 9 Yerger 468. If a juror, not being sworn as a witness, after the jury has retired, state facts of his own knowledge, which his fellow jurors regarded as evidence, a new trial will be granted. *Booby v. The State*, 4 Yerger, 111; *Talmadge v. Northrop*, 1 Root, 522. Where the officers attending upon the jury, under a mistake of duty, permitted them to read the newspapers, the officers first inspecting them, and cutting out every thing that in any manner related to the trial; and it appeared that, in point of fact, the juror never saw anything in any newspaper relative to the trial, and, after the charge from the court, were not allowed to see any until they had delivered their verdict, it was held that this was an irregularity in the officer, but not sufficient to justify the court in setting aside a verdict and granting a new trial or treating the matter as a mistrial. *United States v. Gibert*, 2 Sumner Rep. 21.

In Tennessee, in the case of *Luster v. The State*, (11 Humph. Tenn. Rep. 169,) where the defendant had been tried and convicted in the circuit court for malicious stabbing, a motion was made in the supreme court for a new trial, on the following grounds: the evidence being closed, the jury were respited for the night and placed in charge of an officer, with proper injunctions from the court to keep them together and apart from others: the officer removed them to an upper room and was very careful in the performance of his duty: the jury were together near the fire place, one of them playing on the fiddle; the officer went down for wood or water, and in his absence one Andrew Bowman walked into the room, and on being told by one of the jury to take a seat, he did so, taking a seat on a bed, apart from the jury. There was no other conversation with him—he did not mingle with the jury—when the officer returned, the intruder was immediately removed. Motion for new trial denied.

Where one of the jurymen stated to his fellows, after they had retired, that he had heard a witness, whose credibility was attacked at the trial, sworn before the grand jury, and that his statement was the same as he had made on the trial, and it appeared that his statement had much influence in producing the verdict of guilty, it was held that this proceeding was illegal and vitiated the verdict. *Donstan v. State*, 6 Humph. 275.

After a jury had retired, they came again into court to hear explanations from a witness who stated an additional and important fact, not before stated by him, but which fact the court immediately told the jury to disregard. Held, that the affidavit of the juror, stating that he founded his verdict entirely upon this additional fact, would not authorize a new trial. *Hudson v. The State*, 9 Yerger, 408.

Where, after a jury had retired under the attendance of an officer, and before the court adjourned, another officer was sworn to attend upon them, but after the adjournment a third was sworn by the clerk to supply the place of the second for a few minutes; it was held, that this was according to usage, and no ground for a new trial. *Com. v. Jenkins*, Thacher's Cr. Cas. 118.

Where a person who was not a sworn officer, was permitted to go to the jury room after the jury had retired to make up their verdict in a capital case, and to have charge of them in the absence of the bailiff, it was held sufficient ground for a new trial. *Hare v. The State*, 4 How. Miss. Rep. 187. In a very recent capital case in Mississippi, where the jury were out under the charge of an unsworn officer, it was held that it must appear affirmatively, that the jury were in no way affected thereby; otherwise the verdict would be set aside. *McCann v. The State*, 9 Smedes & Marsh. Rep. 465.

A new trial will not be granted on account of idle words spoken to a juror by a bystander,

it not appearing that there was any fault on the part of the juror, or that of the party in whose favor the verdict was given. *Stewart v. Small*, 5 Miss. Rep. 525.

In Tennessee in *Jim v. The State*, (4 Humph. Rep. 289,) it appeared in evidence that the shoes of the defendant were about half an inch longer than the tracks which left the house where the deceased was shot, and which were discovered next morning after he was shot. It appeared that the jury believed that the tracks of a man running were shorter than when walking; and for the purpose of ascertaining the truth of the assertion they went out and measured the tracks of a juror walking and running, and found the fact to be so; and this experiment removed the difficulty they felt in reconciling the discrepancy between the length of the tracks and the shoes of Jim. "We cannot" (says the supreme court, in reversing the judgment and remanding the case for a new trial) "permit verdicts which have been obtained like this, upon uncertain and dangerous experiments, instead, of a calm, deliberate, and philosophical examination of the proof, to stand, where the lives of individuals are at stake."

In Tennessee in the case of *Crawford v. The State*, (2 Yerger, 60,) where a juror was not satisfied of the guilt of the prisoner, but assented to a verdict of guilty, under an impression suggested by his fellow jurors, that the governor would pardon the defendant, if the jury, by their verdict, recommended it; it was held that this was sufficient cause to set aside the verdict. And in the same state, in the late case of *Cochran v. The State*, (7 Humph. 544,) where a juror made affidavit that he believed the prisoner was innocent, and that he assented to a verdict of guilty, under the belief, induced by the assertions of his fellow jurors, that there were fatal defects in the proceedings which would prevent the prisoner from being sent to the penitentiary and that the governor would pardon the defendant, if recommended to mercy in the verdict, it was held ground for a new trial.

Formerly, the testimony of a juror was admissible to impeach the verdict of his fellows.

It seems that by the common law before the revolution, the affidavits of jurors could be received, and this was the constant practice before the time of Lord Mansfield, except in two cases. In 1767, Lord Mansfield permitted it to be shown by the affidavit of jurors, that a wrong verdict was delivered by the foreman. He says, "the court had no doubt about the fact of this mistake, from the affidavit of eight of the jurymen, confirmed, as they held it in effect to be, by the foreman declining to make any affidavit at all." Bur. 324. His Lordship in the year 1770, changed the practice, and refused to admit the affidavit of a jurymen to show that he had given his verdict under a mistake. Bur. 2687. In the year 1785, we find him adhering to the last decision, in refusing the affidavits of jurors to set aside a verdict. The fact that they offered to prove was, that they tossed up, and the plaintiff won. 1 Term Rep. 11. The court says, they must derive their knowledge from other sources. Three years afterwards, in 1788, during his Lordship's time, but he was not present in court, we find the court of King's Bench refusing to receive an affidavit made by all the jurymen, to show a mistake in entering up their verdict. The court said, they laid no stress upon its being made by all the jury: if it could be made by all, upon the same principle it could be made by some. 2 Term, 282. The reason assigned by the court is, such a practice would be productive of infinite mischief.

"It would open each juror," declared Mansfield, C. J., "to great temptation, and would unsettle every verdict in which there could be found upon the jury a man who could be induced to throw discredit on their common deliberations." Nor are subsequent declarations of jurymen, after a general verdict, admissible to explain or qualify it, though the affidavits of bystanders, as to what passed within their knowledge, touching the delivery of the verdict, may be received. Whart. Cr. Law, 907, citing, *Owen v. Warburton*, 1 N. R. 326; *Hindle v. Birck*, 1 Moore, 455; *Aylett v. Jewell*, 1 H. Black. 1299; *Vaise v. Delaval*, 1 Term R. 11; *Straker v. Graham*, 4 M. & W. 721; *Clark v. Stevenson*, 2 H. Blac. 803; *R. v. Woolter*, 6 M. & S. 366.

In the United States the English rule seems to have been generally adopted. Wharton's Cr. Law, citing, *Dana v. Tucker*, 4 Johns. 487; *Sergeant v. Deniston*, 5 Cowen, 106; *Ex parte Caykendall*, 6 Cowen, 53; *People v. Columbia, &c.*, 1 Wendell, 297; *State v. Freeman*, 5 Connect. 348; *Cochran v. Steel*, 1 Wash. 79; *Price v. Tugna*, 1 Hen. & Mun. 385; *Clug-*

*gale v. Swan*, 4 Binney, 150; *Willing v. Swasey*, 1 Browne, 123; *Robbins v. Wendover*, 2 Tyler, 11; *Bladen v. Cockey*, 1 Har. & M'Henry, 230; *State v. Doom*, Charlton, 1; *Taylor v. Giger*, Hardin, 586; *Steele v. Logan*, 3 A. K. Marshall, 394; *Heath v. Conway*, 1 Bibb, 30; *Den v. M'Allister*, 2 Halst. 46; *Johnson v. Davenport*, 3 J. J. Marshall, 390; *Briggs v. Eggleston*, 14 Mass. 245; *Corn v. Drew*, 4 Mass. 439; *Forester v. Guard*, Breese, 49; *the case see Sawyer v. Stephenson*, Breese, 6; *Grinnell v. Phillips*, 1 Mass. 530; *Hudson v. Swazey*, Yerger, 408; *Crawford v. Slate*, 2 Yerger, 60.

In the case of *The State v. Freeman* (5 Connec. Rep. 348,) the question was whether the testimony of a juror was admissible to show that another juror in the jury-room gave material information, concerning facts not in evidence. By the court, Hosmer, C. J., there is no harmony on this subject among the English cases; but the most modern determinations have adjudged such testimony to be inadmissible. In *Vaise v. Delaval*, (1 Term Rep. 11.) the offered evidence of a juror, to prove the deciding by lot, in the jury-room, was rejected; and in the case of *Owen & al. v. Warburton*, (1 New Rep. 326, 329,) it was determined, in conformity with the opinion of all the English judges, that the affidavit of a juror, stating a similar fact, could not be received. In delivering the opinion of the court, it was said, by Sir James Mansfield: "It is singular indeed, that almost the only evidence of which the law admits should be shut out; but considering the arts, which might be used, if a contrary rule were to prevail, we think it necessary to exclude such evidence. If it were understood to be the law, that a jurymen might set aside a verdict, by such evidence, it might sometimes happen, that a jurymen, being a friend of one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view, afterwards, to set aside the verdict, by his own affidavit, if the decision should be against him."

In the state of Massachusetts, in *Grinnell v. Phillips*, (1 Mass. Rep. 530,) the point has been raised; and, with little discussion, two judges against one, admitted the testimony of a juror to the misconduct of his associates.

The latest decision I have seen in the state of New-York, was in *Dana v. Tucker*, (4 Johns. Rep. 487;) and, in this case, the court determined, "that the better opinion is, and such is the rule adopted by this court, that the affidavits of jurors are not to be received to impeach a verdict; but they may be admitted in exculpation of the jurors, and in support of the verdict."

In *Lessee of Cluggage v. Swan*, (4 Binn. 150,) Yeates, J., the only judge who expressed an opinion on the point, was decidedly of opinion, that such testimony was inadmissible.

The rule in Virginia is to the same effect. *Cochran v. Street*, 1 Wash. Rep. 79, 81. *Price's exr. v. Warren, admr. of Fuqua*, 1 Hen. & Mun. 385.

In this state, it has been the practice to admit such testimony; but said Ch. J. Swift, (1 Dig. 775,) "In England, and in the courts of the United States, jurors are not permitted to be witnesses respecting the misconduct of the jury; for it is a great misdemeanor; and this is most unquestionably the correct principle; for otherwise, a juror, who should be disposed to set aside a verdict, would give information to the party for that purpose; if not so disposed, he could suppress the information; and, in that way, any of the jury could command the verdict."

The question before us regards a point of practice; and as this cannot have any consequences antecedent to this case, it is competent for the court to decide, unshakled by precedent, and change the rule, if justice requires it. *Robinson v. Bland*, 1 Wm. Black. Rep. 264.

If the question depended merely on equitable grounds, as relative to the immediate parties to the suit, the testimony in question, perhaps, ought to be received. But there are higher considerations to be resorted to. On a principle of policy, to give stability to the verdicts of jurors, and preserve the purity of trials by jury, the evidence ought not to be admitted. The reasons assigned by Sir James Mansfield, in *Owen v. Warburton*, and by Ch. J. Swift, in his digest, are of great weight. The sanctioning of the testimony of one juror, relative to the misbehaviour of the rest, would open a door to the exercise of the most pernicious arts, and hold before the friends of one of the parties, the most dangerous temptation. By this capacity of penetrating into the secrets of the jury-room, an inquisition over the

jury, inconsistent with sound policy, as to the manner of their conduct, and even as to the grounds and reasons of their opinions, might ultimately be established, to the injury and dishonor of this mode of trial; imperfect, undoubtedly, but the best that can be devised. And under the guise of producing equity, there might be generated iniquity, in the conduct of jurors, more to be deplored, than the aberration from law, which, undoubtedly, sometimes takes place.

The opinion of almost the whole legal world is adverse to the reception of the testimony in question; and, in my opinion, on invincible foundations.

In Georgia, in *The State v. Doon & Diamond*, (R. M. Chalt, Rep. 1,) on a motion for a new trial the affidavits of two of the jurors were produced, stating that they did not in fact agree to the verdict which was rendered. Judge Berrien said: "Upon the general question whether affidavits of this kind may be received, I think the case of *Vaise v. Delaval*, (1 Term Rep. 11,) conclusive. Upon a motion to set aside a verdict upon an affidavit of two jurors, who swore that the jury being divided in their opinion, tossed up and that the plaintiffs friends won, &c., &c. Lord Mansfield said the court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor: but in every such case the court must derive their knowledge from some other source: such as from some other person having seen the transaction through a window, or by some such other means. But there are other and stronger reasons than that assigned by Lord Mansfield, why in cases like the present, such affidavits should not be received. When the jurors return into court after deliberating upon a case submitted to them, their names are severally called by the clerk and they are asked if they are agreed on their verdict. Their written verdict signed by their foreman is then read aloud in their presence, and the clerk thereupon adds, "so say you all." If the fact which is stated in these affidavits had occurred, this was the proper time to have made it known to the court. But after having rendered in his verdict *upon oath*, shall we permit the juror *by oath* to deny that such was his verdict, whence it will inevitably result that he must have violated the oath administered to him as a juror in the cause, or that which he has voluntarily taken before the magistrate. Moreover it would afford such room for the exercise of improper influence, that if this doctrine were once established, few verdicts could stand."

In Tennessee, it appears to be the practice to receive the affidavits of jurors to impeach the verdict of their fellows. *Crawford v. State*, 2 Yerger, 60; *Cochran v. State*, 7 Humph. 544; *Luster v. State*, 11 Humph. 169. Evidence of improper conduct by a party out of court, calculated to have an influence upon the trial, such as exhibiting papers at public places where members of the jury boarded, would be a sufficient cause for setting aside a verdict in a civil case, and the court may, in its discretion, set aside a verdict in a criminal case, upon evidence of like conduct on the part of the prosecutor. *State v. Hascall*, 6 New Hamp. Rep. 352.

#### NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE.

It is incumbent on a party who asks for a new trial, on the ground of newly discovered evidence, to satisfy the court:

1. *That the evidence has come to his knowledge since the trial.*
2. *That it was not owing to the want of due diligence that it did not come sooner.*
3. *That it would probably produce a different verdict, if a new trial was granted.*
4. *That it is material to the issue, going to the merits, and not impeaching a former witness.*

##### 1. *The evidence must have been ascertained since the trial.*

If new evidence is discovered before the verdict is rendered, it should be submitted to the jury; and if neglected, a new trial will not be granted. *U. S. v. Gibert*, 2 Sumner, 19. Where property was obtained by false pretences, and the defendant failed to show at the trial what he had done with it, or with the proceeds, it is not sufficient to authorize a new trial that he is now desirous to prove that fact, and expects that it would influence the jury in his favor. *Com. v. Benish*, Thacher's Crim. Cas. 684.

In New York, in the case of *People v. Vermilyea*, (7 Cow. 369,) it was held that a new trial will not be granted, on motion of a defendant convicted in a criminal case, on the ground that a co-defendant tried at the same time, and acquitted, was a material witness for the convicted defendant, such testimony not being newly discovered; though the acquitted defendant was then, for the first time, a competent witness. *Savage, C. J.* in giving the opinion of the supreme court said:—"He became a competent witness in virtue of his acquittal; but the absence of all authority on the point is a strong argument against the sufficiency of this ground for granting a new trial. Such a rule would be highly inconvenient in practice. The proper course was, if the testimony against Davis was slight, to have the jury pass on his case, and then introduce him as a witness on behalf of this co-defendant. Such testimony is not newly discovered, though the acquitted defendant is now, for the first time competent as a witness. This ground, of itself, cannot be considered sufficient, though I will not say that, among other considerations, it is not entitled to some weight."

But in Pennsylvania, in *Com. v. Manson*, (2 Ashmead, 30.) on an application for severance in order to admit the wife of one party as a witness for the other the former was acquitted, but the latter convicted, and the wife of the former swore in an affidavit to a complete abs as to the latter, it was held that as she herself was not on the record, but was excluded merely by policy of law on the joint trial, and as she had been made competent by the verdict of the jury, a new trial would be granted.

"In deciding in favor of this application," said King, J., "we do not say, as is supposed, that in any case where we have refused to grant a separate trial, in order to let in the testimony of an accomplice or co-defendant, we will set aside the verdict when such co-defendant happens to be acquitted. Respectable authority has settled, that in no case, where two or more persons are jointly charged with an offence, shall one be a witness for the other, whether jointly or separately tried, at least until the party offered as a witness was either previously acquitted or convicted; and even this last qualification to the general rule has been doubted, and the position to the full extent contended for; that a party to the record cannot, in any event be received as a witness for his associates in accusation. But the wife of one of several defendants is no party to the record; and her testimony in a case in which her husband is on trial, is excluded for a different reason, viz., the peculiar civil relation which she holds to him, and which, from a consideration of legal policy, disqualifies her as a witness in a case directly affecting him."—"Authorities equally respectable and unqualified, have determined that, although in a joint charge, jointly tried against her husband and others, she cannot be heard; yet, if they are separately tried, she is a competent witness for the other co-defendants; and that, to give them the benefit of her testimony, separate trials will be awarded them in all cases, except that of a criminal conspiracy. We do not, therefore, in saying that Margaret Manson is a competent witness for Joseph B. Strafford, in the only part of the accusation against him, as to which he has not been relieved by the verdict, establish any new precedent, or introduce any eccentric doctrine into the criminal law. Nor can this case ever be offered as authority to show that the rejection of a co-defendant, as a witness for his associates, or the refusal to award such associate a separate trial, in order to introduce the testimony of such co-defendant, will afford, in itself, ground for setting aside a verdict, where the defendant offered as a witness, is afterwards acquitted, and he for whom he has been offered as a witness, condemned. All we wish to be understood as deciding is, that under the whole circumstances disclosed in this cause, a case has been made out, imperiously and solemnly calling on this court to exercise their judicial discretion in awarding a new trial, in order that justice, according to law, may be fairly meted out to the accused."

But subsequently, in the same state, in *Com. v. Chauncey*, (2 Ashmead, 90,) on a motion for a new trial on the ground "that the court refused to the defendants the benefit of several trials, though they had severally pleaded; whereby the defendant C., was deprived of the testimony of A. and N., who having been acquitted of the charge, would have been competent and important witnesses for defendant C.," was refused; a distinction being made between a witness, not on record as defendant, excluded by the relations of the parties, and a witness on the record as defendant, excluded by the necessity of trial. *Whart. Cr. Law*, p. 917.

2. *There must not have been a want of due diligence.*

In Pennsylvania, where it appeared that the witness, on whose testimony was sought a new trial, after a conviction of murder, was with the prisoner until a late hour of the evening on which the murder was committed, was in court while the trial was progressing, and had gone to a relative of the prisoner and told him what she was able to testify to; it appearing that due diligence had not been used by the defendant, the motion for a new trial was refused. *Com. v. Williams*, 2 Ashm. 69.

In Tennessee, Gilbert, a slave, was found guilty of murder on circumstantial evidence, and one of the circumstances adduced in proof against him was, that blood was seen on his clothes on the day the murder was committed, and after it was committed. On a motion for a new trial, he introduced his affidavit, in which he stated that he was surprised by the introduction of this proof, and that the blood was thrown on his clothes by an opossum which he had caught on that day. He also introduced the affidavit of a man who stated that he had seen Gilbert, on that day, with the opossum hanging by his side. Held, that this was a case of negligence and not of surprise, within the rule of the law; and that the grounds laid down were not sufficient to authorize the granting a new trial. *Gilbert v. State*, 7 Humph. Rep. 524.

In New York, where the district attorney told the defendant that certain papers were in the hands of C., who, being applied to, answered they were in the possession of the district attorney, but the defendant did not explain the mistake and apply to the district attorney again, a new trial was refused because of the want of due diligence. *People v. Vermilyea*, 7 Cow. Rep. 369.

Where, after a verdict of guilty on an indictment for murder, the prisoner made affidavit that S. C. was a material witness for him in the prosecution; that he was not summoned to attend the trial, because the prisoner had not been informed that he knew anything relating to the affair; and that the prisoner considered that his testimony would have an important effect on a subsequent trial of the cause, but no allegation was made of diligence; it was held that that the new trial was properly refused. *Bennett v. Com.*, 8 Leigh, 745.

On the trial of an indictment for obtaining goods by false pretences, a book was produced in evidence, in which the representations made by the defendant, at the time of procuring the goods, were recorded; and after conviction, the counsel for the defence moved for a new trial, because, since the trial, it had been discovered, upon the examination of the book, that the entry made therein of such representations by the prosecutor, and sworn to by him as having been entered at the time they were made, was in fact entered many weeks after the making of such representations; the new trial was refused principally on the reasoning that it was in the power of the defendant at the trial, by due diligence to have discovered the alleged error. *Com. v. Benesh*, Thacker's Cr. Ca. 84.

Where the defendant was convicted of horse stealing, and a new trial moved for on several grounds, among others, that since the trial, new evidence had been discovered, which, if produced, would have established the prisoner innocence, but no proof of diligence was made; the judges unanimously refused a new trial. Whart. Cr. L. 911, citing *State v. Harding*, (2 Bay, 267.) The court, in this case, very properly remarked, that "the discovery of new evidence, after trial, was not a good ground for a new trial, because, on a sufficient affidavit of the absence of witnesses in criminal, as well as in civil cases, the court will always postpone the trial in order to give the prisoner an opportunity to procure their attendance, and be better prepared at the next court; and that it might have a very mischievous tendency, to establish a precedent of this kind, after a trial and conviction, and after all the evidence on the part of the state had been fully disclosed; as it was easy to foresee, that a man whose life was in danger, would in every case, even to gain time, make use of a pretext of this kind to create delay; but more especially by the assistance of confederates, he might be enabled to procure unprincipled men to be witnesses, to contradict the evidence on the part of the state, and thereby defeat the ends of justice."

On an indictment for larceny, the mere affidavit of a third person, that the prosecutor had declared that there was in existence a bill of sale of the property charged to have been sto-

len, tending to establish title in the prisoner, is not sufficient ground for a new trial, without the affidavit of the prisoner, alleging sufficient reason why the bill of sale was not produced on the trial, and an expectation that it would be procured at a subsequent trial. *Friar v. The State*, 7 How. Miss. Rep. 365.

The voluntary withdrawal, during the trial, of a witness who has been subpoenaed on behalf of the state, but not examined, is not sufficient ground to grant a new trial, especially where his testimony is not shown to be material for the defendant. *The State v. Blennerhassett*, Walker's Rep. 7.

3. *It must be such as would probably produce a different verdict.*

After the verdict, when the motion for a new trial is considered, the court must judge not only of the competency, but of the effect of evidence. If, with the newly discovered evidence before them, the jury ought not to come to the same conclusion, then a new trial may be granted, otherwise they are bound to refuse the application. *Com. v. Flannagan*, 7 Watts & Serg. 423; *Giles v. The State*, 6 Geo. Rep. 276. It is a safer rule to require the affidavit of the newly discovered witness to accompany the motion for a new trial. *Warren v. State*, 1 Green's Iowa Rep. 106.

4. *It must be material to the issue, going to the merits, and not impeaching a former witness.*

In Massachusetts, after a conviction on an indictment for selling *spirituous* liquors, "with-out being duly licensed as an innholder, or common victualler," a new trial will not be granted, for the purpose of allowing the defendant to give in evidence a license, which he had omitted to produce, to sell *fermented* liquor, and thus raise a question, as to the mere form of the indictment. *Com. v. Churchill*, 2 Met. Rep. 118. Per Wilde, J. "no purpose of justice would be promoted by granting the motion; nor does the motion come within any rule by which the granting of new trials is regulated. The defendant has been convicted on the merits, and makes no suggestion that the evidence against him was inadmissible, or that he can control it by evidence since discovered by him. Where a conviction is manifestly right, on the facts and the law applicable thereto, it would be a perversion of justice to allow a defendant to avoid sentence by interposing a mere matter of form, of which he might have availed himself at the proper time." See 1 Chitty's Cr. Law, 655, 657.

Where the object is to impeach a former witness, the general rule, is that a new trial will not be granted. It is a rule in civil, as well as criminal actions that objections to witnesses on the ground of interest or infamy, must be made at the trial; and it is necessary that it should be so established; for otherwise there would be no termination to suits. Parties knowing the facts which constitute objections, would conceal them until the trial was over, for the very purpose of having two chances of success; and it would seldom be known, that they had concealed their knowledge. See *Com. v. Waite*, 5 Mass. 261; *Com. v. Green*, 17 Mass. 215; *Giles v. The State*, 6 Geo. Rep. 276.

# 11. OF THE MOTION FOR NEW TRIAL.

Generally speaking, application for a new trial cannot be heard after a motion in arrest of judgment. But there are cases in which, if it appears that manifest injustice will ensue from a strict observance of the rule, the court will waive the formality, and admit the defendant to a re-hearing. And this indulgence will sometimes be granted, especially if it appear that he was not acquainted with the cause that induces him thus to apply, until after he has moved in arrest of judgment. Chitty's Cr. Law, vol. 1, p. 658. It is also to be observed, that where the motion for a new trial has been duly made first, and afterwards an attempt has been made to arrest the judgment, the court will desire the latter to be first argued, because all the delay and vexation of a second trial will be saved, if the judgment be first arrested. 6 Term Rep. 627.

When the application is made, all the defendants who have been convicted must be actually present, unless a special ground be laid for dispensing with the general rule; (11 East, 307. 2 Stra. 968, 1227. Cas. K. B. 29. 2 Barnard, 412. 1 Sess. Cas. 428. Bac Abr. Trial, L.

9. Tidd, 8th edit. 945. Com. Dig. Indictment, N.;) because the conviction fixes so strong an imputation of guilt upon them, that the court will be sure they have them in their power, before they entertain the motion for a revision of the proceedings. *Id. ibid.* And, it seems, the consent of the counsel for the prosecution cannot dispense with this practice. 2 Dow. & Ry. 46. And it may also be urged, in support of this practice, that otherwise the party most criminal might keep away, and take the opinion of the court, by putting forward one of the defendants, whose guilt was less apparent or less atrocious; or those not present might abscond, on hearing that their application had not been attended with success. 11 East, 307. But it should seem, with reference to the proceedings at the time when judgment is given, that where a pecuniary penalty, or fine only, and not corporal punishment can be awarded, a new trial might be moved for in the absence of the defendant, at least on the clerk in court undertaking for his paying the fine, in case judgment should be given against him. 1 Salk. 55, 6, 400. The court, if they see justice has not been done, may order the matter for a rehearing, though not in the form which they use when a regular motion is granted. 11 East, 309. 3 Burr. 1901. And where some of the defendants have been convicted, and others acquitted, a new trial may be granted as to the former, without impeaching the verdict so far as it relates to the latter. 6 T. R. 638, 645. Tidd, 8th edit. 945. Where the defendant is in custody, he must apply to the court for a *habeas corpus* to bring him up, in order to apply for a revision of the proceedings. 2 Burr. 931.

In the case of *King v. Mawbry*, (6 Term Rep. 638,) there was no question but that a defendant in a criminal case, who had been acquitted, could not be tried a second time. The only difficulty was, whether, as those acquitted could not be again tried, those who were convicted could be relieved, however unjust the verdict. The attorney-general argued that they could not, because the verdict was an entire thing, and could not be set aside in part. All the judges however, agreed that a new trial might be granted to those who were convicted, although the others could not be tried again.

In England, when a new trial is granted in favor of two defendants who have been convicted, while others have been acquitted, in order to prevent the revival of proceedings against the latter, there are two methods which may be adopted, the first of which is to alter the original *venire*, so as to make it embrace those only who have been convicted; and the other is, to make an entry on the record, that the verdict was improperly taken against those who were convicted, and then to award a new trial, as far as they are concerned. 1 Chitty Cr. Law, 660; 6 Term Rep. 626.

Every count of an indictment contains a charge of a distinct offence, and it is upon the principle of joinder of offences, that the joinder of counts is admitted. When therefore, a party is acquitted of the charge in one count of the indictment, he is clear of that charge forever. He can no more be brought in jeopardy upon that charge again, than if it were the only count in the indictment.

When there has been an acquittal on one count and a conviction on another, a new trial can only be granted on the count on which there has been a conviction; and it is error, on a second trial, to put the defendant on trial on the former. *Campbell v. State*, 9 Yerger, 33. But where one count includes a greater and less charge and after acquittal of the greater offence but conviction of the less, a new trial is obtained, the whole case is re-opened, and the defendant exposed on the second trial to the double charge. *State v. Morris*, 1 Blackf. 37; Whart. Cr. Law, p. 925.

It seems that a defendant convicted on the merits, but not sentenced, on account of informality is liable to a second trial; but if proceedings be regular, the case is different. Whart. Cr. Law, p. 925, citing *Penns. v. Huffman*, Addis. 140; *State v. Norvell*, 2 Yerger, 24.



2. *Motion in Arrest of Judgment.*[2]

A defendant may move in arrest of judgment, for all defects or matters of objection which are not cured by verdict. I shall now, there-

[2] A motion in arrest of judgment, is an application on the part of the defendant that no judgment be rendered on a verdict against him. By "ARREST OF JUDGMENT," is meant the refusal of the court to enter a judgment for some cause apparent upon the record. The judgment of the court being a conclusion of law from the facts upon the record must be collected from the whole record. If therefore, the record itself shows no ground for judgment, it cannot be rendered, even though verdict of guilty be found. *State v. Allen*, R. M. Charl. Rep. 518.

By the various English statutes of amendments which extend from the reign of Edward 3d, to that of Anne, and the principles of which have been generally adopted in this country, this evil has been remedied. Now, no judgment can be arrested for a mere formal defect, nor for any substantial defect, enumerated in, and specially cured by, some or other of these statutes. In general, substantial defects are not cured by any of these statutory provisions; but some of them are cured by verdict or otherwise, upon common law principles, without the aid of any statute. Bouvier's Institutes, vol. 3, p. 516.

The causes on which this motion may be grounded, although numerous, are confined to objections which arise upon the face of the record itself, and which make the proceedings apparently erroneous; and, therefore, no defect in evidence, or improper conduct on the trial, can be urged in this stage of the proceedings. 4 Burr. 2287. 1 Lord Raym. 231. 1 Salk. 77, 315. 1 Sid. 65. Com. Dig. Indictment, N. Thus, it is no ground of arrest of judgment, that the sheriff, by whom the panel was returned, is the prosecutor, however strong a reason it would have been of challenge. 1 Leach, 101. But any want of sufficient certainty in the indictment, respecting the time, place, or offence which is material to support the charge, as well as the circumstance of no offence being charged, will cause the judgment to be arrested. 4 Bla. Com. 375. 3 Burr. 1901. 1 East, 146. And it is to be observed, that none of the statutes of *joefails*, or amendments, extend to criminal proceedings; and, therefore, essential defects in the indictment are not, as in civil cases, aided by verdict. 4 Bla. Com. 272. Stark. 252, 3, 4, 5, cont. So that though it was formerly thought that this motion would not be regarded in case of conspiracy, but the party would be left to his writ of error, (1 Saund. 301, 2,) it is now settled, that this idea is entirely destitute of foundation. Hawk. b. 2, c. 48, s. 1, n. e. 1 Saund. 301, 2, n. (1.) Nor is the ground of arresting the judgment confined to the indictment alone, it may be found in any part of the record, which imports that the proceedings were inconsistent or repugnant, and would make the sentence appear irregular to future ages. Thus, the omission in the caption of the indictment, of the words, "then and there," in the statement of the swearing to the jury, was formerly held fatal; because, without them, it did not appear that the oath was taken in the county where the offence is alleged to have been committed, but the law is now otherwise; (2 Stra. 901. Com. Dig. Judgment, N.; and see 2 Taylor, 93;) and it will be no ground for arresting the judgment, after special verdict removed by certiorari, that the judge who tried the prisoner is not stated to have been of the quorum, that no issue appears on the record.

See *Horsey v. State*, 3 Harr. & Johns. 2; *State v. Allen*, R. M. Charlton, 518; *Commonwealth v. Watts*, 4 Leigh, 672.

MASSACHUSETTS.—If a criminal has been arraigned for a capital offence before a single justice, he may move this in arrest of judgment after conviction. 2 Mass. 303.

NORTH CAROLINA.—Judgment was arrested when it appeared that the case had been tried by thirteen jurors. *Whitehurst v. Davis*, 2 Hayw. 113. See *State v. Fort*, 1 Car. Law. Rep. 510; *Commonwealth v. Chancey*, 2 Ash. 91; *Same v. Beckley*, 2 Met. 330; *Same v. Call*, 21 Pick. 509; *Same v. Tuck*, 20 ib. 356; *Dyer v. Commonwealth*, 23 Pick. 402.

If no issue is joined between the state and the defendant, the judgment will be arrested. *State v. Fort*, 1 Car. Law Repos. 510.

"There are several points in which an indictment is cured by verdict, and in which the

fore, enumerate the defects which are cured by verdict, and which of course cannot be made the subject of a motion in arrest of judgment :

errors which might have been taken advantage of at a previous stage, are not sufficient cause to arrest judgment. Thus, while duplicity is fatal on motion to quash or demurrer, the better opinion is, that it will not be ground for arrest; and the same position is undoubtedly good when there has been a misjoinder of counts, but where the defendant has gone to trial without a motion to quash, or an application for election. The practice also is, not to arrest judgment on the ground of irregularities in the summoning or the procedure of the grand jury; and it is clear that if misnomer of the defendant be not met by plea in abatement, it is too late for further objection after trial." Wharton's Cr. Law, p. 863, citing *Com. v. Tuck*, 20 Pick. 356; *State v. Johnson*, 3 Hill S. C. R. 1; *Com. v. Gillespie*, 7 Serg. & R. 476; *Com. v. Chauncey*, 2 Ashmead, 90; *Com. v. Beckley*, 3 Met. 330.

A special verdict, finding the defendant guilty of the same facts as those charged in the indictment, but not finding him guilty in the county where the offence was laid, cannot be supported, and the defendant, must again be put on his trial. It is a very familiar principle in the administration of the criminal law, that all the circumstances essential to sustaining the indictment, must be expressly found by the jury, and the court cannot supply a defect in the finding of the jury, by indictment, or implication. 1 Chitty's Cr. Law, 644; *Bac. Abr. Verdict, D*. In the ordinary case of a general verdict of *guilty* the jury, by the very terms of their verdict, find the prisoner guilty of all the material allegations in their indictment. Not so in a special verdict, for the very object of this departure from the usual form, is presumed to be for the purpose of declaring the prisoner guilty of certain facts only, with a view of submitting the question whether those facts authorize a general verdict of guilty to the judgment of the court. In such a case, if the facts thus found do not include all the essential elements of the offence charged upon the prisoner, he cannot be convicted.

In New York, it has been held, that though the indictment lay the time so long before an indictment is found, that the crime appears to be barred by the statute of limitations, this is no ground for arresting the judgment. 9 Cowen, 655. But in Georgia, when it appeared on the face of an indictment, that the offence charged was barred by the statute of limitations, and none of the exceptions in the statute to prevent its operation were alleged therein, judgment was arrested. *M'Lane v. State*, 4 Geo. Rep. 335.

Where a prisoner was convicted of murder, it was held to be ground for arrest of judgment that the writs of *venire* under which both grand and petit jurors were summoned, were without seal. *State v. Leozier*, 2 Speers, 211. The fact that a jury when out, were under the charge of an unsworn officer, is not technically ground for a motion in arrest of judgment, although it may be for new trial. *M'Cann v. State*, 9 Smedes & Marsh. Rep. 465.

Judgment was arrested where the indictment had been tried in a different district from that directed by law, to which it had been transmitted, by mistake, on a new division of the judicial districts; but a new trial was ordered in the proper district, upon the same indictment. *The State v. Gondalock*, 1 Brevard, 47.

The defendant may move at any time in arrest of judgment, before the sentence is actually pronounced upon him; (5 T. R. 445; 2 Burr. 801; 2 Stra. 845) and even when the defendant waives the motion, yet if the court upon a review of the whole case, are satisfied that he has not been found guilty of any offence in law, they will of themselves arrest the judgment. 1 East, 146; 11 Harg. St. Tr. 299. But if the sentence is once pronounced, though before the actual entry of the judgment, the court are not bound to attend at all to a motion of this nature, even though a formal error should be discovered, sufficient to reverse the proceedings, (3 Burr. 1901, 2, 3; Com. Dig. Indictment, N.) but the defendant is left to his writ of error; though, as we have seen, the court may, without any motion, arrest the judgment. (1 East, 146,) and may alter their sentence any time during the same term. 6 East, 328; 1 M. & S. 442. It should seem that the court may, if they think fit, arrest the judgment, notwithstanding it has been given. A motion in arrest of judgment, however, cannot ever be entertained, after judgment against the defendant on demurrer. 2 Ld. Raym. 1221. In this motion, as in that for a new trial, the defendant must be personally before the court, in

1. Every objection to an indictment for any formal defect apparent on the face thereof, shall be taken by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared.(a)

2. No judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved,—or for the omission of the words "*as appears by the record,*" or the words "*with force and arms,*" or the words "*against the peace,*"—nor for the insertion of the words "*against the form of the statute,*" instead of the words "*against the form of the statutes,*" or *vice versa*; nor for that any person or persons mentioned in the indictment or information is or are designated by a name of office or other descriptive appellation, instead of his, her, or their proper name or names,—nor for omitting to state the time at which the offence was committed, in any case where time is not of the  
[\*179] essence \*of the offence; nor for stating the time imperfectly; nor for stating the offence to have been committed on a day

(a) 14 & 15 Vict. c. 100, s. 25.

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order to procure it a hearing; because there is the strongest presumption possible that he is guilty. 2 Burr. 930, 1; 2 Stra. 844, 1227; 1 Bla. Rep. 209; 2 Barnard, 412; Com. Dig. tit. Indictment, N. In indictment against several for a misdemeanor, a new trial cannot be moved for, unless all be present. 4 B. & C. 329. But where the jury find a verdict, in which they submit a question to the court though not professedly special, his presence will be dispensed with on the argument, because he will be presumed to be innocent. 2 Stra. 1227; 5 Burr. 931. Nor is there any occasion for his presence, to move for an inspection of the venire, and other process. 1 Barnard, 147. And it should seem, that where the judgment against the defendant could only be the payment of a fine, the court might dispense with his personal appearance. 1 Salk. 55, 6, 400. If the defendant is in actual custody, he must apply for a habeas corpus, to enable him, on being brought up, to make the motion. 2 Burr. 931.

The effect of allowing a motion in arrest of judgment, is to place the defendant in the same situation in which he was before the indictment was found.

If, from the evidence on the trial, there is reasonable ground to believe the defendant guilty, and a new indictment can be framed upon which he may be convicted, the court may order him to be re-committed to the officer of the proper county, or admitted to bail anew, to answer the new indictment. If the evidence show him guilty of another offence, he must be committed or held thereon; and in neither case, is the verdict a bar to another prosecution or indictment for the same offence. But if no evidence appear, sufficient to charge him with any offence, he must, if in custody, be discharged, or if admitted to bail, his bail is exonerated, or if money have been deposited instead of bail, it must be refunded to the defendant; and the arrest of judgment operates as an acquittal of the charge upon which the indictment was founded.

subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that never happened;—nor for want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence.(a) And this extends to indictments for offences committed abroad, as well as for offences committed in this country.(b) This latter provision as to venue, however, does not aid the omission of venue, altogether,(c) or the laying of the venue in a wrong county.(d)

By stat. 14 & 15 Vict. c. 100, s. 24, no indictment shall be holden insufficient for any of the defects above enumerated, or for want of a proper or formal conclusion, or for want of or imperfection in the addition of any defendant, or for want of the statement of the value or price of any matter or thing, or the amount of damage, injury or spoil, in any case where the value or price, or the amount of damage, injury or spoil is not of the essence of the offence. In what cases the indictment may be amended,(e)

3. No judgment after verdict upon any indictment or information for any felony or misdemeanor, shall be stayed or reversed for want of a similitur;—nor by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion;—nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors;—nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer;—and that where the offence charged has been created by any statute or subject to a greater degree of punishment by any statute, the indictment or information shall after verdict be held sufficient, if it describe the offence in the words of the statute.(g)

4. We have seen(h) that where there are two or more counts, and one bad, and a general verdict as to both, this is not the subject of a motion in arrest of judgment: because the judgment may still be several, though the verdict be general. And where the indictment contained two counts for larceny, and a third count stating that the prisoner feloniously received and had the goods “so as aforesaid feloniously stolen taken, and carried away,” it was moved to arrest the judgment, because the jury, by their verdict on the two first counts, had negatived the larceny “as aforesaid:” but the judges held that the last count was good, and the judgment ought not to be arrested;—some of them holding that the words “so as aforesaid” might be rejected as surplusage, and others that \*supposing these words had the effect [\*180]

(a) 7 G. 4, c. 64, s. 20.

(b) *Douglas v. The Queen*, 17 Law J. 177 m.

(c) *R. v. O'Connor et al.*, 13 Law J., 33 m.,  
5 Q. B., 16.

(d) *R. v. Mitchell*, 2 Q. B. 636.

(e) See *ante*, pp. 99—101.

(g) *Id.* s. 21. See *R. v. Martin et ux.*, Ad.  
& El. 481.

(h) *Ante*, p. 176.

of importing in the third count that the prisoner had stolen the goods, that still the third count would be good.(a)

### 3. *Judgment*. [1]

If no motion be made in arrest of judgment, or if made and decided against the defendant, the judge at the assizes, or the recorder or chairman at the sessions, proceeds to pass sentence. Sometimes this is done immediately after each trial; sometimes at the end of each day; sometimes on some other day of the assizes or sessions. The first seems to be the better method; at least it is calculated to have a better and more lasting effect upon the audience, in whose minds the crime and its punishment are thus immediately connected, the latter following speedily and certainly upon the former; it is therefore always observed in the case of treason and murder.[2]

(a) *R. v. Craddock*, 20 Law J. 21 m.

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[1] Judgment, is the conclusion and sentence of the law, passed by the court, upon facts found or admitted in the course of the criminal proceedings against a party. Burns' Just. tit. JUDGMENT.

With respect to the form of the judgment it has been held that an entry in the following words, "It is ordered, &c.," was not a judgment, but an order. *Baker v. The State*, 3 Ark. Rep. 491. See also 1 Chitty's Cr. Law, p. 701.

A judgment, though pronounced or awarded by the judges, is not their determination and sentence, but the sentence and determination of the law, which depends, not upon the arbitrary opinion of the judge, but the settled and invariable principles of justice, and is the remedy prescribed by law for the redress of injuries; and the suit or action is the vehicle or means of administering it; and, therefore, the style of the judgment is not "That it is ordered or resolved by the court," for then the judgment might be their own; "It is considered"—"*Consideratum est per Curiam*," which implies that the judgment is none of their own, but the act of the law, pronounced and declared by the court, upon determination and inquiry.

The judge usually precedes the judgment by an address to the prisoner, especially if his crime be capital, in which he states that he has been convicted on satisfactory evidence, and informs him when there is little hope that mercy will be extended to him. Sometimes also he takes an opportunity of impressing the circumstances of the prisoner's guilt on the minds of the spectators, and traces out the remote but important causes which have led him to his unhappy condition. 1 Gisb. Duties of Man, 405. Even in case of an acquittal, he may often usefully warn the defendant against the circumstances which might again place him in an equivocal situation, especially if there seems reasonable ground to suppose him guilty. Id. 406.

[2] When any corporal punishment is to be inflicted on the defendant, it is absolutely necessary, unless some statute has otherwise directed, that he should be personally before the court at the time of pronouncing the sentence. 1 Ld. Raym. 267. 12 Wend. 344. But where the defendant is found guilty, and the court pronounce judgment that he pay a fine and stand committed until it be paid, the imprisonment is no part of the punishment, but only a mode of enforcing payment of the fine, and it is not necessary that the defendant should be present. 12 Wend. 344. 1 Va. Cas. 172.

The judgment or sentence of the court is usually given soon after the conviction—at least during the same term of the court at which the prisoner is convicted; unless the rendering of judgment is stayed by the filing of a bill of exceptions for the purpose of taking the opinion of the supreme court upon the case. See 1 Chit. Cr. L. 699. 2 R. S. 736.

Where sentence of death is to be passed, the crier previously makes proclamation thus: "All manner of persons, keep silence whilst sentence of death is passed upon the prisoner at the bar, upon pain of imprisonment." [3] In capital cases, also, whether sentence is to be passed, or only recorded, the clerk of arraigns at the assizes asks the prisoner—"A. B., have you anything to say why sentence of death should not be passed [*or recorded*] against you;" upon which the prisoner may move in arrest of judgment, if that have not been already done, or he may address any other observations to the judge which he may think proper. [4] In other cases, when sentence is about to be passed, the defendant may address the court in mitigation of punishment, as well as in arrest of judgment, whether he was tried and convicted or pleaded guilty; counsel however are not permitted to address the court, either in mitigation or aggravation of punishment, but the court will receive affidavits on either side, where the defendant pleads guilty, and there are no depositions. (a) At sessions, indeed, where a prisoner has pleaded guilty, the court, when they are about to sentence him, frequently call upon the counsel for the prosecution to state the nature of the case

(a) See *R. v. Gregory*, 1 Car. & K. 228.

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Judgment is rendered by the court, in which the defendant was convicted; except in cases where the indictment is removed into the supreme court, by certiorari, before judgment, as provided by statute. In such cases, if the supreme court decides against the exceptions taken, it must either proceed to render judgment and pronounce sentence against the defendant, or must remit the proceedings to the court in which the trial was had, with directions to proceed and render judgment. 2 R. S. 741, § 25.

In New Jersey, the court of oyer and terminer may give judgment on a conviction had at a previous term. *State v. Guild*, 5 Halsted, 163.

[3] But it is not necessary that this form should appear on the record, and its omission will not be material. 1 Ld. Raym. 1469.

[4] Before judgment is pronounced upon the defendant it is indispensably necessary that he should be asked by the clerk or court if he has any thing to say why judgment should not be pronounced on him; (1 Chit. Cr. L. 700;) and it is material that this appear upon the record to have been done; and its omission, after judgment in high treason, will be a sufficient ground for the reversal of the attainder. 3 Salk. 358. Comb. 144. 3 Mod. 265. On this occasion he may allege any ground in arrest of judgment; (which we shall notice presently;) or may plead a pardon if he has obtained one, for it will have the same consequence which it would have produced before conviction, by stopping the attainder. 4 Black. Com. 376. If he has nothing to urge in bar, he frequently addresses the court in mitigation of his conduct, and desires their intercession with the pardoning power, or casts himself upon their mercy. After this, nothing more is done, but the proper judge pronounces sentence. This may be safely done in general terms, though a part of the indictment is defective, or the conduct charged in part is no legal offence, though the residue is sufficient; because the court will make the punishment proportioned to so much of the charge as is proved by the evidence. 1 Chit. Cr. L. 700. 2 Burr. 984.

A joint sentence may be, and frequently is passed, on several offenders convicted of similar offences. *Id. ib.* 6 Harg. St. Tr. 833.

against him; this, however, is not done at the assizes, but the judge collects the facts of the case from the depositions.[5]

[5] Where a prisoner, convicted at the sessions, is brought into the supreme court for judgment, that court will give no other judgment than might have been pronounced by the court below. 1 Caines, 37.

Where there is no judgment of imprisonment the judgment is that the defendant pay the fine assessed upon him, and the costs of the prosecution. Should he be in court at the time of pronouncing judgment, an order may be entered for his imprisonment until he shall pay the fine and costs, or be otherwise discharged. But if he be not in court, process may be awarded for the recovery thereof. There is a right to proceed by execution for the fine and costs, against the property of the defendant, or against the body, as upon judgments in civil cases. 8 Wend. 204.

In an indictment against two or more, it is generally true that the charge is several as well as joint; so that if one is found guilty, judgment may be rendered against him, although one or more may be acquitted. To this rule there are exceptions, as in cases of conspiracy, or riot, to which the agency of two or more is essential. But violations of the license law, not being within the reason of these exceptions, come under the general rule. *Comm. v. Griffin*, 3 Cush. 523.

It is not necessary, in recording sentence, to refer to the statute which gives the punishment. *Murray v. The Queen*, 14 Law J. 357; 9 Jur. 596.

The judgment, on a verdict of guilty, must not be dependent on any contingency, nor subject to any future decision, but must be final and certain. *Morris v. State*, 1 Blackf. 37.

Upon an indictment against eight persons, for an unlawful assembly, five appeared and pleaded not guilty, and two of these five were found guilty and three not guilty. It was held that the judgment should be entered against the two found guilty, but that they must have been discharged had all the others indicted been tried and acquitted. *State v. Bailey*, 2 Blackf. 151.

A judgment acquitting several defendants charged with committing an offence jointly, will not bar a several prosecution against them. *Comm. v. McCord*, 2 Dana, 242.

Where a party convicted of an offence is subject to two distinct and independent punishments, it cannot be alleged for error, by the defendant, that one only of the punishments to which he was liable is adjudged against him. The prosecutor may complain of such omission, but not the party convicted. 8 Wend. 203.

Every court before which any person is convicted of any offence not punishable with death or imprisonment in the state prison, has power, in addition to such sentence as may be authorized or prescribed by law, to require the defendant to give security to keep the peace, &c., for any term not over two years, or to stand committed until such security is given. But this does not extend to libels. 2 R. S. 737, § 1.

The same rule prevails in England. Thus, where an indictment for perjury had been removed into the queen's bench by certiorari, and the defendant convicted and sentenced by the court to be imprisoned for eighteen calendar months, and to give security to keep the peace and be of good behavior for two years, to commence from the expiration of the eighteen months, and to be further imprisoned until such security was given, it was held by the exchequer chamber, on error, that the court might, as a part of the sentence, require such sureties. *Queen v. Dunn*, 12 Ad. & El. N. S. 1026.

*Proceedings subsequent to Judgment, in the State of New York.*

The Revised Statutes of New York, provide as follows:—Whenever a defendant who shall have been acquitted or convicted upon any indictment, shall require the district attorney to make up a record of the judgment, it shall be his duty to do so, on being paid his legal fees; and if he shall neglect for ten days after being so required, to make up such record, the defendant may himself cause the same to be made up, signed and filed. 1d. 738, § 4.

Where an offence, committed in a county of a city or of a town, is tried at the assizes, the court may order the judgment to be executed,

A court of oyer and terminer after *quashing* an indictment may, at a subsequent term, give leave to the public prosecutor to make up a record as if judgment had been rendered for the defendant on demurrer, for the purpose of enabling him to sue out a writ of error; and should such leave be refused, the supreme court will award a mandamus. 9 Wend. 182.

Whenever a judgment upon conviction shall be rendered in any court, it is the duty of the clerk to enter such judgment fully in his minutes, stating briefly the offence for which the conviction was had; and the court shall inspect such entries and conform them to the facts. 2 R. S. 738, § 5.

It shall be the duty of the district attorney, on being requested by the clerk, to prepare for him a statement of the offence of which any person shall be convicted, as the same is charged in the indictment, to be entered in the minutes of such clerk; but the court shall inspect the same and conform it to the indictment. Id. ib. § 6. Within ten days after the adjournment of any court at which any convictions for offences shall have been had, the clerk therefore shall make out and certify a transcript of the entries in his minutes, of all such convictions and the sentences thereon; and shall transmit the same to the secretary of state, under a penalty of \$50. Id. ib. § 7. This transcript or statement shall contain such a description of the offence committed, abridged from the indictment, as would be sufficient to maintain the averments relating to such offence, necessary to be made in an indictment against the same person for a second offence; and if a defective transcript of any criminal conviction shall be transmitted to the secretary of state, it shall be his duty to require a correct transcript from such clerk; and in case of his refusal or neglect to furnish the same within a reasonable time after being so required, he shall be liable to a penalty of \$50. Laws of 1839, p. 234. If the district attorney shall neglect or refuse to prepare for any clerk of a criminal court, such a statement, within a reasonable time after being required by such clerk, he shall forfeit \$50 to the use of the people of this state, for each statement so neglected to be furnished; and every such neglect shall be immediately reported by such clerk to the secretary of state. Id. 235, § 2.

It is the duty of the secretary of state to file such transcripts, and whenever required by the attorney-general, or district attorney of any county, he is bound to furnish an exemplification thereof, under the seal of his office; which exemplification is declared to be sufficient evidence on the trial of any person for a second or subsequent offence, of the conviction stated in such transcript. 2 R. S. 738, § 8. But neither such transcript nor the exemplification thereof are, in any other case, evidence of such conviction. Id. 739, § 9.

A copy of the minutes of any conviction, with the sentence of the court thereon, entered by the clerk of any court, duly certified by the clerk in whose custody such minutes shall be, under his official seal, together with a copy of the indictment, certified in the same manner, is made evidence of such conviction, in all cases in which it shall appear by the certificate of the clerk, or otherwise, that no record of the judgment on such conviction has been signed and filed. Ibid. § 10.

Upon conviction for a crime punishable with death, it is the duty of the presiding judge of the court at which the conviction took place, to transmit immediately to the governor, by mail, a statement of the conviction and sentence, with the notes of testimony taken by him upon the trial. Ib. 658, § 13. Amended by laws of 1847, p. 437, § 1.

The governor is authorized to require the opinion of the judges of the court of appeals, justices of the supreme court, and of the attorney-general, or of any one of them, upon any statement so furnished. Id. 514; Laws of 1847, p. 437, § 2.

A transcript of the entry of the conviction in the minutes of the court and of the sentence thereupon, certified by the clerk, or a certified copy of the sentence, if the prisoner was sentenced to imprisonment in a state prison, is a sufficient authority to the sheriff to execute



either in the same county, or in the county of the city or town in which the offence was committed.(a)

(a) *Sentence of death.*

The principal offences now punishable with death, are, treason,

(a) 51 G. 3, c. 100, s. 1; 14 & 15 Vict. 55, s. 23.

the sentence. Id. 739, §§ 11, 12. Such sheriff or deputy, while conveying a convict to the proper person, has the same power and the like authority to require the assistance of any person, in securing such convict, and retaking him if he escapes, as if the sheriff were in the county for which he was elected. And all persons refusing or neglecting to assist such sheriff, when required, are liable to the same penalties as if such sheriff were in his own county. 2 R. S. 739, § 13.

Whenever any convict is sentenced to the punishment of death, the court, or a major part thereof, of whom the presiding judge must always be one, must make out, sign, and deliver to the sheriff of the county a warrant, stating such conviction and sentence, and appointing the day on which the sentence is to be executed. Such day must not be less than four weeks, and not more than eight weeks from the time of the sentence. Id. 657, §§ 11, 12. Whenever, for any reason, any convict sentenced to the punishment of death, shall not have been executed pursuant to such sentence, and the same stands in full force, the supreme court, on the application of the attorney-general or of the district attorney, may issue a writ of *habeas corpus* to bring such convict before the court, or if he is at large, a warrant for his apprehension may be issued by the court, or any justice thereof. On such convict being brought before the court, it must proceed to inquire into the facts and circumstances; and if no legal reasons exists against the execution of the sentence, it is made the duty of the court to sign a warrant to the sheriff, commanding him to do execution of the sentence, at such time as shall be appointed therein; which must be obeyed by the sheriff. Id. 659, §§ 23, 24. It has been decided where the execution of the sentence of the defendant is respited by the governor for the purpose of having the conviction reviewed by the supreme court, it is the duty of the sheriff to execute the sentence of the court on the day to which the execution is respited, unless the judgment be reversed or annulled, or a further respite be granted. And it is not necessary in such a case that the defendant be previously brought into court by *habeas corpus*. *The People v. Enoch*, 18 Wend. 159.

The method of inflicting the punishment of death is pointed out in the revised statutes. 2 R. S. 748, 3d. ed. §§ 25 to 28.

If, after a convict has been sentenced to the punishment of death, he becomes insane, the sheriff, with the concurrence of a justice of the supreme court, or if he is absent from the county, with the concurrence of the county judge, may summon a jury to inquire into such insanity, and must give immediate notice to the district attorney of the county. *Laws of 1847*, p. 437, § 3; 2 R. S. 658, § 16. It is the duty of the district attorney to attend such inquiry, and he may produce witnesses before the jury. If it is found by the inquisition of the jury that the prisoner is insane, the sheriff must suspend execution of the sentence until he shall receive a warrant from the governor, or from the justices of the supreme court, directing the execution of the convict. 2 R. S. 658, §§ 17, 18.

If a female, sentenced to death, is pregnant, the sheriff is to summon a jury to try the question of pregnancy; and if it appears by the inquisition that she is quick with child, the sheriff must suspend the execution of her sentence, until he shall receive from the governor a warrant, appointing a day for her execution pursuant to her sentence. 2 R. S. 658, §§ 20, 21, 22.

No judge, court, or officer, other than the governor, has any authority to reprieve or suspend the execution of any convict sentenced to the punishment of death; except sheriffs in the cases above specified. *Ibid*, § 15.

murder, and unnatural offences. In \*treason the sentence [\*181] is, that the prisoner shall be drawn on a hurdle to the place of execution, and there hanged by the neck until he be dead, and that afterwards his head shall be severed from his body, and his body divided into four quarters, shall be disposed of as Her Majesty shall think fit.(a) But after sentence pronounced, Her Majesty, by warrant under her sign manual, countersigned by a secretary of state, may direct that the prisoner, instead of being drawn on a hurdle, shall be conveyed to the place of execution in such manner as is therein mentioned, and instead of being hanged, shall be beheaded, and may direct how his head and quarters shall be disposed of.(b) A woman for treason was formerly burnt;(c) but now, she is to be drawn to the place of execution, and there hanged by the neck until she be dead.(d)[1]

(a) 54 G. 3, c. 146, s. 1.

(b) Id. s. 2.

(c) 2 Hawk. c. 48, s. 6.

(d) 30 G. 3, c. 48.

[1] In England, the judgment in case of *high treason* was, until very lately, an exception to the merciful tenor of our judgments. The least offensive form which is given in the books is, that the offender "be carried back to the place from whence he came, and from thence to be drawn to the place of execution, and be there hanged by the neck, and cut down alive, and that his entrails be taken out and burned before his face, and his head cut off, and his body divided into four quarters, and his head and quarters disposed of at the king's pleasure." 2 Hale, 396, 7. Hawk. b. 2, c. 48, s. 3. See form, 3 Inst. 210, 211. 1 Hale, 350, 1. 2 Hale, 397. Plowd. 387. Co. Ent. 661. 3 Harg. St. Tr. 214, 290, 314, 340, 409. Fost. 112. Williams, J. Judgment. 4 Bla. Com. 92. Some of the precedents add other circumstances, of still more grossness and aggravation. 3 Harg. St. Tr. 340, 409. Comb. 275. But this horrible denunciation was very seldom executed in its more terrible niceties. The king always might pardon every part of it, except beheading, where that was included, and frequently exercised that prerogative. 1 Hale, 351. 4 Bla. Com. 92, 3. And the criminal was almost always deprived of life, by means of strangulation, before the executioner proceeded to mutilate his body. At length this dreadful sentence, which had disgraced our laws, though not our practice, from the earliest periods, was modified and its most offensive parts taken away. By the 54 Geo. 3, c. 146, the judgment in future to be passed upon offenders convicted of high treason, is fixed, "that they be drawn on a hurdle to the place of execution, and be there hanged by the neck until they be dead; and that afterwards their heads shall be severed from their bodies, and the body divided into four quarters, shall be disposed of as shall seem fit to his majesty." By the same statute, the king is empowered to change the whole of the sentence into beheading, by a warrant under the sign manual.

*Treasons* relating to the *coin*, were never subject to the severities with which those affecting the government were formerly attended. 1 Hale, 351. 4 Bla. Com. 93. In case of men, the judgment was merely to be drawn and hanged, for this was the rule of common law, and has not been altered by any subsequent statute. 1 Hale, 351. 2 Hale, 398. 4 Bla. Com. 93. Hawk. b. 2, c. 48, s. 4. The sentence is, "that the defendant be drawn to the place of execution, and there be hanged until he shall be dead." 1 Hale, 351. See form, 1 Hale, 351. Some doubt indeed formerly prevailed respecting clipping, and other offences, made treason by statute; because it is a general rule, that where an act of parliament makes an offence treason or felony, it annexes to it at the same time, all the consequences which, at common law, belong to offences of the same description; (3 Inst. 17. 1 Hale, 362, 3. 2 Hale, 398, 9. Hawk. b. 2, c. 48, s. 4;) but as other treasons of the same kind were always visited with a milder punishment, the more merciful opinion has prevailed, and the present

### The punishment of principals and accessories before the fact in mur-

form of judgment issued in every case of the kind, however created. 2 Dyer, 230, b. 3 Keb. 278. 2 Leon. 98. Sir T. Jones, 233. Sir T. Raym. 234. 1 Vent. 254. Hawk. b. 2, c. 48, s. 4. Williams, J. Judgment. But women were both in this and high treason to be burned; which cruel sentence was, like the other, commonly evaded. The humanity of modern times has also removed this barbarism; for by the 30 Geo. 2, c. 48, women convicted of any species of treason, are to receive judgment to be drawn and hanged, without any further indignity or outrage.

**MASSACHUSETTS.**—Treason against this Commonwealth shall consist only in levying war against the same, or in adhering to the enemies thereof, giving them aid and comfort.

Every person, who shall commit the crime of treason against this Commonwealth, shall suffer the punishment of death for the same. Rev. Sta. Mass. 715, s. 1, 2.

**MAINE.**—Whoever shall be guilty of treason, by levying war against the state, adhering to its enemies, giving them aid and comfort, shall be punished with death. Rev. Sta. of Me. ch. 153, sec. 1.

**NEW YORK.**—The revised statutes of New York (pt. 4, ch. 1, tit. 1, sec. 1,) provide that the following offences shall be punished with death:

1. Of treason against the people of the state.
2. Of murder.
3. Of arson in the first degree.

**MISSISSIPPI.**—In Mississippi, the statute is precisely the same as in New York. Hutch. Miss. Code, p. 954.

**NEW JERSEY.**—Treason and misprison of treason, are punished with death in New Jersey. Rev. Sta. of N. J. tit. 8, ch. 1.

**PENNSYLVANIA.**—In Pennsylvania, the punishment for high treason is confinement at labor, for the first offence for a period of not less than three nor more than six years; for the second offence, for a period not exceeding ten years. Dunlop's Laws of Penn. p. 487.

**MARYLAND.**—On conviction for treason the judgment shall be to suffer death by hanging only, and the circumstances of cruelty in the judgment by the law of England, shall be omitted. Dorsey's Laws of Maryland, vol. 1, p. 181. Certain crimes declared to amount to treason, and persons guilty thereof to suffer death and forfeit their estates. Ib. 136.

**GEORGIA.**—In Georgia, treason in the first degree, is punished with death. Treason in the second degree, (which consists in the knowledge and concealment of treason, without otherwise assenting or participating in the same) is punished by confinement and hard labor in the penitentiary for the term of four years. Hotchkiss' Stat. Law of Geo. p. 704.

**MICHIGAN.**—In Michigan, treason is punished with death, and misprison of treason, by fine not exceeding one thousand dollars, or by imprisonment in the state prison, not more than five years, or in the county jail, not more than two years. Rev. Sta. of Mich. ch. 152, secs. 1, 2.

**VIRGINIA.**—Treason shall consist only in levying war against the state, or adhering to its enemies, giving them aid and comfort, or establishing, without authority of the legislature, any government within its limits, separate from the existing government, or holding or executing, in such usurped government, any office, or professing allegiance or fidelity to it, or resisting the execution of the laws, under color of its authority; and such treason, if proved by the testimony of two witnesses to the same overt act, or by confession in court, shall be punished with death.

If a free person, knowing of any such treason, shall not, as soon as may be, give information thereof to the governor, or some conservator of the peace, he shall be punished by fine not exceeding one thousand dollars, or by confinement in the penitentiary not less than three nor more than five years.

If a free person attempt to establish any such usurped government, and commit any overt act therefor, or, by writing or speaking, endeavor to instigate others to establish such government, he shall be confined in jail not exceeding twelve months, and fined not exceeding one thousand dollars.

der, is death.(a)[2] Formerly the prisoner must have been executed on the day but one after the passing of the sentence; and after being hanged, his body was to be dissected or hung in chains.(b) But by stat. 2 & 3 W. 4, c. 75, the body was no longer to be dissected, but the judge, by his sentence might direct either that it should be hung in chains, or buried within the precincts of the prison. It was again altered by stat. 4 & 5 W. 4, c. 26, s. 1, which repeals so much of these Acts as relates to the hanging in chains. And now, by stat. 6 & 7 W. 4, c. 30, s. 2, sentence of death shall be pronounced, after convictions for murder, in the same manner, and the judge shall have the same power in all respects, as after convictions for other capital offences.

The crime of "buggery committed either with mankind or with any animal," is punishable with death.(c) Formerly rape was punishable in the same manner,(d) but now the punishment is by transportation for life.(e)[3]

(a) 9 G. 4, c. 31, s. 3.

(d) 9 G. 4, c. 31, s. 16.

(b) Id. s. 4.

(e) 4 & 5 Vict. c. 56, s. 3.

(c) Id. s. 15.

If a free person advise or conspire with a slave to rebel or make insurrection, or with any person, to induce a slave to rebel or make insurrection, he shall be punished with death, whether such rebellion or insurrection be made or not. Code of Virginia, p. 722, secs. 1-4.

WISCONSIN.—In Wisconsin, the distinction between murder and petit treason is abolished, and the last named offence is prosecuted and punished as murder. Rev. Sts. of Wis. ch. 141, sec. 13.

IOWA.—In Iowa, treason is punished with death, and misprison of treason by fine, not exceeding one thousand dollars, or by imprisonment in the penitentiary, not exceeding three years, nor less than one year. Code of Iowa, tit. 23, ch. 137.

[2] In Michigan, the statute provides that, all murder which shall be perpetrated by means of poison or lying in wait, or any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life.

All other kinds of murder shall be deemed murder of the second degree, and shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same. Rev. Sts. of Mich. p. 658, secs. 1, 2.

[3] The crime of buggery is punished in Massachusetts by imprisonment in the state prison not more than twenty years. Rev. Sts. of Mass. ch. 130, sec. 14. In New York, it is punished by imprisonment in a state prison for a term not more than ten years. 2 N. Y. Rev. Sts. 689, sec. 20. In Pennsylvania, it is punished by separate and solitary confinement at labor; for the first offence for a period of not less than one, nor more than five years; and for the second offence, not exceeding ten years. Dunlop's Laws of Penn. p. 488. In Maryland, it is punished by confinement not less than one nor more than ten years. Laws of Maryland, 1809, ch. 138, sec. 4.

In Virginia the punishment, is imprisonment in the penitentiary, not less than one, nor more than five years. Rev. Code of Va. 1849, tit. 54, ch. 197, sec. 12. The punishment in Michigan, is imprisonment in the state prison, not more than fifteen years. Rev. Sts. of Mich. tit. 30, ch. 158, sec. 16. In New Jersey it is punished by fine not exceeding one thousand dollars, or imprisoned at hard labor for any term not exceeding twenty-one years, or both. Rev. Sts. of N. J. tit. 8, ch. 1, sec. 9. The punishment in Wisconsin is imprisonment

But in every case of a capital felony, except murder, if the court before whom the offender shall be convicted, shall, be of opinion that un-

in the state prison, not more than five years, nor less than one year. *Rev. Sta. of Wis. ch. 139, sec. 15.* In Georgia, the punishment is imprisonment, at labor, in the penitentiary, for life. *Hotchkiss' Stat. Law of Geo., p. 709.*

*Punishment for Rape.*

UNITED STATES.—If any person upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, shall commit the crime of wilful murder or rape, or shall, wilfully and maliciously strike, stab, wound, poison or shoot at any other person, of which striking, stabbing, wounding, poisoning or shooting, such person shall afterwards die upon land within the United States, every person so offending, his or her counsellors, aiders and abettors, shall be deemed guilty of felony, and shall, upon conviction thereof, suffer death. *Act. 3d March, 1825, sec. 4.*

If any person, upon the high seas, or in any of the other places aforesaid, with intent to kill, rob, steal, commit a rape, or to do or perpetrate any other felony, shall break or enter any vessel, boat or raft; or if any person shall, wilfully and maliciously, cut, spoil or destroy, any cordage, cable, buoys, buoy-rope, head-fast, or other fast, fixed to any anchor or moorings, belonging to any vessel, boat or raft; every person so offending, his or her counsellors, aiders and abettors shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, and by imprisonment and confinement to hard labor not exceeding five years, according to the aggravation of the offence. *Ib. sec. 7.*

MASSACHUSETTS.—If any person shall ravish and carnally know any female, of the age of ten years or more, by force and against her will, or shall, unlawfully and carnally, know and abuse any female child, under the age of ten years, he shall suffer the punishment of death for the same. *R. S. chap. 125, sec. 18.*

NEW YORK.—Every person who shall be convicted of rape, either, 1, By carnally and unlawfully knowing any female child under the age of ten years; or, 2, By forcibly ravishing any woman of the age of ten years or upwards; shall be punished by imprisonment in a state prison, not less than ten years. *2 R. S. 663, sec. 22.*

Every person who shall have carnal knowledge of any woman above the age of ten years, without her consent, by administering to her any substance or liquid, which shall produce such stupor, or such imbecility of mind, or weakness of body, as to prevent effectual resistance, shall, upon conviction, be punished by imprisonment in a state prison, not exceeding five years. *Ibid. sect. 23.*

PENNSYLVANIA.—Every person, duly convicted of the crime of rape, or as being accessory thereto, before the fact, shall be sentenced to undergo a confinement in the jail and penitentiary house of Philadelphia, for a period of time not less than ten years, nor more than twenty-one years, and shall be kept therein at hard labor, or in solitude; and shall, in all things, be treated and dealt with as is prescribed by an act, entitled, "An act to reform the penal laws of this state;" or by the provisions of this act. *Act 22d April, 1794, 3 Dallas, p. 600; 3 Smith, p. 187; Bur. 6th ed. p. 904, sec. 4.*

Instead of the penitentiary punishment, heretofore prescribed, the punishment by solitary confinement at labor shall be inflicted upon the several offenders who shall, after the first day of July next, commit, and be legally convicted of, any of the offences hereinafter enumerated and specified; that is to say:—Every person, duly convicted of the crime of rape, or as being accessory thereto, before the fact, shall be sentenced to undergo a similar confinement at labor, for the first offence for a period not less than two nor more than twelve years; and, for the second offence, for and during the period of his natural life, under the same conditions as are herein before expressed. *Act 23d April, 1829; Pamph. p. 341, 6th ed. Bur. p. 904, sec. 14.*

der the particular circumstances of the case, such offender is a fit and proper subject to be recommended for the royal mercy, such court may,

**VIRGINIA.**—If any white person carnally know a female of the age of twelve years or more, against her will, by force, or carnally know a female child under that age, he shall be confined in the penitentiary, not less than ten nor more than twenty years. Code of 1849, ch. 194, sec. 15. See *Ibid*, ch. 200.

**NEW JERSEY.**—Any person who shall have carnal knowledge of a woman, forcibly and against her will, or who shall aid, abet, counsel, hire, cause or procure any person or persons to commit the said offence, or who, being of the age of fourteen years, shall unlawfully and carnally know and abuse any woman child, under the age of ten years, with or without her consent, shall, on conviction, be adjudged guilty of a high misdemeanor, and be punished by fine, not exceeding one thousand dollars, or imprisonment at hard labor, for any term not exceeding fifteen years, or both. Rev. Stat. of N. J. p. 259, sec. 10.

**MAINE.**—If any man shall ravish and carnally know any female of the age of ten years or more, by force and against her will, or shall unlawfully or carnally know and abuse any female child under the age of ten years, he shall be punished by imprisonment in the state prison, for life.

If any person shall take any woman unlawfully and against her will, and, by force, menace or duress, compel her to marry him, or any other person, or to be defiled, he shall be punished by imprisonment in the state prison, for life, or any term of years.

If any person shall take any woman, unlawfully and against her will, with intent to compel her by force, menace or duress, to marry him or any other person, or to be defiled, he shall be punished by imprisonment in the state prison, not more than ten years. Rev. Sta. of Maine, p. 665, secs. 17, 18, 19.

**OHIO.**—That if any person shall have carnal knowledge of his daughter, or sister, forcibly and against her will, every such person so offending, shall be deemed guilty of a rape, and upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor during life. Stat. of Ohio, 230, c. 35, s. 4; Act of March 7th, 1835.

That if any person shall have carnal knowledge of any other woman, or female child, than his daughter or sister, as aforesaid, forcibly and against her will; or if any male person of the age of seventeen years and upwards, shall carnally know and abuse any female child, under the age of ten years, with her consent, every person so offending shall be deemed guilty of a rape, and upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than twenty nor less than three years. *Ibid*. s. 5.

That if any male person seventeen years old and upwards, shall have carnal knowledge of any woman, other than his wife, such woman being insane, he knowing her to be such, ever person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than ten or less than three years. *Ibid*. s. 6.

**MARYLAND.**—Every person duly convicted of the crime of rape, or as being accessory thereto, before the fact, shall, at the discretion of the court, suffer death by hanging by the neck, or undergo a confinement in the penitentiary for a period of time not less than one year, nor more than twenty-one years, under the same conditions as are hereinafter prescribed.

If any person shall carnally know and abuse any woman child, under the age of ten years, every such carnal knowledge shall be deemed felony, and the offender being convicted thereof, shall, at the discretion of the court, suffer death by hanging by the neck, or undergo a confinement in the penitentiary for a period not less than one year, nor more than twenty-one years, to be dealt with according to law. 1 Dorsey, 575.

**VERMONT.**—If any person shall ravish and carnally know any female of the age of eleven years or more, by force and against her will, or shall unlawfully and carnally know any female child under eleven years of age, with or without her consent, such person shall be punished by imprisonment in the state prison, for a term not exceeding twenty years, and

if it think fit, direct the proper officer, then present in court, to require and ask, and whereupon such officer shall require and ask, if such of-

be fined a sum not exceeding two thousand dollars, or either or both of said punishments, in the discretion of the court, before which such offence is prosecuted. Sec. 1 of No. 7 of 1849.

If any person shall assault any female, with the intent to commit the crime of rape, he shall be punished by imprisonment in the state prison not exceeding ten years, and be fined not exceeding one thousand dollars, or either or both of said punishments, in the discretion of said court. Sec. 2 of No. 7 of 1849; Rev. Stat. of Ver. p. 543, secs. 24, 25.

MICHIGAN.—If any person shall ravish and carnally know any female of the age of ten years or more, by force and against her will, or shall unlawfully and carnally know and abuse any female child under the age of ten years, he shall be punished by imprisonment in the state prison for life, or for any term of years; and such carnal knowledge shall be deemed complete upon proof of penetration only.

If any person shall assault any female with intent to commit the crime of rape, he shall be deemed a felonious assaulter, and shall be punished by imprisonment in the state prison not more than ten years, or by fine not exceeding one thousand dollars.

If any person shall take any woman unlawfully and against her will, and by force, menace and duress, compel her to marry him or any other person, or to be defiled, he shall be punished by imprisonment in the state prison for life, or any term of years.

If any person shall take any woman unlawfully and against her will, with intent to compel her by force, menace or duress, to marry him or any other person, or to be defiled, he shall be punished by imprisonment in the state prison not more than ten years. Rev. Stat. of Mich. p. 660, secs. 20, 21, 22, 23.

GEORGIA.—*Rape defined.*—Rape is the carnal knowledge of a female forcibly and against her will.

*Punishment for committing rape.*—Rape shall be punished by an imprisonment at labor in the penitentiary, for a term not less than two years, nor longer than twenty years.

*Punishment for an attempt to commit rape.*—An assault with intent to commit a rape, shall be punished by an imprisonment at labor in the penitentiary, for a term not less than one year, nor longer than five years. Hotch. Stat. Law of Geo., p. 709, secs. 59, 60, 61.

MISSISSIPPI.—*Rape, what to constitute, and how to be punished.*—Every person who shall be convicted of rape, either,

By carnally and unlawfully knowing a female child under the age of ten years: or,

By forcibly ravishing any woman of the age of ten years or upwards:

Shall be punished by imprisonment in the penitentiary, not less than ten years.

*Other offences against females, and their punishment.*—Every person who shall have carnal knowledge of any woman above the age of ten years, without her consent, by administering to her any substance or liquid, which shall produce such stupor, or such imbecility of mind or weakness of body, as to prevent effectual resistance, shall, upon conviction, be punished by imprisonment in the penitentiary, not exceeding five years.

Every person who shall take any woman unlawfully, against her will, and by force, menace and duress, compel her to marry him, or to marry any other person, or to be defiled, and shall be thereof duly convicted, shall be punished by imprisonment in the penitentiary, not less than ten years.

Every person who shall take away any female under the age of fourteen years, from her father, mother, guardian, or other person having the legal charge of her person, without their consent, either for the purpose of prostitution, concubinage, or marriage, shall, upon conviction thereof, be punished by imprisonment in the penitentiary, not exceeding three years, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment. Hutch. Mississippi Code, p. 959, secs. 22, 23, 24, 25.

LOUISIANA.—Every person who shall hereafter be duly convicted of any manner of rape,

fender hath or knoweth anything to say, why judgment of death should not be recorded against such offender; and in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the court shall and may, and is hereby authorized, to abstain from pronouncing judgment of death upon such offender; and instead

or of the detestable and abominable crime against nature, committed with mankind or beast, shall suffer imprisonment at hard labor for life. Bullard & Curry's Digest, p. 242, ch. 37, sec. 2.

WISCONSIN.—If any person shall ravish and carnally know any female of the age of ten years or more, by force and against her will, he shall be punished by imprisonment in the state prison, not more than thirty years nor less than ten years; but if the female shall be proven on the trial to have been, at the time of the offence, a common prostitute, he shall be imprisoned, not more than seven years nor less than one year.

If any person shall unlawfully and carnally know and abuse any female child under the age of ten years, he shall be punished by imprisonment in the state prison for life.

If any person shall assault any female with intent to commit the crime of rape, he shall be punished by imprisonment in the state prison, not more than ten years nor less than one year. Rev. Stat. of Wis. p. 687, secs. 39, 40, 41.

IOWA.—If any person ravish and carnally know any female of the age of ten years or more by force and against her will, or carnally know and abuse any female child under the age of ten years, he shall be punished by imprisonment in the penitentiary for life or any term of years.

If any person take any woman unlawfully and against her will, and by force, menace or duress, compel her to marry him or any other person, or to be defiled, he shall be fined not exceeding one thousand dollars, and imprisoned in the penitentiary not exceeding ten years.

If any person unlawfully have carnal knowledge of any female by administering to her any substance or by any other means producing such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, he shall upon conviction be punished as provided in the section relating to ravishment.

If any person assault a female with intent to commit a rape he shall be punished by imprisonment in the penitentiary not exceeding twenty years. Code of Iowa, p. 351, 352, secs. 2581, 2582, 2583, 2592.

OREGON.—That if any person shall have carnal knowledge of his daughter, or sister, forcibly, and against her will, every such person so offending shall be deemed guilty of a rape, and upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor during life.

That if any person shall have carnal knowledge of any other woman or female child, than his daughter or sister as aforesaid, forcibly and against her will; or if any male person of the age of seventeen years and upwards, shall carnally know and abuse any female child under the age of ten years, with the consent, every such person so offending shall be deemed guilty of a rape, and upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than twenty, nor less than three years.

That if any male person, seventeen years old and upwards, shall have carnal knowledge of any woman other than his wife, such woman being insane, he knowing her to be such, every person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than ten, nor less than three years.

That if any person shall assault another with intent to commit a murder, rape, or robbery, upon the person so assaulted, every person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be imprisoned in the Penitentiary, and kept at hard labor not more than seven, nor less than three years. Stat. of Oregon, pp. 81, 82, 84, secs. 4, 5, 6, 17.



of pronouncing such judgment, to order the same to be entered of record, and thereupon such officer as aforesaid shall enter judgment of \*death on record against such offender, in the usual and accustomed form, and in such and the same manner as is now used, and as if judgment of death had actually been pronounced in open court against such offender by the court.(a)[1]

(a) 4 G. 4, c. 48, s. 1.

[1] If the defendant does not succeed in reversing the judgment, there are yet two modes by which he can stay or prevent its execution. The first of these operates only in capital cases—a reprieve, which merely delays the execution; the second—a pardon, may be granted in any case, and is an absolute bar to punishment, as well as to all subsequent proceedings.

The term *reprieve* is derived from *reprendre*, to keep back, and signifies the withdrawing of the sentence for an interval of time, and operates in delay of execution. 4 Bla. Com. 394. It is granted either by the favor of his majesty himself, or the judge before whom the prisoner is tried on his behalf, or from the regular operation of law, in circumstances which render an immediate execution inconsistent with humanity or justice.

As to reprieves in general, see 1 Hale, 368 to 370. 2 Hale, 412 to 414. Hawk. b. 2, c. 51, s. 8, 9, 10. Williams, J. Execution and Reprieve.

By the constitution of *New York*, the governor is vested with power to grant reprieves and pardons, after conviction, for all offences, except treason and cases of impeachment: and upon convictions for treason, he is authorized to suspend the execution of the sentence, until the case can be reported to the legislature at its next session; when the legislature shall either pardon, or direct the execution of the criminal, or grant a further reprieve. 1 N. Y. Rev. Stat. (4th ed. Banks, Gould & Co. 1852,) 47.

As to these reprieves, see observations, Gibb. Duties of Man, 390.

UNITED STATES.—The President of the United States is authorized to grant reprieves and pardons for all offences against the United States, except in cases of impeachment. Const. U. S. art. 2, sec. 2.

PENNSYLVANIA.—The governor has power to remit fines and forfeitures, and grant reprieves and pardons, except in cases of impeachment. Const. of Pennsylvania, art. 2, sec. 9.

The governor is authorized to pardon persons under sentence of death for treason or felony, on condition that they depart from the United States. The sentence to be enforced in case of not departing or returning. Smith's Laws Penn. 1 vol. 499, 500.

MASSACHUSETTS.—The power of pardoning offences except such as persons may be convicted of before the senate, by an impeachment of the house, shall be in the governor, by and with the advice of the council; but no charter of pardon, granted by the governor, with the advice of the council, before conviction, shall avail the party pleading the same, notwithstanding any general or particular expressions contained therein descriptive of the offence or offences intended to be pardoned. Const. ch. 2 § 1. art. 8. Rev. Stat. 36.

NEW JERSEY.—Be it enacted by the senate and general assembly of the state of New Jersey, That when a reprieve shall be granted by the governor or person administering the government, to any convict sentenced to the punishment of death, and such convict shall not be pardoned, it shall be the duty of the said governor or person administering the government, to issue his warrant to the sheriff of the proper county, commanding him to execute the sentence at such time as shall be therein appointed and expressed; which warrant shall be transmitted to said sheriff at the expense of the state.

MAINE.—The governor has power, with the advice and consent of the council, to remit, after conviction, all forfeitures and penalties and to grant reprieves and pardons, except in cases of impeachment. Const. of Maine, art. 5, sec. 11.

Whenever any person, who has been or shall hereafter be sentenced by the supreme judicial court to suffer the punishment of death, shall make application to the governor for a pardon, and the governor shall think proper, by and with advice and consent of the council,

As to the mode of proceeding, where the sentence of death is commuted for transportation,(a) or for imprisonment,(b)

(a) See 5 G. 4, c. 84, s. 2.

(b) See 11 G. 4 & 1 W. 4, c. 30, s. 7.

to grant such pardon on condition, that the person thus sentenced be imprisoned or confined to hard labor during his natural life, or for any certain term of years, in the condition of such pardon to be expressed, the governor is hereby authorized, in order to carry the same into effect, to issue his warrant, directed to all proper officers, and they shall be held to serve and obey the same in the same manner, as if such imprisonment or confinement had been the punishment awarded in the original sentence. Rev. Sta. of Maine, p. 723, sec. 4.

OHIO.—The governor has power to grant reprieves and pardons after conviction, except in cases of impeachment. Const. of Ohio, art. 2, sec. 5.

Be it enacted by the general assembly of the state of Ohio, That whenever the governor may deem it expedient and proper to reprieve any person under sentence of death, upon any condition whatsoever, the condition upon which such reprieve is granted, shall be specified in the warrant, and the person accepting of such conditional reprieve, shall subscribe such acceptance upon the warrant, containing the conditions of reprieve, in the presence of two witnesses, who shall attest the same; and such witnesses shall go before the clerk of the court where such sentence is recorded, and shall prove the same. And such clerk shall thereupon record the warrant of reprieve, together with the acceptance and proof thereof, in the journals of the court; a transcript of which record shall, at all times thereafter, be evidence for and against the person accepting such conditional reprieve.

That if, in any case of reprieve, the governor shall deem it expedient and proper to confine the person so reprieved in the penitentiary, it being so specified in the warrant, the sheriff or other officer, having the person so reprieved in his custody, shall convey him or her to the penitentiary, in the same manner as other convicts are directed by law to be conveyed; and the keeper of the penitentiary shall receive such person, together with the warrant of reprieve, and shall proceed with such convict as such warrant may direct. And the expenses of transporting such person to the penitentiary, shall be allowed and paid out of the state treasury, as in other cases.

That if any person, reprieved according to the first section of this act, shall violate the conditions upon which such reprieve is granted, such person shall be proceeded against as in other cases of persons escaping from prison, charged with or convicted of crimes.

MARYLAND.—Be it enacted by the general assembly of Maryland, and it is hereby declared, That the governor of this state may, in his discretion, grant to any offender capitally convicted a pardon, on condition contained therein, and that such condition is and shall be effectual as a condition, according to the intent thereof.

And be it enacted, That if such offender shall be a slave, and the condition of such pardon shall be on leaving this state, or on transportation, the governor may direct the sheriff, in whose custody such offender shall be, to contract and take proper security for the transportation of such slave, agreeably to the condition of his pardon; and the sheriff may either sell such slave subject to such condition, or empower some other person to sell him in the place to which he shall be transported, for the benefit of the state, and the owner of such slave shall be paid as if the same slave had been executed. Dorsey's Laws of Maryland, p. 248, secs. 2, 3.

VIRGINIA.—The governor has power to grant reprieves and pardons, except where the prosecution has been carried on by the house of delegates, or the law otherwise particularly directs. Const. of Va. art. 4, sub. 4.

The governor shall not grant a pardon in any case before conviction, nor to any person convicted of treason against the commonwealth, except with the consent of the general assembly, declared by joint resolution. Neither shall he grant a reprieve to any person convicted of treason, for a longer period than until the end of the session of the general assembly, during which it may be granted, or than until the end of the succeeding session, when it is granted during the recess.

In the case of a slave under sentence of death, the governor may order a commutation of the punishment by directing that such slave be sold, to be transported beyond the limits of the *United States*. The governor shall cause him to be sold, and the purchaser, before delivery to him of the slave, shall pay into the treasury the price agreed, and enter into bond, approved by the governor, in the penalty of one thousand dollars, conditioned that the slave shall within three months be transported beyond the limits of the *United States*, and shall never afterwards return into this state.

The governor shall not remit, in whole or in part, any fine or amercement assessed or imposed by any court of record, court martial or other authority having jurisdiction to assess or impose the same, except as follows:

Whenever judgment shall have been rendered against any person for a contempt of court, other than for non-performance of or disobedience to some order, decree or judgment, the governor shall have power to pardon the offence and remit the punishment, whether corporal or pecuniary, either in whole or in part. Code of Virginia, p. 106, secs. 18-21.

ARKANSAS.—The governor of Arkansas has the constitutional power to pardon convicts, on such condition as he may choose to impose, or upon the terms specified in the statutes; and if the pardon does not follow the terms of the statute it will be considered as granted under the general power. *Hunt, ex parte*, 5 Eng. Ark. Rep. 284.

MICHIGAN.—The governor may grant reprieves and pardons, after conviction, except in cases of impeachment. Const. of Mich. art. 5, sub. 11.

In all cases in which the governor is authorized by the constitution to grant pardons, he may grant a pardon upon such conditions, and with such restrictions, and under such limitations as he may think proper, and he may issue his warrant to all proper officers to carry into effect such conditional pardon, which warrant shall be obeyed and executed, instead of the sentence, if any, which was originally awarded.

Whenever any convict is pardoned by the governor, or his punishment is commuted, the officer to whom the warrant for that purpose is issued, after executing the same, shall make return thereof under his hand, with his doings thereon, to the secretary of state, as soon as may be, and he shall also file in the clerk's office of the court in which the offender was convicted, a copy of the warrant and return certified by him, a brief abstract of which the clerk shall subjoin to the record of the conviction and sentence. Rev. Sta. p. 711, secs. 14, 15.

GEORGIA.—In every case of conviction, for a capital felony, the owner of the slave, or guardian of the free person of color convicted, may apply to the court before which the conviction shall have taken place, and obtain a suspension of the execution of the sentence, for the purpose of applying to the governor for a pardon, and it shall be in the power of the governor to grant said pardon.

On a conviction for any other offence not punishable with death, the court may, at its discretion, grant a suspension of the execution of the sentence for the purpose of enabling the owner of a slave, or guardian of a free person of color, to apply to the governor for a pardon or commutation of the punishment in such manner, and upon such terms and conditions as he may think proper to direct. Hotchkiss' Stat. Law of Geo. p. 848, secs. 51, 52.

MISSISSIPPI.—In all criminal and penal cases, except in those of treason and impeachment the governor shall have power to grant reprieves and pardons, and remit fines, and in cases of forfeiture to stay the collection until the end of the next session of the legislature, and to remit forfeitures, by and with the advice and consent of the senate. In cases of treason he shall have power to grant reprieves, by and with the advice and consent of the senate; but may respite the sentence until the end of the next session of the legislature. Const. Mississippi.

The governor of Mississippi has power to pardon a contempt committed against the circuit court, and to remit the sentence of fine and imprisonment. *Ex parte Hickey*, 4 Smedes & Marsh. 751.

VERMONT.—The governor, and in his absence, the lieutenant governor, with the council, have power to grant pardons, and remit fines, in all cases whatsoever, except in treason and murder, in which they have power to grant reprieves, but not to pardon, until after the end of the next session of assembly; and except in cases of impeachment, in which there can be

no remission or mitigation of punishment, but by act of legislation. Const. of Vermont, part 2, sec. 11.

WISCONSIN.—The governor shall have power to grant reprieves, commutations, and pardons, after conviction, for all offences, except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, he shall have the power to suspend the execution of the sentence until the case shall be reported to the legislature, at its next meeting, when the legislature shall either pardon, or commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall annually communicate to the legislature each case of reprieve, commutation, or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon, or reprieve, with his reasons for granting the same. Const. of Wis. art. 5, sec. 6.

In all cases in which the governor is authorized to grant pardons, he may, upon the petition of the person convicted, grant a pardon upon such conditions, and with such restrictions, and under such limitations as he may think proper, and he may issue his warrant to all proper officers, to carry into effect such conditional pardon, which warrant shall be obeyed and executed instead of the sentence, if any, which was originally awarded.

Whenever any convict is pardoned by the governor, or his punishment is commuted, the officer to whom the warrant for that purpose is issued, after executing the same, shall make return thereof, under his hand, with his doings therein, to the governor, as soon as may be, and he shall also file with the clerk of the court, in which the offender was convicted, an attested copy of the warrant and return, a brief abstract whereof the clerk shall subjoin to the record of his conviction and sentence. Rev. Sta. of Wis. p. 731, secs. 1, 2.

IOWA.—The governor has power to grant reprieves and pardons, and commute punishments, after conviction, except in cases of impeachment. Const. of Iowa, art. 4. sub. 13.

In all cases in which the governor is authorized by the constitution to grant pardons, he may grant them upon such conditions and with such restrictions and limitations as he may think proper, and may issue his warrant to all proper officers to carry into effect such conditional pardon.

Whenever any convict is pardoned by the governor, or his punishment is commuted, the officer to whom the warrant is directed after executing the same, must make return thereof with his doings thereon, to the secretary of state, as soon as may be, and such officer must also file in the clerk's office of the court in which the offender was convicted, a certified copy of the warrant and return, a brief abstract of which the clerk shall subjoin to the record of conviction.

Fines imposed as a punishment for a public offence can be remitted only by the governor of this state; those for contempts of court may be remitted by the court by which they were imposed.

In capital cases the governor may, for good cause shown, grant a reprieve to any convict for a time not exceeding one year from the rendition of the judgment. Code of Iowa, ch. 205, secs. 3278-3281.

OREGON.—The governor of the territory may grant pardons and respites for offences, against the laws of said territory, and reprieves for offences against the laws of the United States, until the decision of the President can be made known thereon. Act of congress, approved Aug. 14, 1848.

But the more usual course is, for a discretionary reprieve to proceed from the judge himself, who, from his acquaintance with all the circumstances of the trial, is most capable of judging when it is proper. The power of granting this respite belongs, of common right, to every tribunal, which is invested with authority to award execution. Hawk. b. 2. c. 51. a. 8. Williams J. Execution and Reprieve. And this power exists even in case of high treason, though the judge should be very prudent in its exercise. 1 Hale, 368. But it is commonly granted where the defendant pleads a pardon, which, though defective in point of form, sufficiently manifests the intention of the crown to remit the sentence; (Hawk. b. 2. c. 51, a. 8. Williams, J. Execution and Reprieve;) where it seems doubtful whether the of-

fence is not included in some general act of grace; (2 Dyer, 235, a. Hawk. b. 2, c. 51, a. & Williams, J. Execution and Reprieve;) or whether it amounts to so high a crime as that charged in the indictment. 3 Dyer, 296, a; Hawk. b. 2, c. 51, a. 8. Williams, J. Execution and Reprieve. The judge sometimes also allows it before judgment or at least intimates his intention to do so, as when he is not satisfied with the verdict, and entertains doubts as to the prisoner's guilt: or when a doubt arises, if the crime be not within clergy; or when, from some favorable circumstances, he intends to recommend the prisoner to mercy. 2 Hale, 412; 4 Bla. Com. 394.

There are also some cases in which *ex necessitate legis*, the judge is bound to reprieve. Thus, when a woman is convicted either of treason or felony, she may allege pregnancy is delay of execution. 3 Inst. 17, 18; 1 Hale, 368; 2 Hale, 406, 413; Hawk. b. 2, c. 51, a. 9; 4 Bla. Com. 395. This humane practice is derived from the laws of ancient Rome which direct "*quod pregnantis mulieris damnata pena differatur quoad pariat*," and has been established in England, from the earliest periods. 4 Bla. Com. 395. In order, however, to render this plea available, she must be quick with child, at the time it is offered, for mere pregnancy, in any earlier stage, will not be regarded. 5 Inst. 17; 1 Hale, 368; 2 Hale, 413; Hawk. b. 2, c. 51, a. 9. Even when this is the case, it will not operate as a plea in bar at the trial, or as a cause for arresting the judgment, but can only be pleaded in stay of execution. 3 Inst. 17; 2 Hale, 413; 1 Hale, 368; 4 Bla. Com. 395.

If she allege that she is pregnant, a jury of twelve matrons are impannelled and sworn to try whether she is *quick with child*, for which purpose they retire with her to some convenient place; and if they find in the affirmative, which, it is said, the gentleness of their sex generally inclines them to do, when pregnancy exists at all, (2 Hale, 413,) she is respited till a reasonable time after her delivery, or till the ensuing session. 3 Inst. 17; 1 Hale, 368, 9; 2 Hale, 413; Hawk. b. 2, c. 51, a. 9; 4 Bla. Com. 395.

If, at the next sessions, she has not been delivered, and, according to the course of nature, there is still a possibility that she may be delivered, she will be again respited till the session ensuing. 1 Hale, 369; 2 Hale, 414; 4 Bla. Com. 395. And it is said, that where it is discovered that she was not quick with child, at the time of the verdict of the matrons, or even where she was not then with child at all, but has since become so, she ought to receive another respite. 1 Hale, 369. But it is certain, that if she had been once delivered, she has no right afterwards to claim any further delay of execution; because, as it is said, she ought not, by her own incontinence, or voluntary act, after sentence, to evade the sentence of the law. 3 Inst. 17, 18; 4 Bla. Com. 395; 1 Hale, 369; 2 Hale, 413; Finch, 478; Hawk. b. 2, c. 51, a. 10. But, as the original delay was intended, not from forbearance to the mother, but pity for the innocent, this seems scarcely reconcileable with the humane principle which dictates the first reprieve; and, probably, in such a case, the judge would exercise the discretion he always possesses, in granting another respite. 4 Bla. Com. 395, n. (1).

The other cause, for which the judge is bound to grant a reprieve, is the insanity of the prisoner. It has, from the earliest periods, been a rule, that though a man be in the full possession of his senses when he commits a capital offence, if he becomes non compos after it, he shall not be indicted; if, after indictment, he shall not be convicted; if, after conviction, he shall not receive judgment; if, after judgment, he shall not be ordered for execution. 4 Harg. St. Trial, 205, 6; 3 Inst. 4, 1 Hale, 370; Hawk. b. 1, c. 1, a. 4; 4 Bla. Com. 395; Williams, J. Execution and Reprieve. And this opinion is confirmed by the fact, that a statute was passed in the reign of Henry the Eighth, (33 Hen. 8, c. 20,) to allow of execution of persons convicted of high treason, though insane, which was always thought cruel and inhuman, and was repealed in the reign of Phillip and Mary. 1 & 2 Phil. & Mary, c. 10, 4 Harg. St. Tr. 206; 1 Hale, 370. The true reason of this lenity is not that a man, who has become insane, is not a fit object of example, though this might be urged in his favor, but that he is incapable of saying anything in bar of execution, or assigning any error in the judgment. 4 Harg. St. Tr. 205, 206; 4 Bla. Com. 396. The judge may, if he pleases, swear a jury to inquire, *ex officio*, whether the prisoner is really insane, or merely counterfeit;

and, if they find the former, he is bound to reprove him till the ensuing session. 1 Hale, 370; 4 Bla. Com. 396.

**MASSACHUSETTS.**—If it shall appear, to the satisfaction of the governor and council, that any convict, who is under sentence of death, has become insane, the warrant for his execution may be delayed, or if such warrant has been issued, the execution thereof may be respited, from time to time, so long as the governor and council shall think proper; and if any female convict, who is under sentence of death, shall be quick with child, the governor and council shall forbear to issue a warrant for her execution, or if such warrant has been issued, the execution thereof shall be respited, until it shall appear, to the satisfaction of the governor and council, that such female convict is no longer quick with child. Rev. Stat. of Mass. p. 767, sec. 12.

**NEW YORK.**—The governor shall be authorized to require the opinion of the judges of the court of appeals, justices of the supreme court and of the attorney general, or of any of them upon any statement so furnished. As amended, same ch., § 2.

No judge, court or officer, other than the governor, shall have any authority to reprove or suspend the execution of any convict sentenced to the punishment of death; except sheriffs, in the cases and in the manner hereinafter provided.

If after any convict shall have been sentenced to the punishment of death, he shall become insane, the sheriff of the county with the concurrence of a justice of the supreme court, or if he be absent from the county, with the concurrence of the county judge of the county in which the conviction was had, may summon a jury of twelve electors to inquire into such insanity, and shall give immediate notice thereof to the district attorney of the county. As amended 1847, ch. 328, § 3.

The district attorney shall attend such inquiry, and may produce witnesses before the jury; for which purpose he shall have the same power to issue subpoenas, as for witnesses to attend a grand jury, and disobedience thereto may be punished by the court of oyer and terminer which shall next sit in such county, in the same manner as disobedience to any process issued by such court.

The inquisition of the jury shall be signed by them and the sheriff. If it be found by such inquisition that such convict is insane, the sheriff shall suspend execution of the warrant directing the death of such convict, until he shall receive a warrant from the governor of this state, or from the justices of the supreme court, directing the execution of such convict.

The sheriff shall immediately transmit such inquisition to the governor; who may, as soon as he shall be convinced of the sanity of such convict, issue a warrant appointing a time and place for his execution, pursuant to his sentence.

If a female convict sentenced to the punishment of death, be pregnant, the sheriff shall in like manner summon a jury of six physicians, and shall give the like notice thereof to the district attorney, who shall attend and have power to issue subpoenas, as herein before provided, and with the like effect. An inquisition shall in like manner be made and signed by the jurors and the sheriff.

If by such inquisition it appear that such female convict is quick with child, the sheriff shall in like manner suspend the execution of her sentence; and shall transmit the inquisition to the governor.

Whenever the governor shall be satisfied that such female convict is no longer quick with child, he shall issue his warrant, appointing a day for her execution pursuant to her sentence; or he may in his discretion commute her punishment to perpetual imprisonment in the state prison. Rev. Stat. of N. Y., pp. 844, 845, secs. 14, 15, 16, 17, 18, 19, 20, 21, 22.

The prerogative of pardon is, in general, a matter of pure discretion, exercised by the chief magistrate according to the peculiar circumstances of each individual offence, which comes under his cognizance. But there are certain cases which come with so strong a claim to indulgence, that they are seldom, if ever, resisted. Of this nature, is the implied engagement of immunity to accomplices, who bring their associates to justice.

The engagement of a judge of the peace to an accomplice, that if he will give his evidence he may expect favor, is merely a personal engagement on his part, that he will recommend

the accomplice to mercy; for a judge of the peace has no authority to promise him any favor, or to tell him that he shall be a witness against others. A judge of the peace has no authority to select whom he pleases to pardon or prosecute; and the prosecutor has still less power or rather pretence, to do this, than the judge. 1 Chit. Cr. L. 83; 1 Leach, 115. Whatever promises or engagement a judge may make with an accomplice, and however punctually or faithfully the accomplice may comply with the conditions upon which such promises were made, he cannot avail himself of them on his trial. They may operate, as an equitable claim upon the government for a pardon, or a postponement of his trial. And on this account the greatest caution and judgment ought to be used by judges of the peace upon these occasions. The power assumed by them of admitting accomplices to be witnesses, is founded in practice only, and does not control, and in many cases ought not to influence, the authority of the court by which the accomplice is liable to be tried. The accomplice, therefore, may be deceived and drawn in, under the color and pretence of judicial authority and power of protection, to disclose what he is not bound to discover; and thus make himself the deluded instrument of his own conviction. Cowp. 331; Davis' Just. 69, 70. The benefit of the accomplice is in fact nothing more than a mere *hope* that he may be exonerated from punishment; but in this hope he may be deceived and disappointed; and when that is the case, he has not, in reality, any grounds to complain of a breach of public faith, as sometimes happens to be the case. There can be no breach of public faith, when it is pledged without competent authority. The correct practice is in conformity to these principles; for no judge would probably take the responsibility of releasing an accomplice who offers to give evidence against his associates; but would commit him for trial, and leave the event to the decision and control of the court before whom he is liable to be tried. Davis' Just. 70; 1 Chit. Cr. L. 82. In some cases, when an accomplice offers to testify against his associates, and more especially when he offers to point out the place where the evidence of the guilt of his associates may be discovered, (as by showing the places where stolen goods or counterfeit bank notes are deposited,) it may be safe and advisable for the judge to inform him that if he conducts fairly in every respect, and discloses *the whole truth*, concerning the guilt of himself and his associates, his punishment may be mitigated, and that perhaps he may obtain a pardon. But he ought to inform him at the same time, that he has no power or right to make any promise or engagement with him to that effect; and further, that his confession, testimony, and disclosure must not only be perfectly voluntary, but that it must be found to be strictly true.

With respect to those cases where favorable circumstances may induce the chief magistrate to extend his prerogative of remission, no general rules can, of course, be given. But nothing can tend more to unsettle the public ideas of crime, than the frequent exercise of the pardoning power. It is contended with great eloquence and ability by Beccaria (Tr. on Cr. 175, 6, 7,) that clemency should shine forth in the laws, and not in the executive. But it must be admitted that there are many cases to which no general rules can apply; where "*summum jus*," would be "*summa injuria*;" and where forgiveness is at once beneficial to the government which bestows, and just to the party who receives it.

In order to render a pardon valid, it must express with sufficient accuracy the crime it is intended to forgive. 4 Blk. Com. 400.

*The United States v. Nathan Lukins.* The defendant was convicted and sentenced "to six months imprisonment, to pay a fine of one hundred and fifty dollars, and the costs of prosecution." A motion was made to discharge him, the President of the United States having granted a pardon, reciting, "that Nathan Lukins was confined in the jail of Philadelphia under sentence of the circuit court of the United States, whereby he was bound to pay a pecuniary fine to the United States, and to stand committed until the fine and costs should be fully satisfied." The pardon proceeds to state that the President "remits the fine aforesaid; hereby willing and requiring that Nathan Lukins, on payment of the costs of prosecution, be forthwith discharged from imprisonment." At the foot of the record of conviction, which had been transmitted to the executive, was written by the President, "Let the fine be remitted on payment of costs."

*By the Court.* The intention of the President is manifest: it was to remit the fine only.

The fine only being pardoned, the President cannot order the prisoner to be discharged from the residue of the sentence. If he pardons generally, remission of fine and discharge follows of course. But if the pardon apply only to the fine, an order to discharge from imprisonment, will not justify the marshal in discharging the prisoner.

The motion was overruled, and during the session of the court, the President granted a general pardon. MSS. Reports in the circuit court of the U. S. for the Pennsylvania District, April sess. 1818. 3 Wash. C. C. 335.

The pardon of a person convicted of forgery, and sentenced to the state prison for life, contained a proviso that nothing in the pardon should be construed so as to relieve the convict of, and from the legal disabilities to him from the conviction, sentence and imprisonment, other than the said imprisonment: It was held, that the proviso was repugnant to the pardon itself, and must be rejected, and the party be freed from all legal disabilities. *People v. Pease*, 3 J. Cas. 333, in error. See *State v. M'Carty*, 1 Bay, 334.

A pardon may be extended to the subject, on any condition which the executive thinks fit to annex, whether precedent, or subsequent, on the performance of which the validity of the pardon will depend. And this prerogative is daily exerted in the pardon of felons, on condition of being confined to hard labor for a stated time, or of transportation to some foreign country for life, or for a term of years, such transportation being allowed by the act of habeas corpus and subsequent acts. 31 Car. 2. c. 2. s. 14; 8 Geo. 3. c. 15; 19 Geo. 3. c. 74; 24 Geo. 3. c. 56; 31 Geo. 3. c. 46; 4 Bla. Com. 401; Williams, J. Pardon, II. And if he does not perform the condition of the pardon it will be altogether void, and he may be brought to the bar and remained to suffer his original sentence. Moor, 466; Bac. Abr. Pardon, E. Williams, J. Pardon, III; Dick. Sess. 431. If after such a pardon the felon's wife become entitled to some personal estate, this will be decreed, in equity, to belong to the wife as to a feme sole. 3 P. W. 37, 8.

See Rev. Stat. of Mass. ch. 142, § 12; *State v. Smith*, 1 Bailey, 283. In this last case it was held, that the Governor of South Carolina might annex the condition that the prisoner should leave the state and never return.

In Virginia, it is held, that the Governor cannot pardon on condition; for the condition is void and the pardon absolute. *Commonwealth v. Fowler*, 4 Call, 35.

If a pardon be granted conditionally, the condition must be performed, otherwise the sentence will be executed. *State v. Fuller*, 1 M'Cord, 176; *State v. Smith*, 1 Bailey, 283; *State v. Addington*, 2 Bailey, 516. See *People v. James*, 2 Caines, 57.

See *Flavell's case*, 8 Watts & Serg. Rep. 197.

The effect of pardon, is not merely to prevent the infliction of the punishment denounced by the sentence, but to give to the defendant a new capacity, credit, and character.

See *Deming's case*, 10 John. Rep. 232.

Competency may be restored by pardon, after the witness shall have served out the term of his imprisonment in the state prison; yet no credit is due to him, unless he be corroborated by others, or by the circumstances of the case. *United States v. Tom Jones*, 2 Wheel. Cr. Cas. 451, 454, 455, 460, 461, before Thompson, J., case of piracy.

The effect of a pardon is to acquit the offender of all the penalties annexed to the conviction, and to give him a new credit and capacity. *Matter of Deming*, 10 John. Rep. 232.

A person having been convicted of forgery, and sentenced to the state prison for life, was pardoned by the governor. The pardon contained a proviso, that nothing in it should be construed "so as to relieve the prisoner of and from the legal disabilities to him, from the conviction, sentence and imprisonment, other than the said imprisonment." This proviso was held to be repugnant to the pardon itself, and was rejected, and it was held that the prisoner was freed from all legal disabilities and was a competent witness. *The People v. Pease*, 3 John. Cas. 333.

Where a prisoner had been pardoned on condition of leaving the state for a specified time, and the condition was not complied with, the court, after the expiration of the time, held the pardon to be void, and passed sentence. *State v. Fuller*, 1 M'Cord, 178. But where, in such case, it appeared that the prisoner had been insane, after the conditional pardon was granted, the court, upon his being seized and brought up for sentence, discharged him, upon



(b) *Sentence of transportation.*

By stat. 5 G. 4, c. 84, Her Majesty, by and with the advice of her privy council, may from time to time appoint any place or places beyond the seas, either within or without her dominions, to which felons or other offenders under sentence or order of transportation shall be conveyed. And the sentence runs accordingly thus:—"The sentence of the court is, that you be transported beyond the seas, to such place as Her Majesty, by and with the advice of her privy council, may direct and appoint, for the term of [*your natural life*," or "*— years*".] The statute by which the offence is punishable, mentions the term of transportation. But it is provided by stat. 9 & 10 Vict. c. 24, s. 1, that where the term of transportation is for life or some long term of years, or where imprisonment is to be for a term not less than two years, it shall be lawful, if the court shall think fit, to pass sentence of transportation for a less term (but not less than seven years,) and to pass sentence of imprisonment for a less term than two years with or without hard labor.[2]

condition of his departing within the same period originally limited in the pardon. *The People v. James*, 2 Caines' Rep. 57. For form of pardon, see *Hoffman v. Coster*, 2 Whart. 453, 468, §.

The plea of non-identity may also probably occur in this stage of the proceedings. If the prisoner was attainted in another court, or has since his sentence been out of custody, it is open to him to allege that he is not the party against whom the sentence was given; (Fost. 40. 1 Bla. Rep. 3. 4 Bla. Com. 396;) or if the prisoner escapes and is re-taken, the same question may arise. 3 Burr. 1810. In these cases, the court must ask the party in custody whether he has any thing to say why execution should not be awarded against him. 1 Hale, 368. 3 Burr. 1810. 1 Bla. Rep. 4. Fost. 40. On this he may, *ore tenus*, and, without holding up his hand, aver that he is not the person mentioned in the record, to which the attorney-general may, in the same way, reply that he is the same, and that he is ready to verify it, and a venire will be awarded to try the issue thus joined returnable instant. 1 Bla. Rep. 4. Fost. 40, 1. 3 Burr. 1810. The prisoner may be allowed counsel to assist him, but the court will not put off the trial unless strong grounds are shown to presume that the party has been mistaken. 3 Burr. 1810. Fost. 41. 1 Bla. Rep. 4. 4 Bla. Com. 396. Nor will time be allowed him to produce witnesses, unless he will positively swear that he is not the party attainted. Fost. 42. 4 Bla. Com. 396. 4 Bla. Rep. 4, 5. Nor, though his life is in question, can he be allowed to make any peremptory challenges. 1 Lev. 61. Fost. 42. 1 Bla. Rep. 6. 4 Bla. Com. 396. During this trial if the offenders have escaped and are considered desperate, they may be chained together. 3 Burr. 1812. If the jury find them to be the same persons, no proclamation ought to be made before the award of execution; (3 Burr. 1811;) but execution will immediately be awarded according to the original sentence. *Id. ib.*

If all these resources fail—if no reprieve is sent—no pardon obtained—and the identity of the prisoner is either indisputable, or thus ascertained—nothing remains but to execute the sentence. This brings us to the end and object of every criminal prosecution—the punishment of the offender.

[2] *Transportation*, or *exile*, (it was held, that by the word *transportation*, in the 8 Geo. 3, c. 15, (now repealed by 5 Geo. 4, c. 84,) was meant not merely the conveying of a felon to the place of transportation, but his being so conveyed and remaining there during the term for which he was ordered to be transported,) is generally regarded as the next to death in the

(c) *Sentence of imprisonment.*

By stat. 5 & 6 W. 4, c. 38, s. 4, whenever any person shall be convicted at any assizes or sessions, of any offence for which he or she shall be liable either to the punishment of death, transportation, or imprisonment, it shall be lawful for the court, if it shall so think fit, to commit such person to any house of correction for such county, in execution of

scale of punishment, though, perhaps, it amounts to scarcely any punishment at all, in the estimation of many of those criminals who actually endure it. It was altogether unknown as a penalty to the common law of England. 2 Hen. Bla. 223. 3 P. Wms. 38. 2 T. R. 584. Co. Lit. 133, a. 1 Bla. Com. 137. Williams, J., Felony, VI. Dick. Sess. 232. The only case in which it arose, seems to have been that of abjuration, where the party accused fled to a sanctuary, confessed his crime, and took an oath to leave the kingdom at the port assigned him, and never to return without the permission of his majesty. 4 Bla. Com. 333. 3 P. Wms. 37. This was evidently not a punishment, but a condition of pardon; for it was expressly provided by *magna charta*, (9 Hen. 3, st. 1, c. 29,) that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. The first introduction of exile into the English law, after abjuration was abolished, by the 30 Eliz. c. 4, respecting vagrants, which was repealed by the 12 Anne, st. 2, c. 23. Very soon after the restoration of Charles the second, it became usual for the crown to grant pardons, on condition that the offender should be banished, either for life, or for some limited period, and that the original sentence should be reviewed on his breaking the stipulations of its remission. Kel. Preface, iv. Kel. 45. 2 Hen. Bla. 223. Hawk. b. 2, c. 33, s. 139. Williams, J., Felony, VI. When this mode was pursued, the convicts were not to be sent away as slaves, but upon indentures by which they were bound to serve particular masters for seven or five years, during the last part of which they were to receive wages, and at the expiration of which time, they were to be allowed land and stock of their own, according to the usage of the plantations. Kel. Pref. iv. Kel. 45. An account was also to be given of the usage they met with, of the expiration of their time, and of their arrival or departure. Kel. Pref. iv. The substitution of exile, for capital punishment was expressly allowed by the habeas corpus act, which, in other cases, rendered all confinement beyond the realm, illegal. 31 Car. 2, c. 2, s. 14. At length, by the 4 Geo. 1, c. 11, transportation was introduced in certain cases, (now extended to all clergyable felonies,) (by 6 Geo. 4, c. 25, s. 2,) instead of burning in the hand, or whipping, which were, at that time, the conditions on which laymen were admitted to clergy. By that act, when any person entitled to clergy on undergoing those penalties was convicted of grand or petit larceny, or the felonious stealing of money or goods, the court before whom he was tried, was empowered, instead of the whipping, or burning in the hand to order him to be sent to some of his majesty's plantations in America, for seven years, and to transfer them, by order, to the use of such persons, and their assigns, as would contract for their performance of the sentence. Prisoners convicted of knowingly receiving stolen goods, were also made subject to the same regulations, when transported for fourteen years; and now offenders may, in various offences, be transported for life. Where a pardon is granted, on condition of transportation, and no term is specified, in that case the offender is to be transported for fourteen years, by the 4 Geo. 1, c. 11.

The principal act now in force regulating the transportation of offenders, is the 5 Geo. 4, c. 84, which revives and consolidates all the laws on the subject; (the act repeals the 4 Geo. 1, c. 11, in part, the 6 Geo. 1, c. 23, in part, the 16 Geo. 2, c. 15. 8 Geo. 3, c. 15, the 28 Geo. 3, c. 24, in part, the 31 Geo. 3, c. 46, in part, and the 43 Geo. 3, c. 15, the parts unrepealed will be found noticed in the text. This act does not extend to persons banished, under the 60 Geo. 3, and 1 Geo. 4, c. 8, for seditious libels;) and by the second section of that act, offenders adjudged for transportation are to be transported under its provisions.

Punishment by transportation, is unknown in the United States.

the judgment. Or such prisoner may undergo his imprisonment in the common jail of the county, &c., in which he is convicted. The court of Queen's Bench, indeed, when it passes sentence of imprisonment, may order the party to be imprisoned in any county in England, without reference to the place where the offence was committed; (a) but this is not the case with courts of oyer and terminer or jail delivery, or courts of quarter sessions.

The period of imprisonment for an offence by statute, is always mentioned in the statute; in what cases the sentence may be for a less term. (b) For an offence at common law, however, the term is not limited; but the court seldom, even for offences the most aggravated, award a longer imprisonment than two years. \*As [\*183] the being already sentenced for another offence. (c) [1]

(a) Arch. Pr. Cr. Off. 108; see *R. v. Gar-*  
*side*, 2 Ad. & El. 266.

(b) See stat. 9 & 10 Vict. c. 24, s. 1, *supra*.  
(c) *Wilkes v. R. in error*, 4 Bro. P. C. 367.

[1] The punishment of imprisonment forms a part of almost every sentence for crimes which are visited with any species of corporal privation or suffering. This is a species of punishment, the duration of which depends upon the nature of the offence, and where the judge has a discretion to exercise it should be proportioned in its length, to the circumstances of the case.

If the order of a court be to confine a person in a certain prison, the confining him in any other prison would be false imprisonment, for which he may recover damages. Salk. 408. Skin. 664. Bac. Ab. Trespass, D. 3. When a party convicted is actually in custody for one offence, and is afterwards tried for another, before the original term is expired, sentence of further imprisonment may be given, to commence from the termination of the first; (4 Burr. 2577. 1 Leach, 536;) or, judging by analogy to the case of transportation, the court may allow the latter term to begin from the time of judgment, and so to be in part, concurrent with the former. 1 Leach, 441. When the prisoner is in custody of the marshal in execution on a criminal sentence, the court will not, on an affidavit of illness, allow him the benefit of the rules, as that would be to render the sentence invalid. 1 Stra. 196, 197. 2 Stra. 817, 843, 845, 1122.

*Crimes punishable by imprisonment in a State Prison in New York.*

In New York, the Revised Statutes, (4th ed. Banks, Gould & Co. 1852,) part 4, chap. 1, titles 2, 3, 4, and 5, make the following acts punishable by imprisonment in a state prison, viz.: killing a human being, without design to effect death, by the act, procurement or culpable negligence of any other person, while such other person is engaged in the perpetration of any crime or misdemeanor not amounting to felony, or in an attempt to perpetrate any such crime or misdemeanor; deliberately assisting another in the commission of self-murder; and wilfully killing an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of the mother,—which acts being *manslaughter in the first degree*.

Administering to any woman pregnant with a quick child, any medicine, drug or substance whatever, or using, or employing any instrument or other means, with intent to destroy such child, unless the same shall be necessary to preserve the life of the mother, or shall be advised by two physicians to be necessary for such purpose; or unnecessarily killing another, either, while resisting an attempt by such other person to commit any felony, or to do any unlawful act, or after such attempt has failed—these being *manslaughter in the second degree*.

A person involuntarily killing a human being, by the act, procurement, or culpable neg-

The court, in sentencing a defendant to imprisonment, might formerly have directed the prisoner to be kept in solitary confinement for the

ligence of another, while such other person is engaged in the commission of a trespass or other injury to private rights or property, or engaged in an attempt to commit such injury; a person navigating any boat or vessel for gain, wilfully or negligently receiving so many passengers, or such a quantity of other lading, that by means thereof such boat or vessel sinks or oversets, and thereby any human being is drowned or otherwise killed; the owner of a mischievous animal, knowing its propensities, wilfully suffering it to go at large, or keeping it without ordinary care, and such animal while so at large or not confined, killing any human being, who takes all the precaution which the circumstances permit, to avoid such animal; and any physician, while in a state of intoxication, and without a design to effect death, administering any poison, drug or medicine, or doing any other act, to another person, which produces the death of such other person:—such person, owner and physician being deemed guilty of *manslaughter in the third degree*.

As to what is deemed *manslaughter in the fourth degree*, see Revised Statutes, part 4, ch. 1, title 2, § 18 and 19. For homicide excusable and justifiable, see Revised Statutes, vol. 2, 660.

Carnally and unlawfully knowing any female child under the age of ten years; forcibly ravishing any woman of the age of ten years or upwards; carnally knowing any woman above the age of ten years, without her consent, by administering to her any substance or liquid, which produces such stupor, or such imbecility of mind or weakness of body, as to prevent effectual resistance; taking any woman unlawfully, against her will, and by force, menace or duress, compelling her to marry him, or to marry any other person, or to be defiled; or taking away any female under the age of fourteen years, from her father, mother, guardian or other person having the legal charge of her person, without their consent, either for the purpose of prostitution, concubinage or marriage—which acts being called *rape*.

Cutting out, or disabling the tongue, putting out an eye, slitting the lip, slitting or destroying the nose, cutting off or disabling any member, with premeditated design, evidenced by laying in wait for the purpose, or in any other manner; or with intention to kill, or commit any felony—these being *mayhem*.

Forcibly seizing or confining another, without lawful authority, inveigling or kidnapping another, with intent, either to cause such other to be secretly confined or imprisoned in this state against his will; or to cause such other person to be sold as a slave, or in any way held to service against his will—these being *kidnapping*.

Being accessory after the fact, to any kidnapping or confinement; selling or in any manner transferring for any term, the services or labor of any black, mulatto, or other person of color, who has been forcibly taken, inveigled or kidnapped from this state to any other state, place, or country; maliciously, forcibly or fraudulently leading, taking or carrying away, or decoying or enticing away, any child under the age of twelve years, with intent to detain and conceal such child from its parent, guardian, or other person having the lawful charge of such child; exposing any child under the age of six years, in any highway, street, field, house or out-house, by the father, mother, or other person to whom the child has been confided; shooting at another, or attempting to discharge any kind of fire arms, or any air gun, at another, or assaulting and battering another by means of any deadly weapon, or by such other means or force as is likely to produce death, with the intent to kill, maim, ravish, or rob such other person, or in the attempt to commit any burglary, larceny or other felony, or in resisting the execution of any legal process; administering or causing and procuring to be administered, any poison to any human being with intent to kill such being, and which shall have been actually taken by such being, whereof death shall not ensue; mingling any poison with any food, drink, or medicine, with intent to kill or injure any human being, or wilfully poisoning any well, spring, or reservoir of water; and assaulting, with an intent to commit any robbery, burglary, rape, manslaughter, or any other felony.

Wilfully setting fire to, or burning any inhabited dwelling house, in the day time; and

whole, or any portion of the time,—in all cases within stat. 7 & 8 G. 4, c. 29, (Peel's Act, larceny,) by sect. 4,—in all cases within stat. 7 & 8

wilfully setting fire to, or burning in the night time, any shop, warehouse, or other building, not being the subject of arson in the first degree, but adjoining to, or within the curtilage of any inhabited dwelling house, so that such house is endangered by such firing—such firing being *arson in the second degree*.

Wilfully setting fire to, or burning in the day time, any shop, warehouse or other building, which being committed in the night time would be arson in the second degree; wilfully setting fire to, or burning in the night time, the house of another, not the subject of arson in the first or second degree—any house of public worship, or any school house—any public building belonging to the people of this state, or to any county, city, town, or village, or any building in which are deposited the papers of any public officer—or any barn or grist mill—or any building erected for the manufactory of cotton or wollen goods, or both, or paper, iron or other fabric—or any fulling mill, or any ship or vessel; and wilfully burning any building, ship or vessel, or any goods, wares, merchandise, or other chattel, being at the time insured against loss or damage by fire, with intent to prejudice the insurer, whether the same be the property of the person setting fire, or of any other—these being *arson in the third degree*.

Wilfully setting fire to, or burning any dwelling house or building, ship or vessel, which being done in the night time, would be arson in the third degree; wilfully setting fire to, or burning in the day time, any saw-mill, any carding machine or building containing the same, any stack of grain of any kind, or any stack of hay, not being the property of the person setting fire, or any toll bridge, or any other public bridge; and wilfully setting fire to or burning, in the day or in the night time, any crop of grain growing or standing in the field, or any nursery or orchard of fruit trees belonging to another—or any fence around any cultivated field belonging to another,—or the woods in any town, not belonging to himself,—or any grass or herbage growing on any marshes or other lands not belonging to himself:—these being *arson in the fourth degree*.

Breaking into and entering, in the night time, the dwelling house of another, in which there is at the time some human being, with intent to commit some crime therein, either by forcibly bursting or breaking the wall, or outer door, window, or shutter of a window of such house, or the lock or bolt of such door, or the fastening of such window or shutter; or breaking in any other manner, being armed with some dangerous weapon, or assisted and aided by one or more confederates, then actually present; or by unlocking an outer door by means of false keys, or by picking the lock thereof:—this being *burglary in the first degree*.

Breaking into any dwelling house in the day time, under such circumstances as constitute the crime of burglary in the first degree, if committed in the night time; breaking into any dwelling house in the night time, with intent to commit a crime, but under such circumstances as do not constitute the offence of burglary in the first degree; entering into the dwelling house of another by day or by night, in such a manner as not to constitute burglary as above specified, with intent to commit a crime; being in the dwelling house of another and committing a crime therein, breaking, in the night time, any outer door, window, or shutter of a window, or any other part of such house, to get out of the same; entering the dwelling house of another in the night time, through an open outer door or window, or other aperture not made by him entering, and breaking any inner door of the same house, with the intent to commit any crime; being lawfully in any dwelling house, and breaking, in the night time, any inner door of the same house, with the intent of committing any crime:—these being *burglary in the second degree*.

Breaking and entering, in the day or in the night time, any building within the curtilage of a dwelling house, but not forming a part thereof,—or any shop, store, booth, tent, warehouse, or other building, in which any goods, merchandise, or valuable thing is kept for use, sale or deposit, with intent to steal therein, or to commit any felony; and breaking and entering into the dwelling house of another, in the day time, under such circumstances as constitute the offence of burglary in the second degree, if committed in the night time:—these being *burglary in the third degree*.

G, 4, c. 30, (Peel's Act, malicious injuries,) by sect. 27,—in all cases within stat. 7 & 8 G. 4, c. 28, by sect. 9,—in all cases within stat. 11 G.

Forging, counterfeiting, and falsely altering any will of real or personal property, or any deed or other instrument, being or purporting to be the act of another, by which any right or interest in real property shall be or purport to be transferred, conveyed, or in any way changed or affected; any certificate or endorsement of the acknowledgment by any person of any deed or other instrument which by law may be recorded, made or purporting to have been made by any officer duly authorized to make such certificate or endorsement; any certificate of the proof of any deed, will, or other instrument, which by law may be recorded, made or purporting to have been made by any court or officer duly authorized to make such certificate, with intent to defraud; any certificate or other public security, issued or purporting to have been issued under the authority of this state, by virtue of any law thereof; any bill of credit heretofore issued by or under the authority of the legislature of this state, or purporting to have been so issued, by which certificate, bill or other public security the payment of any money absolutely, or upon any contingency, shall be promised, on the receipt of any money, goods or valuable thing shall be acknowledged; any certificate of any share, right or interest in any public stock, created by virtue of any law of this state, issued or purporting to have been issued by any public officer; any other evidence of any debt or liability of the people of this state, either absolute or contingent, issued or purporting to have been issued by any public officer; or any endorsement or other instrument, transferring or purporting to transfer the right or interest of any holder of such certificate, public security, bill of credit, certificate of stock, evidence of debt, or liability, or of any person entitled to such right or interest, with intent to defraud the people of this state, or any public officer thereof, or any other person:—these being *forgery in the first degree*.

Forging or counterfeiting the great or privy seal of this state; the seal of any public office authorized by law; the seal of any court of record, including surrogate's seals; or the seal of any body corporate, duly incorporated by or under the laws of this state; falsely making, forging, or counterfeiting, any impression purporting to be the impression of any such seal, with intent to defraud: falsely altering, destroying, corrupting or falsifying, any record of any will, conveyance or other instrument, the record of which is by law evidence; any record of any judgment in a court of record, or any enrolment of any decree of a court of equity; the return of any officer, court or tribunal, to any process of any court, with intent to defraud: falsely making, forging or altering any entry in any book of records; any instrument purporting to be any record or return, specified as above, with intent to defraud: any officer authorized to take the proof or acknowledgment of any conveyance of real estate, or of any other instrument which by law may be recorded, wilfully and falsely certifying that any such conveyance or instrument was acknowledged by any party thereto, when in truth no such acknowledgment was made; or that any such conveyance or instrument was proved when in truth no such proof was made: or counterfeiting any of the gold or silver coin, which are current by custom or usage within this state: these being *forgery in the second degree*.

Making or engraving, causing or procuring to be made or engraved, any plate in the similitude or form of any promissory note, bill of exchange, draft, check, certificate of deposit, or other evidence of debt, issued by any incorporated bank in this state, or by any bank incorporated under the laws of the United States, or of any state or territory thereof, or under the laws of any foreign country or government, without the authority of such bank: having or keeping in custody or possession, any such plate without the authority of such bank, with intent of using or having the same used for the purpose of taking therefrom any impression to be passed, sold or uttered: having or keeping in custody or possession, without the authority of such bank, any impression taken from any such plate, with intent to have the same filled up and completed for the purpose of being passed, sold or uttered: making or causing to be made, or having in custody or possession, any plate upon which is engraved any figure or words, which may be used for the purpose of falsely altering any evidence of

4 & 1 W. 4, c. 66, (Forgery Act,) by sect. 26,—in all cases within stat. 2 W. 4, c. 34, (Coin,) by sect. 19,—in all cases within stat. 8 & 9 Vict.

debt issued by any such incorporated bank, with the intent of having the same used for such purpose: selling, exchanging, or delivering for any consideration, any forged or counterfeited promissory note, check, bill, draft or other evidence of debt or engagement, for the payment of money absolutely, or upon any contingency, knowing the same to be forged or counterfeited, with intention to have the same uttered or passed: offering any such note or other instrument for sale, exchange or delivery for any consideration, with the like knowledge and with the like intention: or receiving any such note or other instrument upon a sale, exchange, or delivery, for any consideration, with the like intent, and with the like knowledge: these also being *forgery in the second degree*.

Having in possession any forged, altered or counterfeit negotiable note, bill, draft or other evidence of debt, issued or purporting to have been issued by any corporation or company duly authorized for that purpose by the laws of the United States or of this state, or of any other state, government or country, the forgery of which is above mentioned, knowing the same to be forged, altered or counterfeited; with the intention to utter the same as true or false, or to cause the same to be uttered, with intent to injure or defraud—this subjecting to the punishment of *forgery in the second degree*.

Falsely making, altering, forging or counterfeiting, with injurious or fraudulent intent, any instrument or writing, being or purporting to be, any process issued by any competent court, magistrate or officer; or being or purporting to be, any pleading or proceeding filed or entered in any court of law or equity; or being or purporting to be, any certificate, order or allowance by any competent court or officer, or being or purporting to be, any licence or authority authorized by any statute: or any instrument or writing, being or purporting to be, the act of another, by which any pecuniary demand or obligation is, or purports to be, created, increased, discharged, or diminished, or by which any right or property whatever, are, or purport to be, transferred, conveyed, discharged, diminished or in any manner effected, the degree of which offence is not above mentioned, whereby any person may be affected, bound, or in any way injured, in his person or property—these being *forgery in the third degree*.

Making with fraudulent intent, any false entry, or falsely altering any entry made, in any book of accounts left in the office of the comptroller of this state, or in the office of the treasurer, or of the surveyor-general, or of any county treasurer, by which any demand or obligation, claim right or interest, either against, or in favor of the people of this state, or any county or town; or any individual, is, or purports to be discharged, diminished, increased, created, or in any manner affected: or making with fraudulent intent any false entry, or falsely altering any entry made, in any book of accounts kept by any monied corporation within his state, or in any book of accounts kept by any such corporation, or its officers, and delivered or intended to be delivered, to any person dealing with such corporation, by which any pecuniary obligation, claim or credit, is, or purports to be, discharged, diminished, increased, created, or in any manner affected—these also being *forgery in the third degree*.

Having in possession any forged or counterfeited instrument, the forgery of which is above mentioned, except such as are enumerated as subjecting to the punishment of forgery in the second degree, knowing the same to be forged, counterfeited or falsely altered, with intention to injure or defraud, by uttering the same as true or as false, or by causing the same to be so uttered: or having in possession any counterfeit of any gold or silver coin which is at the time current in the state, knowing the same to be counterfeited, with intention to defraud or injure, by uttering the same as true or as false, or by causing the same to be so uttered—these being *forgery in the fourth degree*.

Uttering and publishing as true, with intent to defraud, any forged, altered or counterfeited instrument, or any counterfeit gold or silver coin, the forging, altering or counterfeiting of which, is above mentioned, knowing such instrument or coin to be forged, altered or counterfeited.

Making, with injurious or fraudulent intent, any instrument in one's own name, intended

c. 25, (malicious injuries by fire, or explosive substances,) by sect. 11 ;— and in some other cases, which shall be mentioned under their proper

to create, increase, discharge, defeat or diminish any pecuniary obligation, right or interest, or to transfer or effect any property whatever, and uttering or passing it, under the pretence that it is the act of another who bears the same name.

Totally erasing or obliterating any instrument or writing, with intent to defraud, by which any pecuniary obligation, or any right, interest or claim to property, is, or is intended to be, created, increased, discharged, diminished or in any way affected.

Placing or connecting together different parts of several genuine instruments, so as to produce one instrument, with intent to defraud.

Falsely making, forging or counterfeiting any evidence of debt, issued, or purporting to have been issued, by any corporation having authority for that purpose, to which is affixed the pretended signature of any person as an agent or officer of such corporation.

Falsely representing or personating another, and in such assumed character, marrying another; becoming bail or surety for any party in any proceeding, civil or criminal, before any court or officer authorized to take such bail or surety; confessing any judgment; acknowledging the execution of any conveyance of real estate, or of any other instrument, which by law may be recorded; or doing any other act in the course of a suit, proceeding or prosecution, whereby the person so represented or personated may be made liable in any event, to the payment of any debt, damages, costs, or sum of money, or his rights or interests may in any manner be affected.

Falsely representing or personating another, and in such assumed character receiving any money or valuable property of any description, intended to be delivered to the individual so personated.

Fraudulently producing an infant, and falsely pretending it to have been born of parents whose child would be entitled to a share of any personal estate, or to inherit any real estate, with intent of intercepting the inheritance of any such real estate, or the distribution of any such personal property, from any person lawfully entitled thereto.

Substituting and producing to the parent or guardian of an infant under the age of six years, which has been put out for nursing, education or any other purpose, another child in the place of the one so put out for nursing or education, with intent to deceive the parent or guardian of such child.

By colour of any false taken or writing, or by any other false pretence, designedly obtaining the signature of any person to any written instrument, or any money, personal property, or valuable thing, with intent to cheat or defraud another.

Feloniously taking the personal property of another from his person, or in his presence, and against his will, by violence to his person, or by putting such person in fear of some immediate injury to his person :—this being *robbery in the first degree*.

Feloniously taking the personal property of another in his presence, or from his person, which shall have been delivered or suffered to be taken, through fear of some injury to his person or property, or to the person of any relative or member of his family, threatened to be inflicted at some different time, which fear having been produced by the threats of the person so receiving or taking such property :—this being *robbery in the second degree*.

Knowingly sending, delivering or making, and for the purpose of being sent or delivered, parting with the possession of, any letter or writing, with or without a name subscribed thereto, or signed with a fictitious name, or any letter, mark or other designation, threatening therein to accuse any person of any crime, or to do any injury to the person or property of any one with a view or intent to extort or gain any money or property of any description, belonging to another.

Any clerk or servant of any private person, or of any co-partnership, (except apprentices and persons within the age of eighteen years,) or any officer, agent, clerk or servant of any incorporated company, embezzling, or converting to his use, taking, making way with, or secreting, with intent to embezzle or to convert to his own use, without the assent of his



titles. But by stat. 1 Vict. c. 90, s. 5, in all cases thereafter, it shall not be lawful to direct that any offender shall be kept in solitary con-

master or employers, any money, goods, rights in action, or other valuable security or effects whatever, belonging to any other person, which shall have come into his possession, or under his care, by virtue of his employment or office.

Embezzling any evidence of debt negotiable by delivery only, and actually executed by the master or employer of any such clerk, agent, officer or servant, but not delivered or issued as a valid instrument.

Buying or in any way receiving any money, goods, right in action, or any valuable security or effects whatever, knowing the same to have been embezzled, taken or secreted, contrary to the above provisions.

A carrier for hire, without the assent of his employer, taking, embezzling or converting to his own use, or making way with, or secreting, with intent to embezzle or convert to his own use, goods, money, rights in action, property or effects, or any of them, in the mass as they were delivered, without breaking the trunk, box, pack, or other thing in which they or any of them are contained, and before delivering of the articles at the place or to the person entitled to receive them.

Feloniously taking and carrying away the personal property of another, of the value of more than twenty-five dollars.

Severing from the soil of another, any produce growing thereon, of the value of more than twenty-five dollars, or severing from any building, or from any gate, fence, or other railing or enclosure, any part thereof, or any material of which it is formed, of the like value, and taking and converting the same, with intent to steal the same.

Stealing and carrying away, any record, paper or proceedings of a court of justice, filed or deposited with any clerk or officer of such court, or any paper, document or record filed or deposited in any public office, or with any judicial officer.

Every officer having the custody of any record, paper or proceeding specified in the proceeding paragraph, and stealing or fraudulently taking away or withdrawing or destroying any such document or paper, filed or deposited with him.

Buying or receiving in any manner, upon any consideration, any personal property of any value whatsoever, that has been feloniously taken away or stolen from another, knowing the same to have been stolen.

Wilfully and corruptly swearing, testifying or affirming falsely, to any material matter, upon any oath, affirmation or declaration, legally administered, in any matter, cause or proceeding depending in any court of law or equity, or before any officer thereof; in any case when an oath or affirmation is required by law, or is necessary for the prosecution or defence of any private right, or for the ends of public justice; or in any matter or proceeding before any tribunal or officer created by the constitution or by law, or where any oath may be lawfully required by any judicial, executive, or administrative—this being *perjury*.

Unlawfully and corruptly procuring any witness, by any means whatsoever, to commit any wilful and corrupt perjury, in any cause, matter or proceeding, in or concerning which, such witness may be legally sworn and examined—this being *subornation of perjury*.

Attempting, by the offer of any valuable consideration, unlawfully and corruptly to procure any other to commit wilful and corrupt perjury, as a witness, in any cause, matter or proceeding, in or concerning which such other person might by law be examined as a witness.

Offering or giving to the governor or lieutenant governor, or to any member of the senate or assembly of this state, after his election as such member, and either before or after he has qualified and taken his seat; to any commissioner of the land-office, or of the canal fund, or any canal commissioner; to the comptroller, surveyor-general, secretary of state or attorney-general; to any judge of any court of record, or to any judicial officer whatever; any money, goods, right in action or other property, with intent to influence his vote, opinion or judg-

finement for any longer period than one month at a time or three months in a year. Lastly for all offences for which a woman, before

ment on any question, matter, cause or proceeding, which may be then pending, or may by law be brought before him in his official capacity—this being *bribery*.

Every officer in the last paragraph enumerated, accepting any such gift, or any promise or undertaking to make the same, under any agreement that his vote, opinion or judgment shall be given in any particular manner, or upon any particular side of any question, matter, cause or proceeding then pending, or which may by law be brought before him in his official capacity.

Any juror, arbitrator or referee, taking any thing to give his verdict, award or report, or receiving any gratuity or gift whatever, from any party to a suit, proceeding or prosecution, for the trial of which such person has been drawn or summoned, or for the hearing of which he has been chosen an arbitrator or appointed a referee—these being *corruption*.

Corrupting, or attempting to corrupt, any person drawn or summoned as a juror, appointed a referee, or chosen an arbitrator, by giving or offering to give any gift or gratuity whatever, with intent to bias the mind of such juror, referee or arbitrator, in relation to any cause or matter, which may be pending in the court to which such juror has been summoned, or in which such referee or arbitrator has been chosen or appointed.

Conveying into a state prison, jail or other place of confinement, any disguise, instrument, arms or other thing, proper or useful to aid any prisoner in his escape, with intent thereby to facilitate the escape of any prisoner, lawfully committed to, or detained in such prison, jail or place, for any felony whatever, whether such escape be effected or attempted, or not.

Aiding and assisting, by any means whatever, any prisoner lawfully detained in a state prison, or in any jail or place of confinement, for any felony, to escape therefrom, whether such escape be effected or not; or forcibly rescuing any prisoner held in legal custody upon any criminal charge.

Aiding and assisting, by any means whatever, any prisoner lawfully committed to any jail or place of confinement, in execution of any conviction for any criminal offence other than a felony, whether such escape be effected or not; or conveying into such jail or place of confinement, any disguise, instrument, arms or other thing, proper or useful to facilitate the escape of any prisoner so committed, whether such escape be effected, or attempted or not.

Aiding or assisting any prisoner in escaping or in attempting to escape from the custody of any sheriff, coroner, marshal, constable or other officer or person who has the lawful charge of such prisoner, upon any criminal charge.

Any sheriff, jailer, coroner, marshal, or constable, wilfully and corruptly refusing to execute any lawful process directed to them, or any of them, requiring the apprehension or confinement of any person charged with a criminal offence; omitting to execute such process, by which such person shall escape; refusing to receive in any jail under his charge, any offender lawfully committed to such jail, and ordered to be confined therein on any criminal charge or conviction, or on any lawful process whatever; suffering any offender lawfully committed to his custody, to escape and go at large, or receiving any gratuity or reward, or any security or engagement for the same, to procure, assist, connive at, or permit any prisoner in his custody, on any civil process, or any criminal charge or conviction, to escape, whether such escape be attempted, or effected, or not.

Any prisoner confined in a state prison for any term less than for life, breaking such prison and escaping from thence; or any person confined in a county jail upon any conviction for a criminal offence, breaking such jail and escaping from thence.

Being lawfully imprisoned in a state prison for any term less than life, and attempting, by force or violence to any person, to escape from such prison, whether such escape be effected or not; or being lawfully imprisoned in a county jail, for any cause whatever, and forcibly breaking the prison, with intent to escape therefrom, or attempting, by any force or violence to escape from such prison, although no escape be effected.

Fighting a duel with any deadly weapon, although no death ensue; challenging another to fight such duel; sending or delivering any written or verbal message, purporting or in-

stat. 1 G. 4, c. 57, might be sentenced to be whipped, the court may order her to be confined to hard labor for any time not exceeding six

tended to be such challenge; accepting any such challenge or message; knowingly carrying or delivering any such challenge or message; being present at the time of fighting any duel with deadly weapons, either as second, aid or surgeon; or advising or giving any countenance or assistance to such duel.

Leaving this state for the purpose of eluding the operation of the laws respecting duelling, or challenges to fight, with intent of giving or receiving any challenge by law prohibited: or of aiding or abetting in giving or receiving such challenge; and then giving or receiving any such challenge, or aiding and abetting in giving and receiving the same.

Having a husband or wife living, and marrying any other person, whether such other person be married or single—except in the cases specified in the next paragraph:—this being *bigamy*.

The last paragraph does not extend to the following persons or cases:

1. To any person by reason of any former marriage, whose husband or wife, by such marriage, has been absent for five successive years, without being known to such person within that time, to be living: nor,

2. To any person, by reason of any former marriage, whose husband or wife by such marriage, has absented himself or herself from his wife or her husband, and has been continually remaining without the United States, for the space of five years together: nor,

3. To any person, by reason of any former marriage, which has been dissolved by the decree of a competent court, for some cause other than the adultery of such person: nor,

4. To any person, by reason of any former marriage, which has been pronounced void by the sentence or decree of a competent court, on the ground of the nullity of the marriage contract: nor,

5. To any person, by reason of any former marriage, contracted by such person within the age of legal consent, and which has been annulled by the decree of a competent court: nor,

6. To any person, by reason of any former marriage with a husband or wife, who has been sentenced to imprisonment for life.

An unmarried person knowingly marrying the husband or wife of another, in any case in which such husband or wife would be punishable; or persons being within the degrees of consanguinity, within which marriages are declared by law to be incestuous and void, intermarrying with each other, or committing adultery or fornication with each other.

Removing the dead body of any human being from the grave or other place of interment for the purpose of selling the same, or for the purpose of dissection, or from mere wantonness; purchasing or receiving the dead body of any human being, knowing the same to have been disinterred contrary to the provisions of the law; or opening a grave or other place of interment with intent to remove the dead body of any human being, for the purpose of selling the same, or for the purpose of dissection, or with intent to steal the coffin or any part thereof, or the vestments or other articles interred with any dead body.

Willfully administering any poison to any horse, cattle, or sheep, or maliciously exposing any poisonous substance, with intent that the same should be taken or swallowed by any horse, cattle or sheep.

Having a knowledge of the actual commission of any offence punishable by death, or by imprisonment in a state prison for life, and taking any money or property of another, or any gratuity or reward, or any engagement or promise therefor, upon any agreement or understanding, express or implied, to compound or conceal any such crime, or to abstain from any prosecution therefor, or to withhold any evidence thereof.

Having a knowledge of the actual commission of any offence punishable by imprisonment in a state prison for any other term than for life, and taking any money, or property of another, or any gratuity or reward, or any engagement or promise therefor, upon any agreement or understanding, express or implied, to compound or conceal any such crime, or to abstain from any prosecution therefor, or to withhold any evidence thereof.

calendar months nor less than one month, or may pass sentence of solitary confinement for any time not exceeding seven days at any one time, in lieu of the sentence to be publicly or privately whipped.(a)[2]

(a) 1 G. 4, c. 57, s. 3.

Committing the detestable and abominable crime against nature, either with mankind or with a beast.

In New York, the revised statutes provide that, when any person is convicted of two or more offences before sentence has been pronounced upon him for either offence, the imprisonment to which he shall be sentenced upon the second or other subsequent conviction, shall commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second term of imprisonment, as the case may be. 2 R. S. 700, § 11.

Whenever, by statute, an offender is declared punishable by imprisonment in a state prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court may sentence the defendant to imprisonment for life, or for any time not less than that specified. But no person can, in any case, be sentenced to imprisonment in a state prison for any term less than two years. 2 R. S. 700, § 12. There is an exception to this general rule, however, to be found in the "Act to preserve the purity of elections." Laws of 1839, p. 365. By the fourteenth section of that act, voting or offering to vote, in this state, by an inhabitant of another state, is declared a felony, and the person so voting or offering to vote is liable, on conviction, to be imprisoned in a state prison for a period not exceeding one year, at the discretion of the court.

A sentence of imprisonment in a state prison for any term less than for life, suspends all the civil rights of the person so sentenced, and forfeits all public offices and private trusts, authority, or power, during the term of such imprisonment. And a person sentenced to imprisonment, in a state prison for life, shall, thereafter, be deemed civilly dead. 2 R. S. 701, §§ 19, 20.

[2] MASSACHUSETTS.—In every case, in which the punishment of imprisonment in the state prison is awarded against any convict, the form of the sentence shall be, that he be punished by confinement at hard labor, and he shall also be sentenced to solitary imprisonment, for such term as the court shall direct, not exceeding twenty days at one time; and in the execution of such sentence, the solitary imprisonment shall precede the punishment by hard labor, unless the court shall otherwise order.

Any person, convicted of an offence, punishable wholly or in part by imprisonment in the county jail, may be sentenced to suffer such imprisonment in the house of correction, instead of the jail, or to suffer solitary imprisonment and be confined at hard labor, either in the jail or the house of correction.

If any boy, under the age of sixteen years, shall be convicted of an offence, which is punishable by imprisonment in the state prison, such convict not having been before sentenced to imprisonment in the state prison in this state, or in any state prison or penitentiary within the United States, the court, if sentence of solitary imprisonment and confinement at hard labor, for a term not exceeding three years, is awarded against such convict, and also when the sentence of confinement, at hard labor, for any term of time, is awarded against a female convict of whatever age, shall order such sentence to be executed, either in the house of correction or in the county jail, and not in the state prison; but the provisions of this and the preceding section shall not prevent the courts in the city of Boston, from sentencing such convicts to confinement in any place, in which juvenile offenders may be by law confined.

When the punishment of solitary imprisonment, and confinement at hard labor for a term not exceeding three years, shall be awarded by the court against any convict, who has not been before sentenced to the like punishment, by any court in this state, or within the Uni-

ted States, such sentence may be executed, either in the house of correction, or in the county jail, or in the state prison.

When any convict shall be sentenced to solitary imprisonment and hard labor, in any house of correction or jail, the master or keeper thereof shall execute such sentence of solitary imprisonment, by confining the convict in one of the cells, if there be any in such house of correction or jail, and if there be none, then in the most retired and solitary part of such house or jail; and, during the time of solitary imprisonment, such convict shall be fed with bread and water only, unless other food shall be necessary for the preservation of his health: No intercourse shall be allowed with any convict in solitary imprisonment, except for the conveyance of food, and other necessary purposes, unless some minister of the gospel shall be disposed to visit him, in the manner hereafter provided.

As soon as the term of solitary imprisonment shall have expired, the master or keeper shall furnish the convict with tools and materials, or with other means, to work in any suitable manner, in which he can be usefully or profitably employed, either in the said house of correction or jail, or within the close yard thereof; such convict may, if necessary, be confined by a log and chain, or in such other manner as shall prevent his escape, without unnecessarily inflicting bodily pain, or interrupting his labor; the overseers of the house of correction, or, when such punishment is inflicted in the jail the sheriff of the county, shall oversee the execution of all such sentences. Rev. Sta. of Mass. pp. 782, 783, secs. 8, 17, 18, 19, 20, 21.

NEW YORK.—The court before which any person shall be convicted, of an offence punishable by imprisonment in a county jail, may sentence such person to be imprisoned in a solitary cell in such jail, if any such be erected; but such imprisonment shall in no case exceed thirty days in the whole. Rev. Sta. of N. Y., (4th ed., Banks, Gould & Co., 1852,) p. 881, sec. 56.

MAINE.—All punishment in the state prison, by imprisonment, shall be by confinement to hard labor, and not by solitary imprisonment; but solitary imprisonment may be used as a prison discipline, for the government and good order of the convicts, as hereinafter mentioned. Rev. Sta. of Maine, p. 728, sec. 2.

If any convict, sentenced to the state prison for life, shall assault any officer or other person employed in the government thereof, or shall break or escape therefrom, or forcibly attempt so to do, he may be punished, upon conviction thereof in the supreme judicial court, by solitary imprisonment in the state prison not more than one year, and be afterwards held in custody on his former sentence.

If any convict, sentenced to the state prison for a limited term, shall assault any officer or other person employed in the government of said prison, or shall break or escape therefrom, or forcibly attempt so to do, he may be punished, upon conviction thereof in the supreme judicial court, by solitary confinement in the state prison, not more than three months, to precede the fulfilment of any former sentence, and at the discretion of the court may be further punished by confinement to hard labor, for a limited period or during life; to commence after his solitary confinement, or the completion of his former sentence.

Every convict, sentenced to solitary confinement, as mentioned in the two preceding sections, or on whom it is inflicted as a punishment for the violation of the rules and regulations of the prison, shall be confined in a solitary cell; and during such confinement shall be fed on bread and water only, unless the physician shall certify to the warden, that the health of such convict requires other diet. Rev. Sta. of Maine, p. 736, secs. 41, 42, 43.

OHIO.—That in all cases, when any person shall be convicted of any offence by this act declared criminal, and made punishable by imprisonment in the penitentiary, the court shall declare in their sentence, for what period of time, within the respective periods prescribed by law, such convict shall be imprisoned, at hard labor, in the penitentiary; and shall, moreover, determine and declare in their sentence, whether any, and if any, for what period of time such convict shall be kept in solitary confinement in the cells of the penitentiary, without labor; and shall render judgment against such convict for the costs of prosecution, and award execution thereon, against the goods and chattels, lands and tenements of said convict. Rev. Sta. of Ohio, p. 238, sec. 39.

*(d) Hard labor.*

For all offences within stat. 7 & 8 G. 4, c. 28, for which imprisonment may be awarded, the court may sentence the offender either to be imprisoned only, or to be imprisoned and kept to hard labor, in the common jail or house of correction, as to the court in its discretion shall seem meet.<sup>(a)</sup> And the same, as to all the offences within stat. 7 & 8 G. 4, c. 29, (Peel's Act, larceny,) by sect. 4,—as to all the offences within stat. 7 & 8 G. 4, c. 30, (Peel's Act, malicious injuries,) by sect. 27,—as to all offences within stat. 11 G. 4 & 1 W. 4, c. 66, (Forgery Act,) by sect. 26,—as to all offences within stat. 2 W. 4, c. 34, (Coin,) by sect. 19,—as to all offences within stat. 8 & 9 Vict. c. 25, (malicious injuries by fire, or explosive substances,) by sect. 11. So, a woman, instead of being whipped, may be sentenced to be confined to hard labor in the common jail or house of correction, for any time not exceeding six months, nor less than one in lieu of the sentence to be publicly or privately whipped.<sup>(b)</sup>

Also, by stat. 3 G. 4, c. 114, hard labor, as well as imprisonment, may form part of the sentence upon persons convicted of any of the following misdemeanors:—any attempt to commit a felony,—any riot,—keeping a common gaming house, a common bawdy house, or a common ill-governed \*and disorderly house, and wilful [\*184] and corrupt perjury and subornation of perjury (when punished by imprisonment.) The statute mentions some other offences:

(a) 7 & 8 G. 4, c. 28, s. 9.

(b) 1 G. 4, c. 57, s. 3.

**MICHIGAN.**—In Michigan, murder in the first degree is punished by solitary confinement in the state prison, for life. Rev. Sts. of Mich. ch. 153, sec. 1.

The statute further provides that the several boards of supervisors, shall cause to be prepared within the jails of the respective counties, at the expense of such counties, so many solitary cells, for the reception of convicts who may be sentenced to punishment therein, as they may deem necessary. Rev. Sts. of Mich. ch. 14, sec. 19.

**WISCONSIN.**—In every case in which the punishment of imprisonment in the state prison is awarded against any convict, the form of the sentence shall be, that he be punished by confinement at hard labor; and he shall also be sentenced to solitary imprisonment for such term as the court shall direct, not exceeding twenty days at one time; and in the execution of such punishment the solitary imprisonment shall precede the punishment by hard labor unless the court shall otherwise order. Rev. Sts. of Wis. p. 730, sec. 5.

Whenever any person shall be duly sentenced to solitary imprisonment, and confinement at hard labor in the state prison, or either of them, the sheriff of the proper county is required to execute such sentence of solitary imprisonment until a suitable state prison shall be provided, by confining such convict in one of the cells of the jail, or if there be no such cell, then in the most retired and solitary part of the jail; and during the time of such solitary imprisonment, the convict shall be fed with bread and water only, unless other food should be necessary for the preservation of his health; and no intercourse shall be allowed with such convict during such confinement, except for the conveyance of food and other necessary purposes. Rev. Sts. of Wis. 737, sec. 13.

but as far as it respects them it was repealed by stat. 7 & 8 G. 4, c. 27, s. 1, and 9 G. 4, c. 31, s. 1.

And lastly, by stat. 14 & 15 Vict. c. 100, s. 29, whenever any person shall be convicted of any one of the offences following, as an indictable misdemeanor; that is to say,—any cheat or fraud punishable at common law;—any conspiracy to cheat or defraud, or to extort money or goods or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice;—any escape or rescue from lawful custody on a criminal charge;—any public and indecent exposure of the person; any indecent assault, or any assault occasioning actual bodily harm;—any attempt to have carnal knowledge of a girl under twelve years of age;—any public selling, or exposing for public sale or to public view, of any obscene book, print, picture, or other indecent exhibition:—it shall be lawful for the court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labor during the whole or any part of such term of imprisonment.

There are also several other statutes, which specifically assign hard labor, as well as imprisonment, as a punishment for certain offences, which I shall have occasion to mention when I come to treat of those offences, in the course of the work.[1]

(e) *Whipping.*

Where imprisonment forms part of the punishment, male offenders may also be sentenced to be once, twice, or thrice publicly or privately whipped, if the court shall think fit, in the following cases:—for offences against stat. 7 & 8 G. 4, c. 28, by sects. 8, 11,—for most of the offences in stat. 7 & 8 G. 4, c. 29 (Peel's Act, larceny,) and in stat. 7 & 8 G. 4, c. 30 (Peel's Act, malicious injuries,) and for some of the offences in stat. 9 G. 4, c. 31, (offences against the person.) By stat. 8 & 9 Vict. c. 25, (malicious injuries by fire, or explosive substances,) it is enacted by sect. 9, that every male person under the age of eighteen years, who shall be convicted of any offence under this Act, or who shall be convicted of feloniously setting fire to any building, vessel, or mine, or to any stack or steer,—shall be liable, at the discretion of the court before which he shall be convicted, in addition to any other sentence which may be passed upon him, to be publicly or privately whipped in such manner and as often, not exceeding thrice, as the court shall direct. And as to larceny, or offences punishable as larceny, by juvenile offenders, we have seen(a) that they may be punished summarily by impris-

(a) *Ante*, p. 59.

[1] For the offences in which *hard labor* is imposed on the convict, in the several states, see the Revised Statutes of the states respectively.

onment, or imprisonment and hard labor, or fine, or if a male (not exceeding the age of fourteen years,)(a) \*by being once [\*185] privately whipped, either instead of, or in addition to, such imprisonment, or imprisonment and hard labor.(b)

But sentence of whipping, public or private, shall not be passed upon a female, for any offence whatever;(c) but instead thereof, the court or justice of the peace before whom they shall be tried or convicted, may pass sentence of confinement to hard labor in the common jail or house of correction for any time not exceeding six months or less than one,—or of solitary confinement therein for any time not exceeding seven days at any one time,—in lieu of the sentence of being publicly or privately whipped.(d)[1]

(a) 13 & 14 Vict. c. 37, s. 1.

(b) 10 & 11 Vict. c. 82, s. 1.

(c) 1 G. 4, c. 57, s. 2.

(d) Id. s. 3.

[1] The punishment of whipping was inflicted at common law, on persons of inferior condition, who were guilty of petit larceny and other smaller offences. Com. Dig. Tumbrel, C. But it seems that, in the earliest periods, by the usage of the Star Chamber, it was never to be inflicted on a gentleman. 2 Rushw. 463; Com. Dig. Tumbrel, C. And though it was inflicted, with great cruelty, on Titus Oates, on his conviction of perjury, his sentence was afterwards declared to be oppressive and illegal. 4 Harg. St. Tr. 106. This punishment seems first to have been introduced into the statute law, as a mode of allowing clergy. As women convicted of simple felony, were anciently liable to suffer death, (the 21 Jac. 1, c. 6,) allowed, that when convicted of larcenies under the value of ten shillings, they should, instead of receiving judgment to die, be sentenced to be whipped, stocked, or imprisoned for any period not exceeding a year. But now, by (1 Geo. 4, c. 57,) the whipping of females is abolished, and instead thereof imprisonment or solitary confinement may be inflicted. And, when by the (19 Geo. 3, c. 74, s. 3,) the ignominy of branding in the hand was abolished, the court were empowered in its room, in every case except that of manslaughter (and now in that case,) (by 3 Geo. 4, c. 38, the offender in manslaughter may be transported or imprisoned,) to order the offender to be publicly or privately whipped, not more than three times for the same offence. At the same time, in order to prevent collusion, it was directed that every private whipping should take place in the presence of three persons.

Whipping for public offences, was formerly practiced in Pennsylvania. Whipping or pillory was the usual punishment on a conviction for an infamous crime. By the act of 1790, it was the intention of the legislature to abolish whipping and the pillory, by the substitution of confinement at hard labor; and to subject to this punishment all those who were before the subjects of corporal punishment. 5 Serg. & Rawle Rep. 466. The pillory has long since been abolished in Pennsylvania. M'Kinney's Am. Mag. p. 632.

The punishments of the pillory and the tumbrel, are of very early origin; they are said, indeed, to have been used even in the times of the Saxon Heptarchy. 3 Inst. 219. The former is derived from the Pilastro, and signifies a pillar or column; and as it is a wooden machine in which the neck of the culprit is inserted, it was called in old law Latin "Collistrigium," from that circumstance. Id. ibid. The latter, which is now obsolete, originally signified a dung-cart, and was used as another means of exposure. Id. ibid. According to some authorities, it seems to have been synonymous with the trebutchet or ducking stool, which was used as a punishment for scolding woman. Com. Dig. Tumbrel, A. Burn, J. Pillory and Tumbrel. Williams, J. Pillory and Tumbrel. The stocks, formerly called *furcæ*, seem to be of equal antiquity. Com. Dig. Tumbrel, A. These instruments of correction were, by common law, to be erected and maintained by the lord of every leet, who might lose the liberty by default, (Cro. Eliz. 693; Com. Dig. Tumbrel, A.) or be fined for his neglect to the



*(f) Punishment for felony.*

In most cases of felony, created or made punishable by statute, the statute states the punishment, and the sentence must accord with it. But there are, and may be hereafter, some offences made felony by statute, for which no punishment has been or may be specially provided; and in such cases the offender shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned (with or without hard labor,)(a) for any term not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall think fit,) in addition to such imprisonment.(b)[2]

As to the punishment for a subsequent felony:—by stat. 7 & 8 G. 4, c. 28, s. 11, if any person shall be convicted of any felony, not punishable with death, committed after a previous conviction for felony,—such person shall on such subsequent conviction, be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned (with or without hard labor,)(c) for any term not exceeding four years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall think fit,) in addition to such imprisonment.[3]

(a) 1 G. 4, c. 57, s. 9.

(c) 7 &amp; 8 G. 4, c. 28, s. 9.

(b) 7 &amp; 8 G. 4, c. 28, s. 8.

king. Com. Dig. Tumbrel, A. And by the 51 Hen. 3, st. 6, s. 2, a pillory of convenient strength is to be maintained in every town as an appendage to the market. And by 51 Edw. 1, *de pistoribus*, it was further directed to be of sufficient strength, in order that execution might be done without peril to the body of the offender.

Lambert who first published his treatise on the office of justice of the peace in the year 1610, states that corporal punishments are either *capital* or *not capital*—that capital are inflicted “sundry ways; as by hanging, burning, boiling, pressing; not capital, are of divers sorts, as cutting off the hand or ear, burning or branding the hand, face, shoulders, whipping, imprisoning, stocking, sitting in the pillory, or on the cucking stool.”

In England, as recently as the 22d of Hen 8, an act passed for the punishment of one *Rouse*, a cook, who had poisoned seventeen persons of the family of the *Bishop of Rochester*, two of whom died. This was made, by law, treason, and he was ordered to be thrown into *boiling water*; the idea of which punishment, was suggested by his being a *cook*! Such were the barbarous institutions of the age. *To boil a cook*, was quite a royal joke. See *James v. Com.* 12 Serg. & Rawle Rep. 236, note.

[2] In American law, the very word *felony* denotes that the offence is punishable, by death or imprisonment. See Statutes of the States, *passim*.

[3] For the effect of a second conviction for the same offence, in different cases, in *Massachusetts*, see Rev. Sts. of Mass., Titts. *Counterfeiting, Forgery, Larceny, Lotteries, Drunkenness*.

NEW YORK.—The New York Revised Statutes provide, if any person convicted of any offence punishable by imprisonment in a state prison, shall be discharged, either upon being pardoned or upon the expiration of his sentence, and shall subsequently be convicted of any offence committed after such pardon or discharge, he shall be punished as follows:

If the offence of which such person shall be subsequently convicted, be such, that upon

*(g) Punishment for a misdemeanor at common law.*

The punishment for a misdemeanor at common law, is by fine, or imprisonment, or both. I have already observed, (a) that although for offences at common law, the term of imprisonment is not limited, yet the court, even for offences the most aggravated seldom award a longer imprisonment than two years.

*(h) Sentence where the party is in custody for another offence.*

Wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the court to award imprisonment for the subsequent \*offence [\*186] to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence either of imprisonment or transportation, the court, if empowered to pass sentence of transportation, may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation to which such person shall have been previously sentenced, although the aggregate term of imprisonment or transportation respectively may exceed the

(a) *Ante*, p. 182.

a first conviction, an offender would be punishable by imprisonment in a state prison for any term exceeding five years, then such person shall be punished by imprisonment in a state prison, for a term not less than ten years:

If such subsequent offence be such, that upon a first conviction the offender would be punishable by imprisonment in a state prison for five years or any less term, then the person convicted of such subsequent offence, shall be punished by imprisonment in a state prison for a term not exceeding ten years:

If such subsequent conviction be for petit larceny, or for any attempt to commit an offence, which if committed, would be punishable by imprisonment in a state prison, then the person convicted of such subsequent offence, shall be punished by imprisonment in a state prison for a term not exceeding five years. N. Y. Rev. Sta. (4th ed., Banks, Gould & Co., 1852,) pp. 882, 883, sec. 8, sub secs. 1, 2, 3.

MICHIGAN.—When any person shall be convicted of any offence, and shall be duly sentenced therefor to confinement in the state prison of this state, for one year or more, and it shall be alleged in the indictment on which such conviction is had, and admitted or proved on the trial, that the convict has before been sentenced to a like punishment by any court in this state, or in any other of the United States, for period not less than one year, he shall be sentenced to be punished by imprisonment in the state prison not more than seven years, in addition to the punishment prescribed by law for the offence of which he shall then be convicted.

When any such convict shall have been twice before sentenced to imprisonment at hard labor, for a period of not less than one year at each time, by any court in this state, or in any other of the United States, he shall be sentenced to imprisonment at hard labor for life, or for a term of not less than seven years in addition to the punishment prescribed by law for the offence of which he shall then be convicted. Rev. Sta. of Mich. p. 688, sec. 12, 13.

term for which either of those punishments could be otherwise awarded.(a)[1]

(i) *Judgment amended.*

A judgment pronounced by a court of oyer and terminer or jail delivery, may be altered or amended by the judge, at any time during the same assizes; a judgment by a court of quarter sessions may be altered at any time during the same sessions; and a judgment of the court of Queen's Bench, at any time during the same term :—provided the sentence be not actually entered of record.(b)[2]

(a) 7 & 8 G. 4, c. 28, s. 10.

s. 20. *R. v. Fletcher*, R. & Ry. 58. *R. v. JJ.*

(b) See 2 Arch. Pr. 172. 2 Hawk. c. 48, of *Leicestershire*, 1 M. & S. 442.

[1] In the state of New York the revised statutes provide that when any person is convicted of two or more offences before sentence has been pronounced upon him for either of them, the imprisonment to which he shall be sentenced upon the second, or other subsequent conviction, shall commence at the termination of the first term of imprisonment, to which he shall be adjudged, or at the termination of the second term of imprisonment, as the case may be. 2 New York Rev. Sts. (4th ed., Banks, Gould & Co., 1852,) 700, sec. 11.

Fines are the lowest species of punishment, which courts of justice have power to inflict. See 11 Harg. St. Tr. 292. There was, indeed, a time when they formed almost the only penalty to which the opulent were liable, when murder itself was commuted by a sum of money, when judges were in many cases mere agents for the crown, and collectors for the treasury. 3 Salk. 32. These abuses have, however, long ceased to impede the course and degrade the character of public justice. Fines are now, for the most part, retained in cases where they are peculiarly proper, and where they are in general applied to remedy the evil indicted.

Besides the punishments, there are others which may incidentally flow from the sentence to particular individuals. Thus an attorney convicted of an offence which renders him unfit for an attorney, will be struck off the rolls; not so much to punish him, as to keep free from reproach, the profession of which he was a member. In England, where an attorney had been struck off the roll of the court of King's Bench, the court of common pleas refused to strike him off its rolls, it not appearing he had been struck off the rolls of the court of King's Bench, for any misdemeanor. 3 B. & B. 257.

*Amendment of Record.*

[2] It has been correctly observed, that the judge during the term, is a living record, and therefore during that period of time, he may alter and supply, from his own memory, any order, judgment, and decree, which has been pronounced, and this, because having made them himself, he is presumed to retain them in his recollection. But, at common law, after the term had elapsed, the judge had no such power, because it was supposed, that there would be a period at which a judge would cease to retain in his memory, the things which had been ordered and adjudged, and that period, it was well conceived, might be the end of the term, as he would then be apt to dismiss from his thought the things which had been previously passing in them. It is however, a very delicate power, and might be subject to much abuse, especially in criminal cases, if the extent to which it might be carried was not well defined, and properly checked, by law. See *The State v. Harrison*, 10 Yerger, Tenn. Rep. 542.

4. *Costs.*[3](a) *In prosecutions for felonies.*

The court before which any person shall be prosecuted or tried for felony, is hereby authorized and empowered, at the request of the prose-

*Costs to Officers.*

[3] At common law, no reward could be taken by any officer in the administration of justice, for the discharge of their duties in these proceedings, judges of courts receive no fees of office; they have their annual salaries paid by the state. Aldermen, justices of the peace, and the like officers, are allowed by the statutes of the state certain fees for process issued, and for other specific official services performed by them, in these primary proceedings in criminal cases. Constables and sheriffs are, also, thus compensated for what they do as required by law; as witnesses are likewise for their attendance on such prosecutions. These fees are, in general, not paid until the determination of the case; being then paid by the county, in case the accused is discharged by the magistrate on primary hearing, or acquitted on trial; or recovered of the defendant on conviction, if he have property, otherwise to be paid by the county. M'Kinney's Am. Mag. p. 316.

The district attorney of New York city and county is not entitled to costs of suits brought by him on forfeited recognizances and fines, his salary being fixed by the revised statutes and the laws of 1821. *The People v. Supervisors of New York*, 1 Hill, 362.

In Virginia it is provided by statute that, a sheriff or other officer, for travelling out of his county or corporation to execute process in a criminal case and doing any act in the service thereof, for which no other compensation is provided, shall receive therefor, out of the treasury, such compensation as the court, from which the process issued, may certify to be reasonable. When in a criminal case an officer renders any other service, for which no specific compensation is provided, the circuit court of the county or corporation in which such case may be, may allow therefor what it deems reasonable, and such allowance shall be paid out of the treasury. This section shall not prevent any payment under the thirteenth section of chapter forty-five which could have been made if this section had not been enacted. Code of Virg. p. 782, sec. 7.

*Costs to the Prosecutor.*

At common law, it is a general principle that the government neither pays nor receives costs, and as an indictment, though carried on by an individual, is always considered as the suit of the government, no costs are payable, whatever may be the event of the prosecution. Hullock on Costs, 557. And, therefore, even in cases where the costs are afterwards allowed throughout the whole of the proceedings, the prosecutor must defray his own expenses, and the court will not allow him costs, unless, some special ground be laid for the application.

A public prosecution must be at the expense of the prosecutor, unless on disclosure of his circumstances to the court, they find him an object of public charity. *Ex parte Manning*, 1 Caines, 59.

MASSACHUSETTS.—Every county treasurer shall pay over, to the persons entitled thereto, all sums, taxed for costs in criminal prosecutions, or allowed by the courts as rewards or compensations to prosecutors, which shall have been duly certified by the clerks, provided such sums shall be demanded within three years after the taxing or allowance thereof; and in his general account transmitted to the governor and council, and also in his account transmitted to the treasurer of the Commonwealth, next after such general account, as before provided, he shall credit to the Commonwealth all such costs and allowances, which shall not have been demanded within the said term of three years, and shall not have been credited by him, in any former account. Rev. Stat. of Mass. p. 773, sec. 12.

VIRGINIA.—For services rendered, or expenses incurred, in the arrest of a criminal, or

outor, or of any other person who shall appear on recognizance or *subpoena* to prosecute or give evidence against any person accused of any

about a criminal prosecution, for which no particular provision is made by law, it shall be lawful for the first auditor, within three years after the claim might have been presented, if he be of opinion that such claim ought to be paid, to lay the same before the governor, and so much thereof shall be paid as the governor may direct. Rev. Code of Va. of 1849, c. 45, sec. 13.

#### *Costs against Prosecutor.*

As the prosecution of crimes in this country is not only in the name, but purely by the authority and instrumentality of the government, and its officers, and not, as in England, by the instrumentality of an individual prosecutor, whoever originates a public prosecution has a right to have the accusation proceeded upon, free of expense to him. In general the prosecutor is not liable for costs. In some states, however, it is provided by statute that in particular cases of misdemeanors, or on an indictment returned *ignoramus*, the grand jury may direct that the prosecutor shall pay the costs, or on a verdict of acquittal, the petit jury may so find. See act of Pennsylvania of Dec. 8, 1804; 4 Smith's Laws, p. 204, where it is provided that, "in all prosecutions, cases of felony only excepted, if the bill or bills of indictment shall be returned '*ignoramus*,' the grand jury who returns the same shall decide and certify on such bill whether the county or the prosecutor shall pay the costs of prosecution: and in all cases of acquittals by the petit jury, on indictment for the offences aforesaid, the jury trying the same shall determine, by their verdict, whether the county or the prosecutor, or the defendant or defendants, shall pay the costs of prosecution; and the jury so determining, in case they direct the prosecutor to pay the costs, shall name him or them in their return or verdict."

See also, act of Pennsylvania, of 9th of Feb. 1820, 4 Smith's Laws, 240, which provides that, in all prosecutions where the petit jury trying the same shall acquit the defendant or defendants, and shall determine that the prosecutor shall pay the costs, the defendant's bill for his subpoenas, serving the same, and attendance of his material and necessary witnesses shall be included in the costs and paid accordingly.

In Pennsylvania, informers, under the summary proceedings authorized by the statute, for the prevention of vice and immorality, and other similar statutes, are not liable for costs if they fail to establish their accusations. *Commonwealth v. Hargesheimer*, 1 Ashm. Rep. 413.

In North Carolina, where a defendant is acquitted on a charge of petit larceny, or of any offence for which judgment does not extend to life, limb, or member, the court may order the prosecutor to pay costs. *State v. Lumbrick*, 1 Car. Law Repos. 543. If an indictment is quashed, the prosecutor is not liable to pay for the attendance of witnesses on either side. *Office v. Gray*, 2 Car. Law Repos. 424. Nor will he be held to pay costs, if he had probable cause to prosecute, whatever his motives were. *State v. Forsyth*, 1 Taylor, 21. In North Carolina, where the grand jury return a bill, "not a true bill," the court cannot, in any case, order the prosecutor to pay costs. *The State v. Cockerham*, 1 Iredell Rep. 331. Nor is an indictment for perjury one of those "frivolous or malicious" prosecutions, in which the court has power, even upon an acquittal by a petit jury, to order the prosecutor to pay the costs; for at the time the act was passed giving the court power, in certain cases, to order the prosecutor to pay costs, the punishment of perjury did extend, and, in some peculiar cases, does now extend, to the loss of a member. *Ib.* See *State v. Smith*, 2 Murphree, 60.

The prosecutor is no party to the cause, and is not liable, in any case for costs, unless it be so directed by statute. *Carter v. Hawley*, Wright's Rep. 332; *Hansard v. State*, 5 Humphrey's Rep. 115.

The several statutes of Alabama, authorizing the court to tax a prosecutor with the costs of prosecution, extend to cases of misdemeanor only; and even then, the record must disclose that the prosecution appeared to the court to be frivolous or malicious. *Barns v. The State*, 5 Ala. Rep. 227; *S. P. Tuck v. The State*, 8 Ala. Rep. 664.

felony, to order payment to the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment,—and

In Missouri, under the statute of that state of 1843, the prosecutor is not liable for costs in any capital case, or any case punishable by imprisonment in the penitentiary alone. *Ex parte Cain*, 9 Mis. Rep. 769.

Under the territorial statute of Iowa of 1843, rendering private prosecutors liable for costs, there must be a trial and acquittal to fix such liability; and the court must be satisfied that the prosecution was malicious. *Margrave v. United States*, 1 Morris, 452.

The Mississippi statute which subjects the master, employer, or overseer of a slave convicted of larceny to the costs of prosecution, is designed to render the person who had the slave in charge at the time of the commission of the offence, liable for the costs, whether he were the master, employer, or overseer. *Atchinson v. Potter*, 6 Smedes & Marsh. Rep. 120.

A complainant praying for sureties of the peace against defendant, not liable to costs in case defendant is discharged. *State v. Abrams*, 4 Blackf. 440.

In Virginia the statute provides, the sum to which a witness is entitled who attends for the commonwealth, and any other legal charges incurred in a case wherein there is a prosecutor, shall be paid by such prosecutor as if he were plaintiff in the case, unless there be a judgment against the defendant, in which case the same shall be taxed in the costs, and paid to the persons entitled thereto, by the sheriff or officer who may receive the same.

#### *Liability of Defendant to pay Costs.*

At common law, as the government does not pay, any more than it receives, costs, it follows that the defendant, though acquitted, must in general bear all his own expenses. 1 Chitty's Cr. Law, 259. But in North Carolina where a defendant was tried and acquitted on a charge of felony, it was held that he was not liable to pay the costs of the witnesses summoned on behalf of the state. *Cameron & Norwood Rep.* 63. If the evidence is not sufficient to hold the accused to a trial, a magistrate cannot order him to pay costs, on dismissing him. *Scott's case*, Kirby, 362. If a defendant in an indictment is acquitted, or if a *not pros* is entered, he pays his own costs only. *State v. Whithead*, 3 Murphy, 223; S. P. *State v. Hargate*, *Cameron & Norwood Rep.* 63. Where an indictment is found against a person on which he is recognized from term to term, until, on a discovery of a defect in the bill, a *nolle prosequi* is entered, and a new bill is then sent and found against the defendant for the same offence, on which he is convicted, he is liable to pay the costs of the attendance of witnesses for the whole time. *State v. Hanshaw*, 2 Car. Law Repos. 251. A jury may direct a defendant to pay costs, though the indictment is defective. *Commonwealth v. Tighman*, 4 Serg. & Rawle, 127. A defendant pleaded guilty to an indictment for selling spirituous liquors without license, and the court fined him two dollars, saying nothing as to the costs. Held that the costs of prosecution should, in such case, be included in the judgment. *The State v. Smith*, 6 Blackf. Rep. 549.

In Indiana, when a person accused of a crime, before a justice of the peace, is recognized to appear in the circuit court, and is convicted in that court, the costs of the examination before the justice cannot be included in the judgment. *State v. Thurston*, 7 Blackf. 148.

Where a person is recognized to appear and answer to a criminal charge at court, he will be liable for the costs of the recognizance, although no one appears to prosecute. *Houston v. United States*, 1 Morris, 174.

A defendant may be sentenced to pay costs of prosecution, though, after verdict, there has been a general pardon by the governor. *Playford v. Commonwealth*, 4 Barr, 144. Costs on an indictment, are remitted by a pardon before judgment. *Duncan v. Com.* 4 Serg. & Rawle, 449. Otherwise if the defendant be pardoned after the right to the costs has vested in the officers. *Ib.*

The court, in entering judgment, against a defendant for fine and costs, may order that he stand committed until the fine and costs are paid. *Hill v. State*, 2 Yerg. 247.

In South Carolina, the costs constitute a mere debt to the officers of the court, and though

also payment to the prosecutor and witnesses for the prosecution of such sums of money as to the court shall seem reasonable and sufficient

it be part of the defendant's sentence "that he stand committed until the costs are paid" yet he is entitled to the insolvent debtor's and prison-bound acts if he be unable to pay them. *State v. Kenny*, 1 Bailey, 375.

*Witnesses Fees and Expenses.*

In criminal cases no tender of fees is, in general, necessary, on the part of the government, in order to compel its witnesses to attend; it being the duty of every citizen to obey a call of that description.

**MASSACHUSETTS.**—In Massachusetts, it is not necessary to pay or tender any fees to any witness who is subpoenaed on behalf of the commonwealth, to testify in support of any prosecution, but every such witness is bound to attend, and punishable for non-attendance, in the same manner as if the fees allowed by law had been paid to him. *Rev. Sta. of Mass.* ch. 136, sec. 26.

**NEW YORK.**—In New York the revised statutes provide that it shall not be necessary to pay or tender any fees whatever to any witness subpoenaed on the part of the people in support of any prosecution, or to any witness subpoenaed on the part of any defendant in an indictment; but such witness shall be bound to attend as if the fees allowed by law to witnesses in civil cases had been duly paid to him. 2 R. S. 729, § 65.

But when a witness attends the oyer and terminer or sessions, in behalf of the people, on subpoena, recognizance, or on request of the public prosecutor, from another state or territory of the United States, or from any foreign country; or if such witness be poor, on either fact appearing, the court may by order in its minutes direct the county treasurer to pay him such sum of money as shall seem reasonable for his expenses; to be paid to the witness or his order, on producing a certified copy of the order of the court, to the county treasurer. 2 R. S. 753, §§ 13, 14, 16.

**PENNSYLVANIA.**—In Pennsylvania, provision is made by statute, for the payment of the fees of witnesses for the prosecution, in case of conviction, or of the insolvency of the defendant, by the county; and, in some instances, for the payment of the fees of the defendant's witnesses, by the county, or by the prosecutor. *M'Kinney's Am. Mag.* p. 239.

A witness subpoenaed and attending court, and testifying in several prosecutions, at the same time, is entitled to only one daily compensation. 1 *Ashmead*, 265.

**MAINE.**—When a justice shall issue any summons for a witness, at the request of any person, prosecuted in a criminal suit, it shall be so expressed in the summons; and the witness shall thereby be required to appear and give evidence, upon condition that such party pay him his legal fees.

No costs shall be allowed by a justice of the peace for the benefit of any complainant, whether as an officer, witness, or in any other capacity; provided, that a police officer, or constable, duly qualified, and acting under the authority of a town, or complaining in cases where, by particular provisions of law, it is made his duty to complain, may be allowed his fees as an officer.

When any person shall have been summoned as a witness, in more than one criminal prosecution, before a justice of the peace, on the same day, or at the same term of any judicial court, he shall be allowed pay for travel and attendance, only in such one prosecution, as the justice of the court may direct; and in no case shall he be allowed more than one travel, at the same time.

No fees, in criminal prosecutions, continued after the first term, shall be allowed to witnesses on the part of the state, until the third day of the term of the supreme judicial court, or of any district court, held in any county in this state, except in the counties of Hancock, Oxford, Franklin, Piscataquis and Aroostook; nor until the second day in either of these excepted counties, unless in either case, the court shall have expressly required an earlier attendance.

to reimburse such prosecutor and witnesses for the expenses they have severally incurred in attending before the examining magistrate or mag-

If any person, convicted of an offence before any justice of the peace, be ordered by such justice to pay the costs of prosecution, as part of his sentence, and shall comply with such order, the justice may retain his own fees, and pay over the other fees to the officer, witnesses and other persons thereto entitled.

If such fees, other than the justice's, be not called for within one year, they shall be forfeited to the use of the state, and the justice shall pay over the same to the county treasurer, within such time and under such penalty, as is provided in the twenty-second section of this chapter, for the non-payment to such treasurer of fines by him received.

Whenever a party accused shall be acquitted by any justice of the peace, or, being convicted, shall not be sentenced to pay costs, or, being sentenced to pay costs, shall not pay them to said justice, the commissioners of the same county may examine and correct all such bills of costs, including the fees of the officer, witnesses and other persons, entitled thereto, and order the same to be paid out of the county treasurer; except as is provided in the following section.

Whenever any justice, or any individual interested in such bill of costs, shall be one of the county commissioners for the same county, the district court held in said county shall have the same cognizance of such bill of costs, as the commissioners might otherwise have had.

In all criminal prosecutions, which are carried to any court, by appeal from the decision of a justice of the peace, or where the party accused is committed or required to recognize for his appearance to any court, the costs shall be taxed and certified, with the papers, to the court.

In all criminal prosecutions, lawfully pending in the supreme judicial court, or in any district court, the court may allow and tax such costs for justices, officers, aids, jurors and witnesses, and for other charges, upon such prosecution, and previous to its determination, as are provided by law, whether the person accused be brought to trial or not, or whether he be convicted or acquitted upon trial; and all costs, so taxed, shall be paid out of the county treasury. Rev. Sta. of Maine, pp. 655, 656, secs. 6 to 15, inclusive.

OHIO.—The Revised Statutes of Ohio provide that witnesses summoned by order of the prosecuting attorney, or defendant, or who may have been recognized to appear at court, and attending the supreme court or court of common pleas, in criminal cases, *the punishment whereof is capital, or imprisonment in the penitentiary*, shall be allowed the following fees, viz: *those residing out of the county where the trial is to be had, one dollar per day for each day he or she shall actually attend the court under such summons or recognizance, and one dollar for each twenty-five miles traveling to and from said court; and those residing within such county, the sum of seventy-five cents per day, for each day's actual attendance, under a subpoena or recognizance, as aforesaid. And in all other cases where the punishment is less than imprisonment in the penitentiary, the fees for witnesses attending court of common pleas under a subpoena or recognizance, whether residing in or out of the county, shall be seventy-five cents per day for each day's attendance at court; and when witnesses shall reside out of the county in which the trial is had, seventy-five cents for each twenty-five miles traveling to and from court.* The fees in this section specified, to be audited and paid in the manner now provided by law.

That the ninth section of an "act to regulate the fees of officers in civil and criminal cases," passed March 5th, 1831, and the twenty-fourth section of an "act directing the mode of trial in criminal cases," passed March 7, 1831, and all laws and parts of laws inconsistent with the provisions of this act, be and the same are hereby repealed: provided, that in all other cases except those specified in this act, each person summoned as a witness shall be allowed the sum of fifty cents per day for each day that he or she may attend as such; and all persons who shall be called upon to testify in a cause in which they are not summoned, shall receive twenty-five cents: to be audited, taxed and paid, as now is, or here-



istrates and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time

after may be provided for by law. This act to take effect and be in force from and after the first day of June next. Rev. Sta. of Ohio, pp. 390, 391, *seca.* 2, 3.

MICHIGAN.—It shall not be necessary to pay or tender any fees whatever, to any witness subpoenaed on the part of the people of this state, in support of any prosecution, or to any witness subpoenaed on the part of any defendant in any indictment; but such witness shall be bound to attend, as if the fees allowed by law to witnesses in civil actions had been duly paid to him. Rev. Sta. of Mich. p. 699, *sec.* 28.

Whenever any person shall attend any court of record as a witness in behalf of the people of this state, upon request of the public prosecutor, or upon subpoena, or by virtue of a recognizance for that purpose, and it shall appear that such person has come from any other state or territory of the United States, or from any foreign country, or that such person is poor, the court may, by an order to be entered on its minutes, direct the county treasurer of the county in which the court may be sitting, to pay to such witness such sum of money as shall seem reasonable for his expenses; and no fees shall be allowed or paid to witnesses on the part of the people in any criminal proceeding or prosecution, except as in this section above provided. Rev. Sta. of Mich. p. 708, *sec.* 7.

MISSISSIPPI.—Every witness summoned to appear in any of the said courts, on a criminal prosecution, or plea of the state, shall appear accordingly, and continue to attend from day to day, until discharged by the court, the attorney-general, or district attorney, or by the party at whose instance he shall be summoned; and in default thereof, shall be fined by the court in a sum not exceeding one hundred dollars, for the use of the state, or the party summoning him, as the cases may be; unless on the return of a *scire facias* made known, and before final judgment, sufficient cause be shown for such failure; and such witnesses shall be allowed the same compensation for their daily attendance, and the same mileage as is allowed to witnesses attending in civil suits; and such compensation, together with all costs of prosecution, shall be paid by the defendant on conviction. And, in case the state shall fail in the prosecution of any offence of an inferior nature, the court may order the costs to be paid by the prosecutor, if the prosecution shall appear to have been frivolous or malicious; and, if on conviction, the defendant shall be unable to pay the costs of prosecution, or if the defendant be acquitted, and the costs be not taxed on the prosecutor, the witnesses appearing on behalf of the state, shall be paid the compensation aforesaid, out of the treasury of the state; and the certificate given by the clerk of the court in which such prosecution was determined to any witness, specifying the amount of compensation to which he is entitled, with an endorsement thereon, by such clerk, that the defendant is unable to pay the costs of prosecution, or that he was acquitted, and the costs not taxed on the prosecutor, as the case may be, shall be a sufficient voucher to authorize the auditor to issue his warrant on the treasurer, for the sum mentioned in such certificate. Hutchinson's Mississippi Code, pp. 859, 860, *sec.* 105.

Hereafter grand jurors and witnesses in behalf of the state shall each receive one dollar and fifty cents for their services per day, while they shall be required to attend on their respective courts, and six cents per mile for traveling from and to the respective places of their residence, computing the distance by the usually traveled route. Petit jurors, or the original venire, shall each receive one dollar and fifty cents per day while they shall be required to attend on their respective courts, and six cents per mile for traveling from and to their respective places of residence, estimating the distance by the usually traveled route; and the tales jurors shall not hereafter receive any compensation. Witnesses attending on the legislature under a subpoena, for each day they may be required so to do, shall receive two dollars: and six cents per mile for traveling to and going from the state capital, estimating the distance by the usually traveled route; but no payment shall be made by the treasurer of the state on account of services rendered by any of the officers of the state mentioned in

therein ;—and although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall in the opinion of the court, *bona fide* have attended the court in obedience to any such recognizance or *subpoena*, to order payment unto such person of such sum of money as to the court shall seem reasonable and sufficient to reimburse such person for the expenses which he or she shall have *bona fide*

the fourth, fifth, and sixth sections of this act, until they shall have been duly certified and audited according to law.

If any talesman juror shall be detained more than one day in any one cause, such talesman shall be entitled to the same pay and mileage as is prescribed by this act for jurors belonging to the original venire. Ib. p. 891, art. 15.

Witnesses on the part of the state in any criminal prosecution shall only be entitled for each day's attendance on any circuit or criminal court, the sum of one dollar: *Provided*, That the prosecutor in any criminal case shall not be entitled to a certificate for his attendance in any case where he may be endorsed as a witness, and provided that no person shall charge the state for his attendance in more than one prosecution on the same day. Ib. p. 1007, art. 4.

VERMONT.—Witnesses in Vermont, are entitled for travel per mile, to five cents; for attendance, per day, seventy-five cents, except for attending a justices court, court of jail delivery, or to give his deposition before a justice when he is allowed thirty-four cents only. Rev. Sta. of Vermont, ch. 116.

VIRGINIA.—The thirty-fourth, thirty-fifth and thirty-sixth sections of chapter one hundred and seventy-six, shall apply to a person attending as a witness, under a recognizance or summons in a criminal case, as well as to a person attending under a summons in a civil case; except that, in a criminal case, a witness, who travels over fifty miles to the place of attendance, shall have for each day's attendance one dollar instead of fifty cents, and a person residing out of this state, who attends a court therein as a witness, may be allowed by said court, for attendance and for travel to and from the place of his abode, as if he resided in the state.

The sum to which a witness is entitled who attends for the commonwealth, and any other legal charges incurred in a case wherein there is a prosecutor, shall be paid by such prosecutor as if he were plaintiff in the case, unless there be a judgment against the defendant, in which case the same shall be taxed in the costs, and paid to the persons entitled thereto, by the sheriff or officer who may receive the same.

Payment shall not be made out of the treasury, to a witness attending for the commonwealth in any prosecution for a misdemeanor, unless it appears that the sum to which the witness is entitled cannot be obtained, if it be a case wherein there is a prosecutor and the defendant is convicted, by reason of the insolvency of the defendant, or if it be a case in which there is no prosecutor, by reason of the acquittal or insolvency of the defendant or other cause. Rev. Code of Va., p. 782, secs. 4, 5, 6.

WISCONSIN.—The attorney general is authorized to issue subpoenas, and compel the attendance of witnesses on behalf of the state, without paying or tendering fees in advance; and any witness failing or neglecting to attend, after being served with a subpoena, may be proceeded against, and shall be liable in the same manner as provided by law in other cases where fees have been paid or tendered.

When any person shall attend a court of record as a witness in behalf of the state, upon the request of the public prosecutor, or upon a subpoena, or by virtue of a recognizance for that purpose, and it shall appear that such person has come from any other state or territory of the United States, or from any foreign country, or that such person is poor, the court may by order on its minutes, direct the county treasurer of the county in which the court shall be sitting, to pay to such witness such sum of money as shall seem reasonable, for his expenses. Rev. Stat. of Wis. p. 678, secs. 57, 58.

incurred by reason of attending before the examining magistrate or magistrates,—and by \*reason of such recognizance or *subpoena*,—and also to compensate such person for trouble and loss of time.(a)

Where the prosecutor and witnesses were bound over to prosecute and give evidence at the assizes as for a felony, but by the advice of counsel the indictment was preferred for a misdemeanor, in a case where costs were not allowed by the statute: upon application being made for costs, Williams, J., after taking time to consider, granted it.(b)

(b) *In prosecutions for misdemeanors.*

Where any prosecutor or other person shall appear before any court on recognizance or *subpoena*, to prosecute or give evidence against any person indicted of any assault with intent to commit felony,—of any attempt to commit felony,—of any riot,—of any misdemeanor, for receiving any stolen property, knowing the same to have been stolen,—of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer,—of any neglect or breach of duty as a peace officer,—of any assault committed in pursuance of any conspiracy to raise the rate of wages,—of knowingly and designedly obtaining any property by false pretences,—of wilful and indecent exposure of the person,—of wilful and corrupt perjury, or of subornation of perjury,—[or unlawfully and carnally knowing and abusing any girl being above the age of ten years and under the age of twelve years,—unlawfully taking or causing to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her,—conspiring to charge any person with any felony, or to indict any person of any felony,—and conspiring to commit any felony;(c)—and in every case of assault, brought before justices of the peace for summary decision, under stat. 9 G. 4, c. 31, in which the justices shall be of opinion that the same is a fit subject for indictment, and shall thereupon bind the complainant and witnesses in recognizance to prosecute and give evidence at the assizes or sessions of the peace];(d) every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorized and empowered to order the same in cases of felony;—and although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall have *bona fide* attended the court, in obe-

(a) 7 G. 4, c. 64, s. 22.

(b) *R. v. Hanson*, 2 Car. & K. 912.

(c) 14 & 15 Vict. c. 55, s. 2.

(d) *Id.* s. 3.

dience to such recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony.<sup>(a)</sup> \*This [\*188] statute, however, does not extend to cases where the indictment is removed by *certiorari* at the instance of the prosecutor, and afterwards tried on the civil side at the assizes.<sup>(b)</sup>

(c) *Costs of attending before the examining magistrate.*

By stat. 7 G. 4, c. 64, s. 22, already noticed,<sup>(c)</sup> prosecutors and witnesses, in cases of felony, are to be allowed their expenses in attending before the examining magistrate or magistrates; and the section also enacts, "that the amount of the expenses of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate or magistrates, granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same;" the other expenses to be ascertained by the proper officer of the court. By that section, the magistrates' certificate was conclusive as to the amount of those expenses. But this is no longer so; for by stat. 14 & 15 Vict. c. 55, s. 6, the amount of such expenses shall also be ascertained by the proper officer of the court, but the amount thereof, as so ascertained, shall not exceed the amount mentioned in the certificate of the examining magistrate. So that now, it should seem, the prosecutor and witnesses are entitled to be allowed their expenses of attending before the examining magistrate, only in case such magistrate shall grant a certificate, and if granted, the amount therein allowed must be examined, and may be reduced on taxation, by the taxing officer of the court.

The 23rd sect. of stat. 7 G. 4, c. 64, above mentioned, which granted costs in certain cases of misdemeanors, contained a proviso, "that in cases of misdemeanor, the power of ordering the payment of expenses and compensation, shall not extend to the attendance before the examining magistrate." But this proviso is now repealed by stat. 14 & 15 Vict. c. 55, s. 1; and as by stat. 7 G. 4, c. 64, s. 23, the prosecutors and witnesses are entitled to their expenses in the cases of misdemeanor therein mentioned, "in the same manner as in cases of felony," they are now entitled to these costs of attending before the examining magistrate.

(d) *In prosecutions for offences at sea.*

It shall be lawful for the judge of the court of Admiralty, [and for

(a) 7 G. 4, c. 64, s. 23.

Tr. 1828.

(b) *R. v. Johnson et al.*, Ry. & M. 173. *R. v. Oates*, Ry. & M. 175. *R. v. Richards*, MS.

(c) *Supra*.

the judges of the Central Criminal Court,(a) or judges of assize, and commissioners of oyer and terminer,](b) in every case of felony, and in every case of misdemeanor of the denominations hereinbefore enumerated, committed upon the high seas, to order the assistant to the counsel for the affairs of the Admiralty and navy, to pay such costs, [\*189] \*expenses, and compensation to prosecutor and witnesses, in like manner as other courts may order the treasurer of the county to pay the same.

(e) *In other cases.*

Upon an indictment for a nuisance by a steam engine, it is enacted by stat. 1 & 2 G. 4, c. 41, that it shall be lawful for the court, by which judgment ought to be pronounced, in case of conviction upon any such indictment, to award such costs as shall be deemed proper and reasonable to the prosecutor or prosecutors, to be paid by the party or parties so convicted as aforesaid, such award to be made either before or at the time of pronouncing final judgment, as to the court may seem fit.

In prosecutions for misdemeanors under stat. 12 & 13 Vict. c. 76, (*procuring the defilement of women*), the prosecutor and witnesses shall be allowed their expenses, in the same manner as in cases of felony.(c)

In prosecutions for offences under stat. 14 & 15 Vict. c. 19, (namely, misdemeanors in being found at night, armed, with intent to break and enter a dwelling-house, or with implements of house-breaking, or disguised, or in a dwelling-house with intent to commit a felony,—or in inflicting grievous bodily harm with or without weapon,—or for felony, in using chloroform, &c., with intent to commit or assist another in committing a felony,) the court may allow the expenses of the prosecution in all respects as in cases of felony.(d)[1]

(a) 4 & 5 W. 4, c. 36, s. 22.

(c) *Id.* ss. 2, 3.

(b) 7 & 8 Vict. c. 2, s. 1.

(d) 14 & 15 Vict. c. 19, s. 14.

[1] In cases of trifling misdemeanors, the courts have power to allow a compromise, in order to render some satisfaction to the party immediately injured. 2 Bla. Com. 363, 4. This may be done by suffering the defendant to confer, or, as it is commonly called, to *spcak* with the prosecutor; after which, if the latter declares that he is satisfied, the court will only impose a trifling fine for the injury to the public welfare. 4 Bla. Com. 263, 4; Dick. Sess. 155, 6. But this mode of compromise has been censured, when entrusted to inferior magistrates, as allowing the prosecutor to become a witness in the cause from which he is to derive benefit, and encouraging the commencement of criminal prosecutions rather for the sake of private advantage, than the great purposes of public justice. 4 Bla. Com. 364. But this reasoning scarcely appears conclusive, for there are many instances where the legislature have themselves offered rewards to persons, who are the means of convicting the guilty, and who are to derive a most evident advantage from conviction, and one far more certain than the mere chance of recompense from the defendant, and who are still competent witnesses. It is not, therefore, true, "that the rules of evidence are entirely subverted." 4 Bla. Com. 364. And it has been urged, with apparent force, that the justices, whom Mr.

But in prosecutions for felonies and offences against the Queen and government, under the stat. 11 Vict. c. 12, the court shall not order payment to the prosecutor or witnesses of any costs which shall be incurred in preferring or prosecuting the indictment.<sup>(a)</sup>

*(f) Rewards, &c. for apprehending certain offenders.*

By stat. 7 G. 4, c. 64, s. 28, where any person shall appear to any court of oyer and terminer, jail delivery, superior criminal court of a county palatine [or court of quarter sessions, so far as respects offences which the sessions have power to try,]<sup>(b)</sup> to have been active in or towards the apprehension of any person charged with murder,—or with feloniously and maliciously shooting at or attempting to discharge any kind of loaded fire arms at any other person,—or with stabbing, cutting, or poisoning,—or with administering anything to procure the miscarriage of any woman,—or with rape,—or with burglary or felonious house-breaking,—or with robbery on the person,—or with arson,—or with horse stealing, bullock stealing, or sheep stealing,—or with being accessory before the fact to any of the offences aforesaid,—or with receiving any property knowing the same to have been stolen:—every \*such court is hereby authorized and empowered, in any of [\*190] the cases aforesaid, to order the sheriff of the county in which the offence shall have been committed, to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such

<sup>(a)</sup> 14 & 15 Vict. c. 19, s. 10.

<sup>(b)</sup> 14 & 15 Vict. c. 55, s. 8.

Justice Blackstone considers as the most improper to be entrusted with such a power, are, in fact, the best fitted to exercise it with judgment; because they are from their local knowledge, much better acquainted with the character and circumstances of the parties, than the judges, who are acquainted only with the facts produced in evidence. Dick. Sess. 156, in notes; and see 11 East, 46, 48.

It is also not unusual for the court, in order to defray the costs of the prosecution, to intimate an inclination to mitigate the punishment, on the ground of the defendant's paying them or advancing a sum for that purpose. Hawk. b. 2, c. 25, s. 3; Bac. Abr. Indictment, A.; 11 East, 46, 48. And, in conformity to this principle, it has been holden; that where, on an indictment against a master for ill-treating his parish apprentice, the defendant gave a security for the expenses of the proceedings, on an intimation from the court that the imprisonment would, on that account be reduced from twelve months to six, the note was founded on a good consideration, and consequently the transaction was legal. 11 East, 46, 48; Bac. Abr. Indictment, A.; 16 East, 301; 4 Campb. 46. And where by leave of the magistrates, the party referred it to the master to ascertain the costs the prosecutor had incurred, as well as the damages he had sustained by the original injury, and he had accordingly fixed them at sums for which the defendant was attached, it was holden that he could not be discharged at the end of twelve calendar months, though the damages were less than £20, under the 48 Geo. 3, c. 123, because the ground of the imprisonment was regarded as criminal. 2 M. & S. 201, but see 13 East, 190. Since, then, a compromise is thus enforced, its legality can scarcely be disputed.

sum or sums of money as to the court shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expenses and loss of time, in or towards such apprehension.[1]

[1] MASSACHUSETTS.—The governor shall be authorized, whenever in his opinion the public good may require it, to offer and pay a suitable reward, not exceeding one thousand dollars in any one case, to any person who shall, in consequence of such offer, apprehend, bring back, and secure any person who shall be convicted of any capital crime, or other high crime or misdemeanor, or shall be charged therewith, and shall have escaped from any prison in this state; and he may offer and pay a like reward to any person who shall, in consequence of such offer, apprehend and secure any person charged with any such offence, when the person charged cannot be arrested and secured in the common course of proceeding; and the governor may, with the advice of the council, issue his warrant on the treasury for the payment of every such reward. Rev. Stat. of Mass. p. 810, sec. 14.

There shall be allowed and paid to the person who shall inform and prosecute, in the cases hereafter mentioned, the following rewards, that is to say; the sum of sixty dollars for each person convicted and sentenced for the offence of forgery, or making any false and counterfeit certificate, bill or note, in the similitude of any certificate, bill or note, issued as aforesaid, for any debt of this commonwealth, or by or for any bank or banking company, by law established in this state, or for the offence of counterfeiting any gold or silver coin current by law or usage, as aforesaid; and the sum of forty dollars for each person so convicted and sentenced for the offence of possessing, with intent to utter as true, or of knowingly uttering as true, any such false and counterfeit certificate, bill or note, or any such counterfeit coin as aforesaid; which rewards shall be paid out of the public treasury, by the warrant of the governor, with advice of the council, to be granted upon the certificate of the judge or court, before whom such conviction shall be had; and when there shall be two or more informers and prosecutors, for the same offence, the said reward shall be divided between them equally, or in such proportions as the said judge or court shall determine. Rev. Stat. of Mass. p. 731, 732, sec. 19.

A person informing against, and prosecuting another for being engaged in a lottery, is entitled to a reward of fifty dollars; and if the offender is convicted and punished by a fine, the informer, is entitled, at the discretion of the court, to a sum not exceeding one half of the fine actually paid by such offender. Rev. Stat. of Mass. ch. 132, sec. 7.

NEW YORK.—There shall be annually paid out of the treasury to the governor, a sum not exceeding two thousand dollars in the whole, to defray such expenses, as may from time to time, in his opinion, be necessarily incurred, in the apprehension of criminals, and he shall account to the comptroller for the expenditure thereof. Rev. Sta. of New York, (4th ed. Banks, Gould & Co., 1852,) vol. 1, p. 417, ch. 9, sec. 18.

MAINE.—The governor, whenever he shall deem it necessary, is hereby authorized to offer and pay a suitable reward, not exceeding one thousand dollars in any one case, to any person, who shall, in consequence of such offer, apprehend and bring back, and secure any person escaping from any prison in this state, convicted of a capital crime or other high handed offence and misdemeanor, or charged therewith; and also to offer and pay a like reward for apprehending any person, having committed any such crime or offence, where it cannot be done in the ordinary course of proceeding: and the governor, with advice of the council, may draw his warrant on the treasurer for the payment of such reward. Rev. Sta. of Maine, p. 723, sec. 3.

There shall be paid to the person, who shall inform and prosecute in the cases hereinafter mentioned, the following rewards; that is to say: the sum of sixty dollars for each person convicted and sentenced for either of the offences of forging and counterfeiting any public security, bank bill, or note or any coin, as described in the third, fourth and sixteenth sections of this chapter; and the sum of forty dollars for each person convicted and sentenced for either of the offences of possessing with intent to utter, or of knowingly uttering any such public security, bank bill, note or coin as described in the fifth, sixth, seventh, six-

And if any man shall happen to be killed, in endeavoring to apprehend any person who shall be charged with any of the offences hereinbefore last mentioned, it shall be lawful for the court before whom such person shall be tried, to order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married, or to his child or children in case his wife shall be dead, or to his father or mother in case he shall have left neither wife nor child, such sum of money as to the court in its discretion shall seem meet.(a)

(g) *What expenses, &c. allowed.*

Formerly the justices at sessions were to make regulations as to the costs, expenses, and compensations to prosecutors and witnesses, by stat. 7 G. 4, c. 64, s. 26. But now that section is repealed by stat. 14 & 15 Vict. c. 55, s. 4; and by sect. 5, of the latter statute, it shall be lawful for one of Her Majesty's principal secretaries of state, to revoke any regulations made under the provision hereinbefore repealed, and to make regulations as to the rates or scales of payment of all or any costs, expenses, and compensations to be allowed or ordered to be paid, under the said Act or any other Act or this Act, to prosecutors and witnesses and to persons attending the court in obedience to any recognizance or subpoena, in cases of criminal prosecutions,—and (except as herein-after mentioned) to persons who may have been active in or towards the apprehension of persons charged with offences,—and also regulations as to the rates or scales of payment according to which certificates

(a) 7 G. 4, c. 64, s. 30.

teenth and seventeenth sections; which rewards shall be paid out of the treasury of the state, by warrant of the governor, with advice of the council, to be granted on certificate of the judge or court before whom the conviction shall be had; and, where there shall be two or more informers and prosecutors for the same offence, the said reward shall be divided between them equally, or in such proportions as said judge or court shall determine. Rev. Sta. of Maine, p. 676, sec. 21.

MICHIGAN.—All suitable rewards and other sums of money, necessarily paid for advertising and apprehending any convict that may escape from the prison, shall be allowed by the auditor general, and paid out of the state treasury. Rev. Sta. of Mich. ch. 172, sec. 60.

VIRGINIA.—The governor may offer a reward for apprehending and securing any person convicted of an offence or charged therewith, who shall have escaped from prison, or for apprehending and securing any person charged with an offence, who, there is reason to fear, cannot be arrested in the common course of proceeding. But no such reward shall be paid to any sheriff, serjeant or other officer, who may arrest such person by virtue of any process in his hands to be executed. Rev. Code of Va., pp. 105, 106, sec. 7.

If any convict escape from the penitentiary or from the custody of the superintendent, he may offer a reward for the apprehension and re-delivery of such convict, not exceeding five hundred dollars, one half thereof to be paid by the institution and the other by the superintendent, his assistants and the inferior guard, in proportion to the amount of their salaries.

None of said officers shall be entitled to any such reward, or any part of it, unless expressly authorized by the superintendent. Rev. Code of Va., p. 796, secs. 49, 50.



may be granted by the examining magistrate or magistrates in respect of the expenses of any prosecutor, or witness or witnesses for the prosecution, or other person, of attending before such magistrate or magistrates, and of any compensation for trouble and loss of time therein, in any case where any court or judge is empowered under the said stat. 7 G. 4, c. 64, or any other Act or this Act to order payment of such expenses or compensation,—and concerning the forms of such certificates and the details or particulars to be inserted therein of the expenses, trouble, and loss of time to which such certificates relate; and it shall be lawful for one of Her Majesty's principal secretaries of state from time to time to alter any such regulations, \*or make new regulations in relation to any of the matters aforesaid, and such regulations for the time being shall be binding on all courts and persons whomsoever.

*(h) Costs taxed, and order for the same.*

By stat. 14 & 15 Vict. c. 55, s. 6, in all cases where the expenses, &c., of prosecutors or witnesses shall be allowed,—and in all cases where the court shall order payment (except as hereinafter mentioned) to any person, who may appear to have been active in or towards the apprehension of any person charged with any offence, of compensation for expenses, exertions, and loss of time in or towards such apprehension,—the amount of such costs, expenses, or compensation shall be ascertained by the proper officer of the court, according to the regulations made under this Act:—and where the expenses and compensation in respect of attending before any examining magistrate or magistrates are so ordered to be paid, such expenses and compensation shall also be ascertained by the proper officer of the court according to such regulations, but the amount thereof as so ascertained shall not exceed the amount mentioned in the certificate of the examining magistrate or magistrates, and save as aforesaid, the certificate of any examining magistrate or magistrates shall not be conclusive as to the amount to be allowed for expenses of attendance before him or them, or for compensation for trouble or loss of time therein.

By stat. 7 G. 4, c. 64, s. 24, the order for payment to the prosecutor or witness shall be forthwith made out and delivered by the proper officer of the court unto such prosecutor or witness, upon being paid the sum of one shilling for the prosecutor, and sixpence for each of the other persons, and in ordinary cases shall be made on the treasurer of the county, riding, or division in which the offence was or is supposed to have been committed. Or if the offence have been committed in a liberty, franchise, city, or town, not contributing to the payment of the county rate, it shall be paid out of the rate, in the nature of a county

flight, on being pursued, they will become vested in the lord of the franchise; but the property of the party robbed is rather suspended than destroyed, for after having performed his duty in bringing the offender to justice, he will again be at liberty to claim them. 5 Co. 109; Kel. 49; 1 Hale, 541; Hawk. b. 2, c. 23, s. 49; Com. Dig. Justices, A.; Burn, J. Restitution of stolen goods. And if the things stolen have been converted into money, the owner may have the produce, instead of the special chattel; for the case, though not within the words, is clearly within the equity of the statute. Noy, 128; Loft, 88; 1 Hale, 542; Burn, J. Restitution of stolen goods; Williams, J. Felony, VIII. And it seems to be the stronger opinion, though it was formerly a matter of dispute, that if the goods stolen have been openly sold in market overt, the owner may have them restored, even from an innocent purchaser. Kel. 48, 35; 1 Hale, 542, 543, 4; Hawk. b. 2, c. 23, s. 54; 4 Bla. Com. 363; Com. Dig. Justices, A. id. Market, E; Williams, J. Felony, VIII. And though this may seem hard upon the buyer, who has given value for them, it should be remembered, that either he or the original owner must suffer, and that the former has done a meritorious act in bringing an offender to justice; whereas the merit of the latter is only negative, in having been guilty of no unfair transaction. 4 Bla. Com. 363. The maxim, therefore, "*spoliatus debet ante omnia restitui*," is founded on a principle of equity. But this rule cannot be extended, so as to affect any intermediate possessors of the property who have sold it before conviction; and the owner cannot maintain trover against them, even though he gave them notice that it was stolen, while it remained in their possession. 2 T. R. 750; 2 Leach, 586, n. (a). Burn, J. Restitution of stolen goods; Williams, J. Felony, VIII. And the prosecutor can never recover any other things than those stated in the indictment; but any others which might have been stolen, will be forfeited to his majesty. 5 Co. 110; Kel. 49; 1 Hale, 545; Com. Dig. Justices, A.; Burn, J. Restitution of stolen goods.

The justices of jail delivery are, by the statute 21 Hen. 8. c. 11, directed to award a writ of restitution to the owner, as soon as the felon is convicted. But, it is said, that no such writ has, for upwards of two hundred years, been issued; but the constant practice is for the judges or justices, without any precept, to order the goods brought into court to be restored to the parties indicting. Loft, 88; 4 Bla. Com. 363; Williams, J. Felony, VIII. And, after the conviction of the offender, the proprietor may take his goods wherever he can find them, so that it be effected without any breach of the peace, because he satisfied public justice, and is entitled to a writ of restitution, whenever he thinks fit to demand it. 1 Hale, 546; 4 Bla. Com. 363; Williams, J. Felony, VIII. And if the felon be pardoned after conviction, and allowed the benefit of clergy, or even if he be bona fide acquitted, the owner may bring an action against him, in trespass or trover, to recover damages; for the civil right was not merged in the public injury, but only suspended, till the prosecution was concluded. 12 East, 409; Loft, 88; 1 Hale, 546; Bac. Abr. Trespass, E. 2; Trover, D.; 4 Bla. Com. 363; Williams, J. Felony, VIII. But no action lies before prosecution; because if this were allowed, the inducement to punish offenders, would, in a great degree, be removed, and parties would seek their own immediate advantage, rather than the security of the public. 1 Hale, 546, 7; Noy, 82; 4 Bla. Com. 363; Williams, J. Felony, VIII. Nor can the goods be taken again, though the original owner find them, for the same reason applies; and if it is done with intention to compound the offence, it will amount to theft bote, and the party will be punishable by imprisonment and fine. 1 Hale, 546; 4 Bla. Com. 363; Burn, J. Restitution of stolen goods. There is indeed a kind of statutable exception to this rule, by 31 Eliz. c. 12, which provides, that if horses are stolen and sold in market overt, the owner may claim them within six months, and on paying the buyer the price for which he purchased them, may obtain them again, without instituting a prosecution against the offender; (2 Bla. Com. 450, 1; Com. Dig. Market, E.) and this statute, as well as the 2 P. & M. c. 7, contains several regulations as to the sale of horses, in particular in market overt, which if not observed, render the sale wholly inoperative; and the original owner may sue the party who withholds the horse, though he has neglected to prosecute. Id. Ibid. It has been held, that a complaint having been made to a magistrate by A. the owner, that his horse had been stolen by B. without actual proof of its being stolen, an officer, though armed

with a warrant against A. was not justified, under the 31 Eliz. c. 12. s. 4, in taking the horse out of the possession of a bona fide purchaser from B. 2 Stark. C. N. P. 76.

It seems that if goods are restored in consequence of an erroneous conviction, and the judgment be reversed, a restitution was formerly awarded. Cro. Jac. 151; Cro. Eliz. 490.

**NEW YORK.**—When property alleged to have been stolen shall come into the custody of any constable, marshal, sheriff or other person authorized to perform the duties of any such officer, he shall hold the same subject to the order of the officers hereinafter authorized to direct the disposition thereof.

Upon receiving satisfactory proof of the title of any owner of such property, the magistrate who shall take the examination of the person accused of stealing such property, may order the same to be delivered to such owner, on his paying the reasonable and necessary expenses incurred in the preservation of such property, to be certified by such magistrate: which order shall entitle such owner to demand and receive such property.

If stolen property shall come into the custody of any justice of the peace or other magistrate, upon satisfactory proof of the title of any owner thereof, it shall be delivered to him, on his paying the reasonable and necessary expenses incurred in the preservation of such property, to be certified by such magistrate.

If property stolen shall not have been delivered to the owner thereof, the court before which a conviction shall be had for the stealing of such property, may upon proof of the ownership of any person, order the same to be restored to him.

If stolen property shall not be claimed by the owner thereof before the expiration of six months from the time any person shall have been convicted of stealing such property, the magistrate, sheriff, constable or other officer or person having the same in his custody, shall deliver such property to the county superintendents of the poor, on being paid the reasonable and necessary expenses incurred in the preservation thereof, to be appropriated to the use of the poor of such county. Rev. Sta. of New York, vol. 2d. (4th ed., Banks, Gould & Co., 1852,) p. 930, secs. 37, 38, 39, 40, 41.

**MASSACHUSETTS.**—The officer, who shall arrest any person, charged as principal or accessory, in any robbery or larceny, shall secure the property alleged to be stolen, and shall be answerable for the same, and he shall annex a schedule thereof to his return; and upon conviction of the offender, the stolen property shall be restored to the owner. Rev. Sta. of Mass. p. 724, sec. 25.

**PENNSYLVANIA.**—And whereas it is reasonable and just, that restitution of goods stolen by robbers and burglars, or of their value, should be made to the lawful owners, before any forfeiture to the public should take place. That wherever any person or persons shall be convicted of robbery or burglary, such person or persons shall be ordered to restore to the lawful owner or owners the goods and chattels so stolen, or to pay to him, her or them, the full value thereof, or of so much thereof as shall not be restored, and the forfeiture of his, her or their lands and chattels shall only extend to the residue thereof, after such restitution made as aforesaid; and the owner or owners of goods and chattels, stolen as aforesaid, shall have like remedy for restitution by executions, issued by the court, in which the attainders shall be had, as is provided by an act of assembly in the case of conviction of larceny, entitled, "An act for the advancement of justice, and more certain administration thereof."

And whereas persons accused of burglary, robbery or larceny, frequently have stolen goods in their possession, the owners whereof may not be known, and it is reasonable that such goods should be secured for a time, for the benefit of the owners. That when any person shall be accused before a magistrate, upon oath or affirmation, of any of the said crimes, and the said magistrate shall have issued his warrant to apprehend such person or persons, or to search for such goods as have been described on oath or affirmation to have been stolen, if any goods shall be found in the custody or possession of such person or persons, or in the custody or possession of any other person or persons for his, her or their use, and there is probable cause, supported by oath or affirmation, to suspect that other goods which may be discovered on such search are stolen, it shall and may be lawful for the said magistrate to direct the said goods to be seized, and to secure the same in his own custody, unless the person in whose possession the same were found shall give sufficient surety to produce the same

at the time of his or her trial; and the said magistrate shall forthwith cause an inventory to be taken of the said goods, and shall file the same with the clerk of that court in which the accused person is intended to be prosecuted, and shall give public notice in the newspapers, or otherwise, by advertising the same in three or more public places in the city or county where the offence is charged to have been committed, before the time of trial, noting, in such advertisement, the said inventory, the person charged, and time of trial; and if on such trial the accused party shall be acquitted, and no other claimant shall appear, or suit be commenced, then, at the expiration of three months, such goods shall be delivered to the party accused, and he, she or they shall be discharged, and the county be liable to the costs of prosecution; but if he or she be convicted of larceny only, and after restitution made to the owner, and the sentence of the court being fully complied with, shall claim a right in the residue of the said goods, and no other owner shall appear or claim the said goods, or any part of them, that then it shall be lawful, notwithstanding the claim of the said party accused, to detain such goods for the term of nine months, to the end that all persons having any claim thereto may have full opportunity to come, and to the satisfaction of the court, prove their property in them, on which proof the said owner or owners, respectively, shall receive the said goods, or the value thereof, if from their perishable nature, it shall have been found necessary to make sale thereof, upon paying the reasonable charges incurred by the securing the said goods, and establishing their property in the same; but if no such claim shall be brought, and duly supported, then the person so convicted shall be entitled to the remainder of the said goods, or the value thereof, in case the same shall have been sold, agreeably to the original inventory; but if, upon an attainder of burglary or robbery, the court shall, after due inquiry, be of opinion that the said goods were not the property of such burglar or robber, they shall be delivered, together with a certified copy of the said inventory, to the commissioners of the county, who shall indorse a receipt therefor on the original inventory, register the said inventory in a book, and also cause the same to be publicly advertised, giving notice to all persons claiming the said goods to prove their property therein to the said commissioners; and unless such proof shall be made within three months from the date of such advertisement, the said goods shall be publicly sold, and the neat monies arising from such sale shall be paid into the county treasury, for the use of the commonwealth. *Provided always, nevertheless,* That if any claimant shall appear within one year, and prove his or her property in the said goods, to the satisfaction of the commissioners, or, in the case of dispute, shall obtain the verdict of a jury in favor of such claim, the said claimant shall be entitled to recover and receive, from the said commissioners or treasurer, the neat amount of the monies paid as aforesaid into the hands of the said commissioners, or by them paid into the treasury of this commonwealth. *Dunlop's Laws of Penn., pp. 185, 186, secs. 9, 10.*

**MAINE.**—The officer who shall arrest any person, charged as principal or accessory in any larceny, or with buying, receiving or concealing stolen property, shall secure the property alleged to have been stolen, and shall be answerable for the same; and shall annex a schedule thereof to his return; and, upon conviction of the offender, the stolen property shall be returned to the owner. *Rev. Sta. of Maine, p. 672, sec. 14.*

**MISSISSIPPI.**—Any person convicted of larceny to the value of twenty dollars, or upwards, or as accessory thereto, shall restore the goods or chattels so stolen to the rightful owner or owners; or shall pay to him, her, or them, the value of such goods or chattels as shall not be restored.

If any person or persons shall feloniously take, steal, and carry away any goods or chattels under the value of twenty dollars, or shall be accessory thereto, before the fact, he, she, or they, being thereof legally convicted, shall be deemed guilty of petit larceny, and shall restore the goods and chattels so stolen, to the owner or owners thereof, or pay the value thereof to such owner or owners; and shall receive any number of lashes not exceeding thirty-nine. *Hutchinson's Mississippi Code, p. 938, secs. 18, 19.*

**MICHIGAN.**—The officer who shall arrest any person charged as principal or accessory to any robbery or larceny, or with buying, receiving or aiding in the concealment of any money or other property, knowing the same to have been stolen, shall secure the property alleged

[\*193]

\*8. *The record.*

The following is the form of the record when made up :

Warwickshire } Be it remembered that at [*&c.*, *as in the caption of the*  
to wit. } *indictment*, (a) then copy the indictment to the end. Then  
state the arraignment, &c., thus: Afterwards to wit at the same ses-  
sions of the Lady the Queen of oyer and terminer [*or sessions of the*  
*peace*] holden as aforesaid on Friday the — day of —, in the —  
year of the reign aforesaid, the said A. B. being brought to the bar of  
the court here, and the indictment aforesaid being read unto him, and  
being demanded concerning the premises in the said indictment above  
specified whether he is guilty or not guilty thereof, saith that he is not  
guilty thereof, and thereof puts himself upon the country: therefore  
let a jury thereupon here immediately come before the said justices of  
the Lady the Queen, of free and lawful men of the county of Warwick  
aforesaid, by whom the truth of the matter may be the better known,  
and who are not of kin to the said A. B., to recognize upon their oath  
whether the said A. B. be guilty of the [*felony and murder*] in the said  
indictment aforesaid above specified, or not guilty: and the jurors of  
the said jury for this purpose by the sheriff of Warwickshire impanelled  
and returned, to wit G. H., [*&c.*, *stating the names of the jurors*,] being  
called, come, who being elected, tried and sworn to speak the truth of  
and concerning the premises, upon their oath say that the said A. B. is  
guilty of the [*felony and murder*] aforesaid, on him above charged in  
manner aforesaid, as by the indictment aforesaid is above supposed  
against him: [*And upon this it is forthwith demanded of the said A. B. if*  
*he hath or knoweth anything to say, wherefore the said justices here ought not*  
*upon the premises and verdict aforesaid to proceed to judgment and execution*  
*against him; who nothing further saith unless as he before had said.*]  
Whereupon all and singular the premises being seen, and by the said  
justices here fully understood, it is considered by the court here that  
the said A. B. [*be taken to the jail of the said Lady the Queen of the said*  
*county of Warwick, from whence he came, and from thence to the place of*  
*execution, and there be hanged by the neck until he be dead.*]

Where there are two or more counts in the indictment, care must be  
taken in entering the verdict and judgment. Where an indictment  
against the principal and receiver, contained two counts against

[\*194] the principal, one for stealing a bank note, and \*the other for

(a) *Ante*, pp. 76, 77.

to be stolen and hold the same irrepleviable, and shall be answerable for the same, and he  
shall annex a schedule thereof to his return; and upon conviction of the offender the stolen  
property shall be restored to the owner. Rev. Sta. of Mich. pp. 665, 666, sec. 24.

stealing a pocket book, and the receiver was charged with knowingly receiving them; and the principal was found guilty on the second count only, and the receiver found guilty "of the offence aforesaid," this was holden bad, for it was uncertain to which offence the finding referred.(a) So where there were two counts for felony in the indictment, and the jury process was to try whether the prisoner was guilty "of the felony aforesaid," and the verdict was, that he is guilty "of the felony aforesaid;" this was holden bad, for the word "felony" is not *nomen collectivum*.(a)[1]

## SECTION V.

## APPEAL TO THE CRIMINAL APPEAL COURT.[2]

(a) *The court and its judges.*

The establishment of a criminal court of appeal, by stat. 11 & 12

(a) *R. v. Graham*, 1 Leach, 82; 2 Hawk. T. R. 149.  
c. 25, s. 72, n.; and see *R. v. Salmons*, 1 (b) 10 Shaw's J. P. 327.

[1] If the jury, through mistake, or evident partiality, deliver an improper, (1 And. 104. Alley, 12. 2 Hale, 299, 300. 2 Hawk. ch. 47, § 11,) or an informal or insensible verdict, or one that is not responsive to the issue submitted, (2 Murph. 571,) they may be directed by the court to *reconsider* it, and be recommended to make an alteration. Thus where the decision is repugnant, as if they find one alone guilty of a conspiracy, and acquit the other, they will, on explanation that they can not find that one person alone was guilty of a conspiracy, withdraw, and may on reconsideration, find both the defendants guilty. Bro. Abr. Jurors, 7. Bac. Abr. Verdict, (G.) But it is said this has been seldom done in modern times, when the decision is in the defendant's favor. 2 Hawk. ch. 47, §§ 11, 12. 1 Chit. Cr. L. 648.

Where the verdict is so imperfect that no judgment can be given upon it, it will be set aside and a venire *de novo* awarded, in misdemeanors. 1 Chit. Cr. L. 646. 2 M'Cord, 129. 4 Leigh, 686. But it seems doubtful whether this ought to be done in capital cases; (Id. ib. 1 Id. Raym. 141. 2 id. 1585;) and at all events the court may enter a judgment of acquittal. 2 Id. Raym. 1586. Such a discharge, however, by reason of an imperfect verdict, will be no bar to another prosecution for the same felony. 3 P. Wms. 439.

[2] MASSACHUSETTS.—Every person, convicted before a justice of the peace, of any offence in any county except Suffolk, may appeal from the sentence to the court of common pleas, then next to be held in the same county; and such appellant shall be committed, to abide the sentence of the said court, until he shall recognize to the commonwealth, in such reasonable sum, and with such sureties, as the justice shall require, with condition to appear at the court appealed to, and there to prosecute his appeal, and to abide the sentence of the court thereon, and in the mean time to keep the peace, and be of good behavior.

The justice, on such appeal, shall make a copy of the conviction and other proceedings in the case, and transmit the same, together with the recognizance, if any shall be taken, to the clerk of the court appealed to; and the fees of the justice therefor shall be paid from the county treasury, in like manner as other costs in criminal prosecutions are paid.

The appellant shall not be required to advance any fees, upon claiming his appeal, nor in prosecuting the same; but if convicted in the court of common pleas, or if sentenced, for

Vict. c. 78, is the greatest improvement which has perhaps ever been made in the administration of our criminal law, so far as relates to in-

failing to prosecute his appeal, he may be required, as part of his sentence, to pay the whole or any part of the costs of prosecution.

If the appellant shall fail to enter and prosecute his appeal, he shall be defaulted on his recognizance, if any was taken, and the court of common pleas may award sentence against him, for the offence whereof he was convicted, in like manner as if he had been convicted thereof in that court; and if he is not then in custody, process may be issued to bring him into court to receive sentence.

Every person, convicted in the court of common pleas, upon any indictment for a libel, or for a nuisance or a conspiracy, or who shall be convicted of any crime or offence, for which he may be punished by imprisonment in the state prison, or elsewhere, for a term exceeding five years, may appeal therefrom to the supreme judicial court, next to be held for the same county, if such appeal shall be claimed a convenient time before the end of the term at which the conviction is had; and such appellant shall be committed, to abide the sentence of the supreme judicial court, until he shall recognize to the commonwealth, in such reasonable sum, and with such sureties, as the court of common pleas shall order, with condition to appear at the court appealed to, and there to prosecute his appeal, and to abide the sentence of the court thereon, and in the mean time to keep the peace, and be of good behavior.

The clerk of the court of common pleas, upon such appeal, shall make out a copy of the conviction of the appellant, and of the other proceedings in the case, and place the same, together with the recognizance, when any shall be taken, upon the files of the supreme judicial court; and such appeal shall be entered at the next term of the court, or, at the option of the appellant, it may be entered at any session of such court, held by adjournment, if any such session shall be held before the next stated term; provided, that the appellant, at the time of claiming the appeal, shall give notice of his intention so to enter it, to the district attorney, or other prosecuting officer.

The appellant shall not be required to advance any fees, upon claiming his appeal, nor in prosecuting the same; but if he shall be convicted in the supreme judicial court, or if sentence be awarded against him for failing to prosecute his appeal, he may be required, as a part of his sentence, to pay the whole or any part of the costs of prosecution.

If the appellant shall fail to enter and prosecute his appeal, he shall be defaulted on his recognizance, if any was taken, and the supreme judicial court may award sentence against him, for the offence whereof he was convicted, in the same manner as if he had been convicted of such offence in that court; and if he is not then in custody, process may be issued to bring him into court to receive sentence.

Whenever, upon suit brought upon any recognizance to prosecute an appeal, the penalty thereof shall be adjudged to be forfeited, or when, by leave of court, such penalty shall have been paid to the county treasurer, or to the clerk of the court, without a suit, or before judgment shall be given, in the manner provided in the one hundred and thirty-fifth chapter, if, by law, any forfeiture shall accrue to any person, by reason of the offence, of which the appellant was convicted, the court may award to him such sum as he may be entitled to, out of such forfeiture.

The supreme judicial court, and the court of common pleas, may, at the term in which the trial of any indictment shall be had, or within one year thereafter, on the petition or motion in writing of the defendant, grant a new trial, for any cause for which by law a new trial may be granted, or when it shall appear to the court that justice has not been done, and on such terms or conditions as the court shall direct.

Any person, who shall be convicted of an offence before the court of common pleas, being aggrieved by any opinion, direction or judgment of the court, in any matter of law, whether he have a right to appeal therefrom or not, if an appeal be not actually taken, or, having been taken, if it be waived by leave of the court, may allege exceptions to such opinion, direction or judgment; which exceptions, being reduced to writing in a summary mode, and

dictable offences. It gives a defendant the full effect of a writ of error, speedily, and with little expense to either party; and the doubt or diffi-

presented to the court, at a convenient time before the end of the term, and found conformable to the truth of the case, shall be allowed and signed by the presiding justice thereof, and thereupon all further proceedings in the case, in that court, shall be stayed, unless it shall clearly appear to the presiding justice, that such exceptions are frivolous, immaterial, or intended only for delay, and in that case, judgment may be entered, and sentence awarded, in such manner as the court may deem reasonable, notwithstanding the allowance of such exceptions.

If, upon the trial of any person, who shall be convicted in the court of common pleas, or municipal court of the city of Boston, any question of law shall arise, which, in the opinion of the presiding judge, shall be so important or so doubtful, as to require the decision of the supreme judicial court, he shall, if the defendant desire it or consent thereto, report the case, so far as may be necessary to present the question of law arising therein; and thereupon all further proceedings in that court shall be stayed.

Any person, who shall file exceptions, or for whose benefit a report shall be made by the judge, as is provided in the two preceding sections, may recognize to the commonwealth, in such sum as the court shall order, with sufficient sureties, for his personal appearance at the supreme judicial court, next to be held for the same county, and to enter and prosecute his exceptions with effect, and abide the sentence thereon, and in the mean time to keep the peace and be of good behavior.

If such person shall not so recognize, he shall be committed to prison, to await the decision of the supreme judicial court; and in that case, the clerk of the court, in which the conviction was had, shall file a certified copy of the record and proceedings in the case, in the supreme judicial court, and the court shall have cognizance thereof, and consider and decide the cause, in the same manner as they decide questions of law, reserved by one of the justices of that court, and shall render such judgment, and award such sentence, or make such order thereon, as law and justice shall require; and a new trial may be ordered, at the bar of the supreme judicial court, or the cause may be remanded to the court of common pleas, for a new trial there, as the justices of the supreme judicial court shall direct; but the proceedings herein prescribed shall not deprive any party of his writ of error, for any error or defect appearing of record. Rev. Sta. of Mass. ch. 138, secs. 1-14.

Every person convicted before the police court of the city of Boston, of any offence, may appeal therefrom to the municipal court of the city of Boston, and the appeal must be entered at the next term of the municipal court, and be conducted and disposed of, in all respects, like appeals in criminal cases, from justices of the peace to the court of common pleas in other counties. Rev. Sta. of Mass. ch. 87, sec. 8.

Any person, convicted in the court of common pleas, upon indictment for a libel, nuisance or conspiracy, or for any offence, which is or may be punishable by confinement to hard labor, for a term exceeding five years, may appeal therefrom to the supreme judicial court, then next to be held for the same county, in the manner and upon the terms prescribed in the one hundred and thirty-eighth chapter. Rev. Sta. of Mass. ch. 82, sec. 28.

Any person, convicted in the municipal court of the city of Boston, upon indictment for a libel, nuisance or conspiracy, or for any offence which is or may be punishable by confinement to hard labor, for a term exceeding five years, may appeal therefrom to the supreme judicial court for the county of Suffolk, in the same manner that is provided, in the one hundred and thirty-eighth chapter, for appeals by a person convicted in the court of common pleas; and such appeal from the municipal court shall be prosecuted, conducted and determined, in all respects, in the manner provided in the last mentioned chapter, with respect to the said appeals from the court of common pleas. Rev. Sta. of Mass. ch. 86, sec. 10.

Where the proceedings in the court below are not according to the course of the common law, if there be any error, it may be corrected by *certiorari*. *Clark v. Commonwealth*, 4 Pick. 125, and this is the only mode of correcting error in such cases. *Commonwealth v. Ellis*, 11



culty being pointed out by the judge who tried the case, affords the judges of the appeal court the best assurance they can have, that no frivolous objections will be submitted to them.

Mass. 465; *Melvin v. Bridge*, 3 Mass. 305; *Commonwealth v. Blue Hill Turnp.*, 5 Mass. 470. The only object of the writ of *certiorari* in this state is the correction of the errors committed in some cases by inferior tribunals. Howe's Prac. 491.

But the court of errors not having the same special jurisdiction as the court below, cannot, on *certiorari*, render such judgment as ought to have been rendered below, but can only affirm the proceedings if found to be regular, or quash them if the court below has exceeded its jurisdiction, or proceeded in a manner not warranted by the statute or other authority under which it acts. *Commonwealth v. Ellis*, 11 Mass. *supra*. *Commonwealth v. Blue Hill Turnp.*, *supra*.

The writ of *certiorari* is an original writ issuing out of the supreme court, directed to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, in order that the party may have more sure and speedy justice done him. See 1 Chit. Cr. L. 371. The supreme court has power, at common law, to review the proceedings of all inferior tribunals; to pass upon the *jurisdiction* of such tribunals, and to review all *legal decisions* made by them, but not their determinations upon matters of fact; which are conclusive, unless a power of review is given by statute. 6 Wend. 564. See 4 Mass. R. 171. Where a new jurisdiction is created, to proceed according to the course of the common law, it is always implied that a *certiorari* will lie, to remove its proceedings. But where a new special jurisdiction is to decide according to other rules, the implication will not include it. 1 Chit. Cr. L. 374.

A writ of *certiorari* lies to remove all judicial proceedings, except where otherwise directed by the express provision of some particular statute. *Id.* 376. But it does not lie to remove other than judicial acts; therefore it does not lie to remove a mere order of court or warrant of a magistrate. *Id.* *ib.* Cald. 309. Say. 6. See 2 Caines' R. 179. 6 Wend. 564.

A district attorney may remove a criminal case to the supreme court by *certiorari*, as a matter of course and of right. 7 Cowen, 108.

The writ of *certiorari* is frequently used in order the better to consider and determine the validity of indictments and proceedings thereon, and to prevent a partial and insufficient trial; for when the proceedings have been removed, the trial will be either at bar or at *nisi prius*, by a jury of the county out of which the indictment is brought. 1 Chit. Cr. L. 371. And if a fair and impartial trial can not be had in such county, the court will, upon a suggestion entered on the record, order it to be tried in the next adjoining one. *Id.* *ib.* 3 Burr. 1330. So a special jury may be obtained in the supreme court, and more time for the trial may be thus obtained, or it may be brought on more expeditiously than in the inferior court. 5 T. R. 626. On the part of the defendant, too, this writ may frequently be advantageous; as for the purpose of obtaining the judgment of the supreme court as to the validity of the proceedings upon a demurrer; or to enable the defendant to plead a pardon. 1 Chit. Cr. L. 373. And as an inferior court can not, in a criminal case, grant a new trial, upon the merits, but only for irregularity in the formal proceedings, this advantage may be gained by the removal of the proceedings. *Id.* *ib.*

So, if after a verdict against the defendant, the judge entertain doubts as to the nature of the offence, the defendant may be brought up by *habeas corpus* and committed, and the indictment removed into the supreme court by *certiorari*, for the opinion of the court. *Id.* *ib.* But the supreme court has recently decided that it will not hear criminal cases tried at the sessions or oyer and terminer upon a case made for the *advice* of the court; but that such cause must be brought up by *certiorari*. 15 Wend. 159.

Where several defendants are jointly indicted, and the indictment is removed by *certiorari* at the suit of a part of the defendants, whereupon the whole cause is retained for trial on the civil side, if the other defendants will not voluntarily come in and be recognized, &c. they may be brought in on a *capias*. 7 Cowen, 108.

The judges of the court comprise the whole of the fifteen judges of the courts of common law at Westminster,—the justices of the court of

If there be an indictment to be removed, and the party be in custody, it is usual to have a *habeas corpus* to remove the prisoner, and a *certiorari* to remove the record; for, without the latter, the defendant must continue in the same custody. 1 Chit. Cr. L. 386.

The *certiorari* ought regularly to be directed to the judges or magistrates of the inferior court before whom the proceedings were originally taken. Id. 388. 7 Cowen, 103. 9 id. 655. But, in some cases, it may be directed to the proper officer known to have the actual custody of the record. 1 Chit. Cr. L. 388. The writ may be served by delivering it to the clerk of the court below in vacation, who may return it immediately, though it be directed to the court. 7 Cowen, 103.

The proper mode of making the *return* seems to be, for the clerk to indorse on the back of the writ, "the execution of this writ appears in a certain schedule hereunto annexed," and then to give a transcript of the indictment, bill of exceptions and the certificate staying judgment, on a separate paper, annex the writ and return to the transcript, and transmit them together to the supreme court. See 1 Chit. Cr. L. 393.

If the return be defective, it may nevertheless, be amended by leave of the court. Id. ib. See 4 East, 175. If any thing is inserted in it by way of explanation, or otherwise, which was not commanded, it will not vitiate, but may be rejected as surplusage; (2 Salk. 493;) as where the *evidence* was returned by a court of oyer and terminer. 7 Cowen, 103. See form of *certiorari* in criminal cases, 9 Cowen, 655, n. (b.)

The Revised Statutes of Massachusetts (ch. 112,) provide: all writs of *certiorari*, to correct errors in proceedings that are not according to the course of the common law, shall be issued from and returnable to the supreme judicial court, according to the practice heretofore established, and subject to such further regulations, as shall be made, from time to time, by the general rules of the supreme judicial court.

Upon every application for a *certiorari*, and also on the final adjudication, when a *certiorari* is granted, the court may, in their discretion, award costs against any party who shall appear and undertake to maintain or object to the proceeding in question.

No such writ of *certiorari* shall be issued, unless application therefor be made within six years next after the proceeding which is complained of, or within six years after this act shall take effect.

All writs of *audita querela*, writs of error in civil cases, and petitions for writs of *certiorari* shall be indorsed in the same manner as is provided with respect to original writs, and all the regulations concerning the indorsement of original writs, contained in the ninetyeth chapter, shall apply in like manner to the indorsement of writs and petitions mentioned in this section. Rev. Sta. of Mass. ch. 112. sec. 21-24.

The proceedings on an information filed under the Massachusetts Statute, for the purpose of causing a convict in the state prison to be sentenced to additional punishment, cannot be removed by *certiorari*. *Ex parte Cooke*, 15 Pick. Rep. 234.

On a petition for a writ of *certiorari* to quash the record of a conviction, the court will not examine the evidence given at the trial, unless it appears on the record that objections were then taken to its competency. *Stratton v. Com.* 10 Met. 217.

NEW YORK.—In the state of New York, there are, by the existing practice, two modes of appeal in criminal cases; *first*, before judgment upon a bill of exceptions, and *second*, upon a judgment.

The first of these modes of appeal, before judgment upon a bill of exceptions, was unknown to the common law, and was created for the first time by the Revised Statutes. Indeed, before that time, there was no bill of exceptions in a criminal case; the only mode of correcting an error occurring on the trial, being by the reservation of the question by the court in which the trial was had, for the advice of the supreme court. The Revised Statutes gave the right to the defendant, to take exceptions to any decision of the court, in the same cases and manner provided by law in civil cases; and provided that a bill thereof should be

ces and barons, or five of them at least, (of whom the Lord Chief Justice of the court of Queen's Bench, the Lord Chief Justice of the court

of the district attorney of the county immediately to sue out a writ of *certiorari*, returnable in the supreme court, to remove such indictment, with the bill of exceptions and other proceedings thereon, into such court; and the clerk of the court must without delay make a return thereto, containing a transcript of the indictment, bill or exceptions, and the certificate staying judgment.

The district attorney of the county must bring on for argument, as soon as practicable, the return to any *certiorari* so issued by him in cases where judgment on an indictment is stayed. It is also competent for the defendant to notice and bring on for argument such return. Id. 741, sec. 21.

If an attorney has appeared for the defendant in any indictment so removed, by giving notice of his appearance to the district attorney, within ten days after filing the certificate staying proceeding, notice of argument thereon may be served on such attorney, by the district attorney, as in other cases. If no attorney has so appeared, such notice must be served personally on the defendant if he is in custody; and if he is not in custody it may be served by affixing the same in the office of a clerk of the supreme court.

No assignment of errors or joinder in error is necessary upon any *certiorari* so issued; but the court is to proceed on the return thereto and render judgment upon the record before them.

If the supreme court decides against the exceptions taken, it must either proceed to render judgment and pronounce sentence against the defendant, or remit the proceedings to the court in which the trial was had, with directions to proceed and render judgment.

If a new trial be ordered by the supreme court, as above provided, the same is to be had in the court in which the indictment was first tried.

If the defendant has been let to bail, after the staying of any judgment as above provided, and neglects to appear at any new trial that may have been ordered, or to appear and receive judgment, the court authorized to render such judgment, or in which such new trial was directed, may cause such defendant to be arrested, in the same manner as upon the finding of an indictment, and may forfeit his recognizance and direct the same to be prosecuted.

Whenever any indictment is removed into the supreme court, or any person indicted is brought into that court by *habeas corpus*, the justices thereof may remand such person and such indictment to the proper county, where such indictment may be tried; and the court of oyer and terminer or the court of sessions to which any indictment is so remanded must proceed thereon in the same manner as if such indictment had not been removed into the supreme court. 2 R. S. 471, §§ 22 to 28; 7 Cowen, 133.

A writ of *certiorari* to remove into the supreme court a conviction had before a court of special sessions may be allowed on the application of the party convicted, by any justice of the supreme court, or by any officer authorized to perform the duties of such justice in vacation.

The party desiring such *certiorari*, or some one in his behalf, shall apply for the same within ten days after such conviction shall have been had, and shall make an affidavit specifying the supposed errors in the proceedings or judgment complained of.

If the officer to whom application for such *certiorari* shall be made shall be satisfied that any error has been committed in the proceedings or the judgment, he shall indorse upon the writ his allowance thereof, and shall certify the affidavit upon which the *certiorari* was allowed. But when the defendant shall have been tried by a jury, no *certiorari* shall be allowed upon the ground that the verdict of such jury was against evidence. See 5 Wend. 530; 12 id. 347.

The said writ and original affidavit shall be delivered to the magistrates, or one of them, before whom the conviction was had, within ten days after such allowance.

The magistrates to whom the *certiorari* shall be delivered, shall make a special return to

of common pleas, and the Lord Chief Baron of the court of exchequer, or one of such chiefs at least, shall be part,) being met in the exchequer chamber or other convenient place.”(a)

(a) 11 & 12 Vict. c. 78, s. 3.

all the matters specified in the affidavit accompanying the writ, and shall cause such writ, affidavit and return to be filed in the office of one of the clerks of the supreme court, within twenty days after the service of the said writ.

The supreme court shall have the like power to compel the making of such return, and to require the same to be amended and perfected, as in cases of *mandamus*.

A certified copy of every such *certiorari*, affidavit and return shall be served by the party prosecuting the writ, upon the attorney general, with at least four days' notice of the argument thereof.

It shall not be necessary for the party convicted to appear in the supreme court upon the prosecution of such *certiorari*; nor shall any assignment of errors or joinder in error be necessary; but the supreme court shall proceed to hear the parties, and give judgment on the return to such writ.

If, at the time of his conviction, any defendant shall notify the magistrates before whom the same shall have been had, that he intends to remove such conviction by writ of *certiorari*, and shall offer to become bound in a recognizance, with satisfactory sureties, to appear at the next sessions of the peace to be held in the same county; and to abide the judgment or order of that court in the premises, it shall be the duty of such magistrates to take such recognizance, and thereupon to suspend the execution of any sentence upon such conviction. But such sentence shall be pronounced and entered in the minutes of the proceedings.

If the party convicted shall have been committed to prison in pursuance of his sentence, upon becoming bound with a condition as provided in the last section, with such sureties as shall be approved by the officer allowing the writ of *certiorari*, he shall be entitled to be discharged from such imprisonment; and the certificate of such officer stating the fact, and ordering the jailer to discharge such prisoner, shall be a sufficient warrant for his discharge.

The magistrates or officer, by whom any recognizance under either of the two last sections shall be taken, shall immediately cause the same to be filed with the clerk of the county.

The court of sessions, in which the party so convicted and recognized, shall be bound to appear, has power to continue such recognizance, or to require a new recognizance with further or other sureties, until the decision of the supreme court shall be had in the premises; and in default of compliance with any such requisition, the said court of sessions may commit the party so convicted to close custody. 2 R. S. pt. 4, ch. 2, tit. 3, art. 4.

The supreme court, it seems, is restricted from reversing the conviction on the ground that the verdict is against the weight of evidence. But it may examine any other errors in the proceedings and judgment, which appear on the face of the return. *Pulling v. The People*, 8 Barb. 384. If the conviction be reversed, and the defendant be in prison by virtue thereof, the supreme court shall award a writ of supersedeas for his discharge. If the defendant shall have been let to bail, as above provided, the judgment of the supreme court, whether the conviction be reversed or affirmed, shall be remitted to the court of sessions of the proper county, to be by that court carried into effect. 2 R. S. 719, § 54.

Upon such judgment being received, the court of sessions, if the conviction be reversed, shall discharge the defendant; if the conviction be affirmed and the defendant shall have been sentenced by the court of special sessions, such court of sessions shall order that such sentence be executed; and if the defendant shall have been let out of prison as herein provided, he shall be remanded to such prison for the remainder of the term for which he was sentenced.

If the conviction be affirmed, and the defendant shall not have been sentenced, the court of sessions shall proceed to sentence the defendant upon such conviction, in the same

manner and with the like effect as if such conviction had been had in such court of sessions.

If it shall appear to the supreme court that the person prosecuting such *certiorari* has unreasonably delayed to notice or bring on for argument the return to such writ, such court may enter a rule to quash the *certiorari*; and upon the same being certified to the court of sessions in which the person prosecuting such writ shall be bound to appear, such court shall proceed thereon, in the same manner as if the judgment of the court of special sessions had been affirmed by the supreme court. Ibid. §§ 55, 56, 57.

A court of special sessions before whom a conviction is had, may proceed and cause the judgment to be executed, notwithstanding notice of an intention to remove the conviction, and the entering into a recognizance by the defendant, if a *certiorari* is not actually made out. 5 Wend. 110.

The proceedings of a court of special sessions will not be reversed, on *certiorari*, for the errors of the magistrate before whom the complaint was made. Id. 530.

On *certiorari* the supreme court cannot pass upon the question whether the finding by the jury before a court of special sessions was against or without evidence; and therefore, though the facts of the case be returned, they will not look into them to see whether or not the jury erred. Id. ib; 12 id. 347.

Any person tried and sentenced by a court of special sessions in New York, without having demanded such trial, may appeal to the court of general sessions. But such appeal must be made at the time sentence is pronounced; and thereupon such conviction will be void. The court must enter such appeal in its minutes; and proceed in the same manner as if no such trial had been had, to take a recognizance from the accused, with sufficient surety, to appear at the general sessions. Or in default of his giving such recognizance, the court must commit him to prison; (See form of commitment, Barb. Cr. Law, Append.) and take the same measures to insure the attendance of the witnesses in behalf of the prosecution, at such court of general sessions, as in other cases; that is, by requiring them to enter into recognizances.

The court of general sessions is to proceed, in every such case, by indictment and other proceedings, in the same manner as if no such trial or conviction had been had before the special sessions.

MAINE.—Any person, convicted of an offence in the district court, may allege exceptions to any opinion, direction or judgment of the said court, and thereupon such proceedings shall be had in said court, and also in the supreme judicial court, as are prescribed in the nineteenth section, of the ninety-seventh chapter, establishing the said district court.

In criminal trials in the supreme judicial court, any person convicted of any offence tried before any one justice of said court, may, in the manner mentioned in the preceding section, allege exceptions to any opinion, direction or judgment of such justice, to be allowed and signed by him; or any questions of law, which may be so reserved on exceptions, as above stated, may be reserved on a report signed by such justice, who may require such defendant to recognize with sufficient sureties to appear at the next term of said court, and abide the judgment which the full court shall render in the cause; or commit him, on his neglecting so to recognize. Rev. Stat. of Maine, p. 721, secs. 40, 41.

Any person, aggrieved at the sentence of any justice of the peace, or judge of a municipal or police court, may appeal therefrom to the next district court, to be holden in the same county; and the justice or judge shall grant the appeal, and order him to recognize in a reasonable sum, not less than twenty dollars, with sufficient sureties for his appearance, and for prosecuting his appeal; and he shall stand committed till the order is complied with.

He shall be held to produce a copy of the whole process, and of all writings filed before the justice, at the district court. Rev. Stat. of Maine, pp. 710, 711, secs. 8, 9.

All writs of *certiorari*, to correct errors in proceedings, that are not according to the course of the common law, shall be issued from the supreme judicial court, according to the practice heretofore established, and subject to such further regulations, as shall be made from time [to time] by the supreme judicial court.

Upon every application for a *certiorari*, and also on the final adjudication, when a *certio-*

*rari* is granted, the court may, in their discretion, award costs against any party who shall appear and undertake to maintain or object to the proceeding in question.

No such application for a writ of *certiorari* shall be sustained, unless made therefor within six years next after the proceeding which is so complained of, or within six years after this chapter shall take effect; provided, that the saving clause in the tenth section of this chapter shall apply to this section also. Rev. Stat. of Maine, pp. 606, 607; secs. 11, 12, 13.

MISSISSIPPI.—*Bill of Exceptions in Civil or Criminal Case.*—If in the trial of any cause in any circuit court, either the plaintiff or defendant shall think himself or herself aggrieved by the charge, direction, or decision of the judge, the party so considering himself or herself aggrieved, may in person, or by his or her counsel, tender to the judge giving such charge, direction, or decision, a bill of exceptions to his opinion, stating therein the matters of law wherein he is supposed to err, and the judge shall be bound to sign and seal the same, and the bill of exceptions so signed and sealed, shall be made and considered a part of the record in the cause; and in case the judge shall refuse to sign and seal a bill of exceptions, so tendered, if the facts therein be duly stated, he shall be deemed guilty of a high misdemeanor in office.

In the prosecution of any person or persons for any crime or misdemeanor, in any court of law of this state, it shall be the duty of the judge or justices, before whom such prosecution is pending, to sign and seal any bill of exceptions tendered to the court, during the progress thereof: *Provided*, The truth of the case be fairly stated in such bill of exceptions. And thereupon, the said exceptions shall, by the clerk of the said court, be entered in the record of such prosecution, and become, to all intents and purposes, a part thereof. Hutchinson's Mississippi Code, p. 880, secs. 145, 146.

It shall and may be lawful for all persons who feel themselves aggrieved by the judgment of the board of police of any county, to appeal by bills of exception or *certiorari* to the circuit court of his county; which appeal shall be taken during the term of the board at which judgment is entered, or at the next succeeding regular term thereof, and not after.

In cases when appeals are prosecuted in the circuit courts, the president of the board of police shall defend the same; and all expenses of money paid by him, shall be repaid by the proper county, by order of said board of police. Hutchinson's Mississippi Code, p. 712, secs. 45, 46.

MICHIGAN.—Any person who shall be convicted of any offence before any court of record, considering himself aggrieved by any opinion, direction or judgment of the court, in any matter of law, may allege exceptions to such opinion, direction or judgment, which exceptions being reduced to writing in a summary mode, and presented to the judge before the end of the term, and found conformable to the truth of the case, shall be allowed and signed by the judge.

Upon the signing of such exceptions, all further proceedings in that court shall be stayed, unless it shall clearly appear to the judge, that such exceptions are frivolous, immaterial, or intended only for delay, and in that case, judgment may be entered, and sentence awarded in such manner as the court shall deem reasonable, notwithstanding the allowance of such exceptions.

If upon the trial upon indictment of any person who shall be convicted in any court of record, any question of law shall arise, which, in the opinion of the judge, shall be so important or doubtful, as to require the opinion of the supreme court, he may, if the defendant desires it or consents thereto, report the case so far as may be necessary to present the question of law arising thereon, and transmit the same with all convenient speed to the chief justice, or one of the associate justices of the supreme court, and thereupon all further proceedings in such court shall be stayed.

Any person who shall file exceptions, or for whose benefit a report shall be made by the judges, as is provided in the preceding sections, may, if the offence be bailable, recognize to the people of this state, in such sum as the court shall order, with sufficient sureties for his appearance at the next term of such court, and to prosecute his exceptions to effect in the supreme court, if exceptions are alleged as aforesaid, and to abide the further judgment or

manner and with the like effect as if such conviction had been had in such court of sessions.

If it shall appear to the supreme court that the person prosecuting such *certiorari* has unreasonably delayed to notice or bring on for argument the return to such writ, such court may enter a rule to quash the *certiorari*; and upon the same being certified to the court of sessions in which the person prosecuting such writ shall be bound to appear, such court shall proceed thereon, in the same manner as if the judgment of the court of special sessions had been affirmed by the supreme court. *Ibid.* §§ 55, 56, 57.

A court of special sessions before whom a conviction is had, may proceed and cause their judgment to be executed, notwithstanding notice of an intention to remove the conviction, and the entering into a recognizance by the defendant, if a *certiorari* is not actually sued out. 5 Wend. 110.

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Any person tried and sentenced by a court of special sessions in New York, without having demanded such trial, may appeal to the court of general sessions. But such appeal must be made at the time sentence is pronounced; and thereupon such conviction will be void. The court must enter such appeal in its minutes; and proceed in the same manner as if no such trial had been had, to take a recognizance from the accused, with sufficient surety, to appear at the general sessions. Or in default of his giving such recognizance, the court must commit him to prison; (See form of commitment, Barb. Cr. Law, Append.) and take the same measures to insure the attendance of the witnesses in behalf of the prosecution, at such court of general sessions, as in other cases; that is, by requiring them to enter into recognizances.

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No such application for a writ of *certiorari* shall be sustained, unless made therefor within six years next after the proceeding which is so complained of, or within six years after this chapter shall take effect; provided, that the saving clause in the tenth section of this chapter shall apply to this section also. Rev. Stat. of Maine, pp. 606, 607; secs. 11, 12, 13.

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In the prosecution of any person or persons for any crime or misdemeanor, in any court of law of this state, it shall be the duty of the judge or justices, before whom such prosecution is pending, to sign and seal any bill of exceptions tendered to the court, during the progress thereof: *Provided*, The truth of the case be fairly stated in such bill of exceptions. And thereupon, the said exceptions shall, by the clerk of the said court, be entered in the record of such prosecution, and become, to all intents and purposes, a part thereof. Hutchinson's Mississippi Code, p. 880, secs. 145, 146.

It shall and may be lawful for all persons who feel themselves aggrieved by the judgment of the board of police of any county, to appeal by bills of exception or *certiorari* to the circuit court of his county; which appeal shall be taken during the term of the board at which judgment is entered, or at the next succeeding regular term thereof, and not after.

In cases when appeals are prosecuted in the circuit courts, the president of the board of police shall defend the same; and all expenses of money paid by him, shall be repaid by the proper county, by order of said board of police. Hutchinson's Mississippi Code, p. 712, secs. 45, 46.

MICHIGAN.—Any person who shall be convicted of any offence before any court of record, considering himself aggrieved by any opinion, direction or judgment of the court, in any matter of law, may allege exceptions to such opinion, direction or judgment, which exceptions being reduced to writing in a summary mode, and presented to the judge before the end of the term, and found conformable to the truth of the case, shall be allowed and signed by the judge.

Upon the signing of such exceptions, all further proceedings in that court shall be stayed, unless it shall clearly appear to the judge, that such exceptions are frivolous, immaterial, or intended only for delay, and in that case, judgment may be entered, and sentence awarded in such manner as the court shall deem reasonable, notwithstanding the allowance of such exceptions.

If upon the trial upon indictment of any person who shall be convicted in any court of record, any question of law shall arise, which, in the opinion of the judge, shall be so important or doubtful, as to require the opinion of the supreme court, he may, if the defendant desires it or consents thereto, report the case so far as may be necessary to present the question of law arising thereon, and transmit the same with all convenient speed to the chief justice, or one of the associate justices of the supreme court, and thereupon all further proceedings in such court shall be stayed.

Any person who shall file exceptions, or for whose benefit a report shall be made by the judges, as is provided in the preceding sections, may, if the offence be bailable, recognize to the people of this state, in such sum as the court shall order, with sufficient sureties for his appearance at the next term of such court, and to prosecute his exceptions to effect in the supreme court, if exceptions are alleged as aforesaid, and to abide the further judgment or



order of the court in the premises, in which such trial was had, and in the mean time to keep the peace and be of good behavior.

If such person shall not so recognize, he shall be committed to prison, to await the decision of the supreme court; and in that case the clerk of the court in which the conviction was had, shall file a certified copy of the record and proceedings in the case, in the supreme court; and such court shall have jurisdiction to hear and determine the questions of law arising on such exceptions or report; and shall certify their determination to the court in which the trial was had, together with directions as to a new trial, or such other proceedings as right and justice shall require; but the proceedings herein prescribed shall not deprive any party of his writ of error, for any error or defect appearing of record.

The court in which the party so convicted and recognized shall be bound to appear as aforesaid, shall have power to continue such recognizance, or require a new recognizance, with further or other sureties until the decision of the supreme court shall be had in the premises, and in default of compliance with any such requisition, such court may commit the party so convicted to close custody. Rev. Sta. of Michigan, pp. 703, 703, secs. 2 to 7, inclusive.

A person convicted of an offence by a justice of the peace may appeal from the judgment of such justice of the peace to the circuit court; provided said person shall enter into a recognizance with one or more sufficient sureties conditioned to appear before said court and abide the judgment of the court therein. And the justice from whose judgment an appeal is taken, shall make a special return of the proceedings had before said justice; and shall cause the warrant and return, together with the recognizance or recognizances to be filed in said circuit court on or before the first day of the circuit court next to be holden for said county, and the complainant and witnesses may also be required to enter into recognizances with or without sureties, in the discretion of the court, to appear at said circuit court at the time last aforesaid, and to abide the order of the court therein. Ibid. 419.

VERMONT.—Every question of law, decided by the county court, arising on demurrer, or upon a trial by jury, in a prosecution by indictment or information for any crime or misdemeanor, may, after verdict of guilty is returned, be allowed and placed upon the record, if the court, upon consideration of the difficulty and importance of such question, shall so direct; and not otherwise; and the same shall thereupon pass to the supreme court for a final decision, and judgment, sentence and execution shall be thereupon respited and stayed.

Exceptions to the decision of the county court, upon any motion in arrest of judgment made in a prosecution by indictment or information, may be allowed and placed upon the record, if such court, upon consideration of the difficulty and importance of the question, shall so direct, and not otherwise; and the same shall thereupon pass to the supreme court for a final decision; and judgment, sentence and execution shall thereupon be respited and stayed.

If, on inspection of the record in any cause, the supreme court shall be of opinion that judgment ought to be rendered upon the verdict, such court shall proceed to render judgment and sentence thereon, according to law, and cause execution thereof to be done; otherwise the cause shall be removed to the county court for trial, or judgment of acquittal shall be rendered by the supreme court, as law and justice may require.

No writ of error shall be allowed in a criminal cause, prosecuted by indictment or information. Rev. Sta. of Vermont, pp. 228, 229, secs. 72 to 75, inclusive.

The supreme court shall have exclusive jurisdiction of all such petitions, not triable by jury, as may by law be brought before such court, and shall have power to issue and determine all writs of error, certiorari, mandamus, prohibition and quo warranto, and all other writs and processes to courts of inferior jurisdiction, to corporations and individuals, that shall be necessary to the furtherance of justice and the regular execution of the laws, and shall have power to try and determine all such questions of law as shall be removed from the county court, agreeably to the provisions of this chapter. Rev. Sta. of Vermont, pp. 219, 220, sec. 5.

VIRGINIA.—A party, in a criminal case or proceeding for contempt, for whom a writ of error lies to a higher court, may except to an opinion of the court and tender a bill of excep-

tions, which, (if the truth of the case be fairly stated therein,) the judge, judges or justices, or the greater part of those present, shall sign; and it shall be a part of the record of the case. This section shall not be construed to authorize a bill of exceptions to an opinion of an examining court. Rev. Code of Va., p. 779, sec. 1.

An appeal may be taken, in Virginia, from the judgment of a conservator of the peace, to the court of the county or corporation. Rev. Code of Va., of 1849, tit. 55, ch. 201.

In the case of a negro convicted of a misdemeanor, by a justice, there may be an appeal from the decision to the county or corporation court, by the negro, or if he be a slave, by his owner. Such negro shall, unless let to bail, be committed by the justice to jail until the next term of such court, and the witnesses shall also be recognized to appear then.

Every such appeal shall be tried without pleadings in writing, and without a continuance, except for good cause; the court shall hear all the evidence produced on either side, and give such judgment as seems to it proper, and enforce the execution thereof. Rev. Code of Va., p. 788, secs. 15. 16.

WISCONSIN.—Every person convicted before a justice of the peace of any offence, may appeal from the sentence to the circuit court then next to be held in the same county, and such appellant shall be committed to abide the sentence of said justice until he shall recognize to the state of Wisconsin in such reasonable sum with such sureties as said justice shall require, with condition to appear at the court appealed to, and there to prosecute his appeal and to abide the sentence of the court thereon, and in the mean time to keep the peace and be of good behavior.

The justice, on such appeal, shall make a copy of the conviction and other proceedings in the case, and transmit the same, together with the recognizance, if any shall be taken, to the clerk of the court appealed to; and the fees of the justice therefor shall be paid from the county treasury in like manner as other costs in criminal prosecutions are paid.

The appellant shall not be required to advance any fees in claiming his appeal, nor in prosecuting the same; but if convicted in the circuit court, or if sentenced for failing to prosecute his appeal, he may be required, as part of his sentence, to pay the whole or any part of the costs of prosecution.

If the appellant shall fail to enter and prosecute his appeal, he shall be defaulted on his recognizance, if any was taken, and the circuit court may award sentence against him for the offence whereof he was convicted, in like manner as if he had been convicted thereof in that court. And if he is not then in custody, process may be issued to bring him into court to receive sentence.

Whenever, upon suit brought upon any recognizance to prosecute an appeal, the penalty thereof shall be adjudged to be forfeited, or when by leave of the court such penalty shall have been paid to the county treasurer or to the clerk of the court, without a suit or before judgment shall be given in manner by law provided, if by law any forfeiture shall accrue to any person by reason of the offence of which the appellant was convicted, the court may award to him such sum as he may be entitled to out of such forfeiture.

The circuit court may, at the term in which the trial of any indictment shall be had, or within one year thereafter, or the supreme court within one year thereafter, on the petition or motion in writing of the defendant, grant a new trial for any cause for which by law a new trial may be granted, or when it shall appear to the court that justice has not been done, and on such terms or conditions as the court may direct.

Any person who shall be convicted of an offence before the circuit court, being aggrieved by any opinion, direction or judgment of the court in any matter of law, may allege exceptions to such opinion, direction or judgment, which exceptions being reduced to writing in a summary mode, and presented to the court any time before the end of the term, and found conformable to the truth of the case, shall be allowed and signed by the judge, and thereupon all further proceedings in that court shall be stayed, unless it shall clearly appear to the judge that such exceptions are frivolous, immaterial or intended only for delay; and in that case judgment may be entered and sentence awarded in such manner as the judge may deem reasonable, notwithstanding the allowance of such exceptions.

If upon the trial of any person who shall be convicted in said circuit court, any question

of law shall arise, which in the opinion of the judge shall be so important or so doubtful as to require the decision of the supreme court, he shall, if the defendant desire it or consent thereto, report the case so far as may be necessary to present the question of law arising therein, and thereupon all proceeding in that court shall be stayed.

Any person not being accused with an offence punishable with death, who shall file exceptions, or for whose benefit a report shall be made by the judge, as is provided in the two preceding sections, may recognize to the state of Wisconsin in such sum as the judge shall order, with sufficient sureties for his personal appearance at the supreme court at the next term thereof, and to enter and prosecute his exceptions with effect, and abide the sentence thereon, and in the mean time keep the peace and be of good behavior.

If any person, so filing exceptions, or desiring a report to be made by the judge, shall not so recognize, he shall be committed to prison to await the decision of the supreme court; and in that case, the clerk of the court, in which the conviction was had, shall file a certified copy of the record and proceedings in the case in the supreme court, and the court shall have cognizance thereof and consider and decide the questions of law, and shall render such judgment, and award such sentence, or make such order thereon as law and justice shall require; and if a new trial is ordered, the cause shall be remanded to said circuit court for such new trial, but the proceedings here prescribed shall not deprive any party of his writ of error for any error or defect appearing of record. *Rev. Sts. of Wis.*, pp. 728, 729, secs. 1 to 10, inclusive.

IOWA.—On the trial of an indictment exceptions may be taken by the defendant or prosecuting attorney to a decision of the court upon matters of law in any of the following cases:

FIRST.—In disallowing a challenge to the panel of the jury, or to an individual juror for a general disqualification or for actual or implied bias.

SECOND.—In admitting or rejecting witnesses or testimony, or in deciding any question of law not a matter of discretion, or in charging or instructing the jury upon the law on the trial of the issue.

A bill of exceptions must be settled and signed by the judge who tried the cause and filed with the clerk.

The bill of exceptions must be settled at the trial unless the court otherwise direct. If no such direction be given the point of exceptions must be particularly stated in writing and delivered to the court and shall immediately be corrected or added to until it is made conformable to the truth.

The bill of exceptions must contain so much of the evidence only as is necessary to present the question of law upon which the exceptions were taken. *Code of Iowa*, pp. 420, 421, ch. 179, secs. 3046 to 3049, inclusive.

TENNESSEE.—All such criminal matters as can be brought by *certiorari* into the court of King's bench in England, from inferior jurisdictions, may, by that process, be brought into the circuit court of Tennessee, except such cases as are prohibited by statute. *Bob v. State*, 2 Yerger, 173. A criminal case may be removed from a justice of the peace into the circuit court, by *certiorari*. *Kendrick v. State*, Cooke, 474.

MARYLAND.—In Maryland, the attorney-general may direct a writ of *certiorari* to the county court to remove a prosecution for murder. *State v. Judges, &c.*, 3 Har. & M'Hea 115.

NORTH CAROLINA.—In North Carolina, habeas corpus, and *certiorari*, were issued to remove the prisoner and the record of her conviction and sentence by the county court, in the case of a slave convicted and sentenced to be executed for an offence not capital; and the sentence was reversed, and the prisoner remanded to the county court "to receive such judgment as the laws and constitution of the state will warrant." *State v. Sue, Cameron & Norwood*, 54. Refusal of an appeal when the prisoner is entitled to it and prays for it, is cause for bringing up the case by *certiorari*. *State v. Washington*, 2 Murph. 100.

GEORGIA.—The writ of *certiorari* lies to remove the proceedings of three justices in Georgia, in the trial of a party accused of inveighling a negro. *Ex parte George*, Charlt. Rep. 80.

ALABAMA.—In Alabama, the supreme court, will not, under the statute of 1820, issue a

(b) *Appeal in what cases.*

By stat. 11 & 12 Vict. c. 78, s. 1, "when any person shall have been convicted of any treason, felony, or misdemeanor, before any court of oyer and terminer or jail delivery, or court of quarter sessions, the judge or commissioner or justices of the peace before whom the case shall have been tried, may, in his or their discretion, reserve any question of law, which shall have arisen on the trial, for the consideration \*of the justices of either bench and barons of the [\*195] exchequer;—and thereupon shall have authority to respite execution of the judgment on such conviction or postpone the judgment until such question shall have been considered and decided, as he or they may think fit;—and in either case the court, in its discretion, shall commit the person convicted to prison, or shall take a recognizance of bail, with one or two sufficient sureties, and in such sum as the court shall think fit, conditioned to appear at such time or times as the court shall direct, and receive judgment, or to render himself in execution, as the case may be." Although justices of the peace are alone mentioned here with reference to a court of quarter sessions, yet it has been holden that a recorder at a borough sessions may reserve a question for the opinion of the judges of this appeal court.(a)

Under this section, the judge, justices, or recorder may reserve "any question of law, which shall have arisen upon the trial;" even a ques-

(a) *R. v. Masters*, 2 Car. & K. 930.

*certiorari* to bring up parts of the record which do not relate to the questions of law reserved for their opinion. And the defendant ought not to assign errors in the record. *State v. Shelton*, 3 Stew. 343. It is always correct to insert a special clause in a writ of *certiorari* to a criminal court directing it to operate as a *superseedeas*, and if necessary, to also direct a special writ of *superseedeas* to the sheriff to delay execution until the case is heard and determined. *John v. The State*, 1 Ala. Rep. 95.

OHIO.—In Ohio, a *certiorari* will not lie in a criminal case. *Winn v. The State*, 10 Ohio, 345.

NEW JERSEY.—A *certiorari* in a criminal case, may be allowed by a single judge at chambers. *State v. Morris Canal, &c.*, 1 Green, 192. *Anon.* 4 Haalt. 2. Indictments found at oyer and terminer, may be brought by *certiorari* before the supreme court sitting in bank. *State v. Gibbons*, 1 South. 40; *Nichols v. State*, 2 South. 539. The return to the writ must be signed by the justice of the supreme court who held the session of oyer and terminer, and must contain the record of the whole proceedings against the defendant and not merely the original indictment and papers. *State v. Gibbons*, 1 South. 40. When the judgment or order of the court is made in such a case the indictment sent up with the writ will be returned to the files of the court of oyer and terminer. *State v. Dayton*, 1 South. 57. The record is not sent up with the writ, but a transcript only. *Nicholls v. State*, 2 South. 542. See form of record to be returned with the writ. *State v. Gustin*, 2 South. 746.

PENNSYLVANIA.—In Pennsylvania, the defendant must show cause before he can obtain a *certiorari*. *Pennsylvania v. Kirkpatrick*, Addis. 197. But when a removal of a criminal case is necessary for the due administration of justice, an allowance of the writ, by one of the judges of the supreme court, is grantable to the defendant of right. *Com. v. M'Ginnis*, 2 Whart. 117.

tion upon the form of the indictment.(a) So, a question which at the trial was made the subject of a motion in arrest of judgment, may be reserved.(b) But the court, under this Act, have no authority to review the judgment given by any judge, justices, or recorder upon demurrer;(c) indeed it is now declared, by a rule of this court, "that no case be heard upon any demurrer to the pleadings."(d)

(c) *Case.*

In order to obtain the opinion of the court of appeal "the judge or commissioner or court of quarter sessions shall state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the said justices and barons."(e)

The case must briefly state the question or questions of law reserved, and such facts only as raise the question or questions submitted; if the question turn upon the indictment, or upon any count thereof, then the case must set forth the indictment, or the particular count. It must state, also, whether judgment on the conviction was passed or postponed, or the execution of the judgment respited, and whether the person convicted be in prison or has been discharged on recognizance of bail to appear and receive judgment, or to render himself in execution.(g)

The original case, signed by the judge, or commissioner, or chairman of sessions, and seventeen copies of the same, one for each judge, and one for each party, shall be delivered to the clerk of the [\*196] court at the exchequer chamber, Westminster, \*at least four days before the day appointed for the sitting of the court; and the fee thereon, payable to the clerks of the said judges, shall not exceed the fee payable on demurrer or other paper books [2s.] as contained in the table of fees allowed and sanctioned by the judges, pursuant to stat 1 Vict. c. 80.(h)

Also, when any case intended to be argued by counsel or by the parties, notice thereof must be given to the clerk of the court, at least two days previously to the sitting of the court.(i)

(d) *Hearing and judgment.*

Upon the case being thus transmitted, "the said justices and barons shall have full power and authority to hear and finally determine the

(a) *Vide infra*; and see *R. v. Webb*, 2 Car. & K. 933; *R. v. Martin*, Id. 950.

(b) *R. v. Martin*, 2 Car. & K. 950.

(c) *R. v. Fuderman et al.*, 19 Law J. 147 m.

(d) Rule Tr. T. 18 Vict. 19 Law J. xv.

(e) 11 & 12 Vict. c. 78, s. 2.

(g) Rule Tr. T. 18 Vict. 19 Law J. xv.

(h) Id.

(i) Id.

said question or questions,—and thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen,—or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said justices and barons the party convicted ought not to have been convicted,—or to arrest the judgment,—or order judgment to be given thereon at some other session of oyer and terminer or jail delivery, or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised,—or to make such other order as justice may require.(a)

If the case be argued by counsel, they must confine themselves to the case as stated, and argue it upon the facts therein mentioned.(b) And if the judge, chairman, or recorder who reserved the case, shall have omitted any matter which may be deemed material, the counsel, before the case comes on for argument, should apply to him to insert it.(c)

Also, the judges shall have the power, if they think fit, to cause the case to be sent back for amendment; and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended.(d)

The “judgment or judgments of the said justices and barons shall be delivered in open court, after hearing counsel or the parties, in case the prosecutor or the person convicted shall think it fit that the case shall be argued, in like manner as the judgments of the superior courts of common law at Westminster are now delivered.”(e)

(e) *Subsequent proceedings.*

“Such judgment and order, if any, of the said justices and barons, shall be certified under the hand of the presiding chief justice or chief baron, to the \*clerk of assize or his deputy, or to the [197] clerk of the peace or his deputy, as the case may be, who shall enter the same on the original record in proper form; and a certificate of such entry, under the hand of the clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, in the form, as near as may be or to the effect mentioned in the schedule annexed to this Act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or jailer in whose custody the person convicted shall be; and the said certificate shall be a sufficient warrant to such sheriff or jailer, and all other persons, for the execution of the judgment, as the same

(a) 11 & 12 Vict. c. 78, s. 2.

(b) *R. v. Smith*, 2 Car. & K. 882.

(c) *Id.*

(d) 11 & 12 Vict. c. 78, s. 4.

(e) *Id.* s. 3.

shall be so certified to have been affirmed or amended, and execution shall be thereupon executed on such judgment,—and for the discharge of the person convicted from further imprisonment, if the judgment shall be reversed, avoided, or arrested, and in that case such sheriff or jailer shall forthwith discharge him, and also the next court of oyer and terminer and jail delivery or sessions of the peace shall vacate the recognizance of bail, if any;—and if the court of oyer and terminer and jail delivery or court of quarter sessions shall be directed to give judgment, the said court shall proceed to give judgment at the next session."

The following is the form, given in the schedule to the Act, of the

*Certificate of the Clerk of Assize or Clerk of the Peace.*

Whereas at the session of the peace for the county of —, held on —, before — and others their fellows, [*or at the sessions of oyer and terminer and jail delivery held for the county of —, on —, before, among others, Sir A. B., knight, one of the justices of the court of — and — [here name the quorum commissioners,] justices of oyer and terminer and jail delivery,*] A. B., late of —, laborer, having been found guilty of felony, and judgment thereupon given, that [*state the substance,*] the court before whom he was tried reserved a certain question of law for the consideration of the justices of either bench and the barons of the exchequer, and execution was thereupon respited in the meantime:

This is to certify, that the said justices and barons having met in the exchequer chamber at Westminster, on the — day of —, it was considered by the said justices and barons there that the judgment aforesaid should be annulled, and an entry made on the record, that the said A. B., ought not, in the judgment of the said justices [\*198] and barons, to have \*been convicted of the felony aforesaid; and you are therefore hereby required forthwith to discharge the said A. B. from your custody.

To the jailer of —, and the sheriff of —, and all others whom it may concern.

(Signed) E. F.

Clerk of the peace for the county of —,  
[*or Clerk of assize for —,*  
*as the case may be.*]

And to prevent any fraud being practised, for the purpose of getting the prisoner discharged by means of a forged or altered certificate, it is enacted, "That every person who shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any certificate of or copy certified by a chief justice,—or any certificate

of or copy certified by a clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be,—with intent to cause any person to be discharged from custody, or otherwise prevent the due course of justice,—shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding ten years, or be imprisoned for any time not exceeding three years, with or without hard labor and solitary confinement, both or either, at the discretion of the court before which he shall be tried.(a)

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## SECTION VI.

### WRIT OF ERROR.[1]

#### (a) *In what cases.*

After judgment given against a defendant upon an indictment at the assizes or quarter sessions, if the indictment be bad in substance, or the

(a) 11 & 12 Vict. c. 78, s. 6.

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[1] A writ of error is used to remove the indictment and others proceedings from the oyer and terminer or sessions into the supreme court, after judgment given in the court below, for the purpose of reversing such judgment. When once judgment is given, this is the only remedy for any defect in the proceedings. But it can never be obtained before judgment. 1 Chit. Cr. L. 747.

MASSACHUSETTS.—Writs of error, in civil and criminal cases, may issue of course out of the supreme judicial court, in vacation as well as in term time, and shall be returnable to the same court.

No writ of error, upon a judgment for any capital offence, shall issue, unless allowed by one of the justices of the supreme judicial court, after notice given to the attorney-general, or other attorney for the commonwealth.

Writs of error, upon judgments in all other criminal cases, shall issue of course, but they shall not stay or delay the execution of the judgment or sentence, unless they shall be allowed by one of the justices of the supreme judicial court, with an express order thereon for a stay of proceedings on the judgment or sentence.

In *Massachusetts*, a writ of error lies from the supreme court to the court of common pleas, in all cases where the proceedings are according to the course of the common law. *Martin v. Commonwealth*, 1 Mass. 347, and in case of reversal, the court of error is authorized to render the same judgment as the court below ought to have rendered. *Commonwealth v. Ellis*, 11 Mass. 465.

NEW YORK.—In New York, the revised statutes provide as follows:

In all cases except on trials for capital offences, writs of error upon any final judgment rendered upon any indictment are writs of right and issue of course, in vacation as well as in term, out of the court in which by law they may be made returnable. 2 R. S. 740, § 15. 7 Cowen, 339. But where the offence is capital, such writs can not issue unless allowed by one of the justices of the supreme court, upon notice given to the attorney-general or to the



judgment be erroneous, or any other defect in substance appear upon the face of the record, the defendant may have the judgment reversed

district attorney of the county where the conviction was had; and no other officer is authorized to allow such writs. *Ibid*, § 14.

The statute declares that writs of error shall issue out of and under the seal of the court in which they shall be returnable, and shall be tested in the same manner as other writs issued out of such court. 2 R. S. 277, § 8.

It has been held that where proceedings in the sessions are removed into the supreme court upon certiorari, before judgment, according to the statute, and they are remitted, a writ of error does not lie to the supreme court from the court of errors, (now the court of appeals) *The People v. Stearns*, 23 Wend. 634. Nor will a writ of error lie in behalf of the people after judgment for the defendant. *The People v. Corning*, 2 Comst. 9. In one case (*Richard v. Walton*, 12 John, 434,) it is said that the same rule applies to criminal as to civil cases; and that a writ of error will not be granted where the merits have been fairly tried.

The statute provides that no writ of error shall stay or delay the execution of the judgment, or of sentence thereon, unless the same shall be allowed by a justice of the supreme court, or by a circuit judge, with an express direction therein that the same is to operate as a stay of proceedings on the judgment upon which such writ of error is brought. 2 R. S. 740, § 16.

Such writ, when so allowed, shall be filed with the clerk of the court in which the judgment was rendered, who shall furnish to the party filing the same, a certificate of the filing thereof, together with a copy of the allowance. *Ibid*, § 17.

If the defendant be in the custody of the sheriff, and such allowance direct a stay of proceedings on the judgment, it is the duty of such sheriff, upon being served with the clerk's certificate of such writ being filed, and a copy of the allowance of such writ, to keep such defendant in his custody, without executing the sentence passed upon such indictment, and to detain the defendant, to abide such judgment as may be rendered upon such writ of error. *Ibid*, § 18.

If the offence charged in the indictment is punishable by imprisonment in a state prison or in a county jail, any officer authorized to allow such writ of error, may allow a writ of *habeas corpus* to bring the defendant before him; and may thereupon let him to bail, upon a recognizance with sufficient sureties, conditioned that such defendant shall appear in the supreme court to receive judgment on such writ of error, or in the court where the trial was had, at such time and place as the supreme court shall direct, and that he will obey every order and judgment which the supreme court shall make in the premises. *Ibid*, § 19.

Upon any writ of error being filed which shall operate as a stay of proceedings, it is the duty of the clerk of the court to make a return thereto without delay, containing a transcript of the indictment, bill of exceptions, and judgment of the court, certified by the clerk thereof. 2 R. S. 740, § 20.

The district attorney of the county must bring on for argument, as soon as practicable, the return to such writ of error; and it is also competent for the defendant in any indictment removed by writ of error, to notice and bring on for argument the return to such writ. *Id.* 741, § 21.

If an attorney has appeared for the defendant in any indictment so removed by writ of error, or by *certiorari*, by giving notice of his appearance to the district attorney, within ten days after the filing of such writ of error, or within ten days after filing the certificate staying proceedings, notice of argument thereon may be served on such attorney, by the district attorney, as in other cases. If no attorney has so appeared, such notice must be served personally on the defendant if he be in custody; and if he be not in custody, it may be served by affixing the same in the office of a clerk of the supreme court. *Ibid*, § 22.

The argument of a criminal case, brought up on error, can not be moved out of its order on the calendar, unless the notice states the intention to do so. The counsel for the people has the right to move such cases out of their order during the first week of the term: after that either party may, on due notice. *Ibid*, § 23.

by the court of Queen's Bench, by writ of error; or where his property, real or personal, is forfeited by the judgment, the writ of error may

No assignment of errors or joinder in error is necessary upon any writ of error issued pursuant to the foregoing provisions: but the court must proceed on the return thereto and render judgment upon the record before them. *Ibid*, § 24.

If the supreme court affirms such judgment, it must direct the sentence pronounced to be executed, and the same must be executed accordingly. If the supreme court reverses the judgment rendered, it must either direct a new trial or that the defendant be absolutely discharged, according to the circumstances of the case. 1 Barb. Sup. C. Rep. 136.

In a case where the defendant demurred to the indictment, and judgment was given against the people, which was reversed on error, it was held that the supreme court must pass final judgment for the people, on the demurrer, and pass sentence; and that he could not withdraw the demurrer and plead. *People v. Taylor*, 3 Denio, 91.

A judgment of reversal, by default, will not be given, in a criminal case. There must be proof of error in the record or proceedings of the court below. *Barron v. The People*, 1 Bar. Sup. C. Rep. 136.

If a new trial is ordered by the supreme court, as above provided, the same is to be had in the court in which the indictment was first tried. 2 R. S. 741, § 26.

If a defendant in any indictment has been let to bail after the bringing of any writ of error, and neglects to appear at any new trial that may have been ordered, or to appear and receive judgment, the court authorized to render such judgment, or in which such new trial was directed, may cause such defendant to be arrested, in the same manner as upon the finding of an indictment, and may forfeit his recognizance and direct the same to be prosecuted. *Ibid*, § 27.

Whenever any indictment shall be removed into the supreme court, or any person indicted shall be brought into that court by *habeas corpus*, the justices thereof may remand such person and such indictment to the proper county, where such indictment may be tried; and the court of oyer and terminer, or the court of sessions to which any indictment shall be so remanded, shall proceed therein in the same manner as if such indictment had not been removed into the supreme court. *Id.* 742, § 28.

It is a general rule that if a record come into the supreme court it can not be remanded to the court below. Had it not been for this last section of the statute above referred to, (which corresponds with 1 R. L. 1813, p. 496, § 7, and 6 Hen. 8, ch. 6,) indictments for felonies removed into the supreme court must always have remained there. It is in virtue of that statute that they go down to the oyer and terminer or sessions of the proper county. 7 Cowen, 133.

PENNSYLVANIA.—Whensoever any person shall be indicted in any court of oyer and terminer, gaol delivery, or sessions of the peace, the party charged shall be at liberty to remove the said indictment, and all proceedings thereupon, or a transcript thereof into the supreme court, by a writ of certiorari, or by writ of error, as the case may require. *Provided always*, That no such writ of certiorari, or writ of error, shall issue, or be available to remove the said indictment, and proceedings thereupon, or a transcript thereof, or to stay execution of the judgment thereupon rendered, unless the same shall be specially allowed by the supreme court, or one of the justices thereof, upon sufficient cause to it or him shown, or shall have been sued out with the consent of the attorney-general; which special allowance or consent shall be in writing, and certified on the said writ. *Dunlop's L. Penn.* ch. 106, § 7.

MAINE.—No writ of error, upon a judgment for any capital offence, shall issue, unless allowed by one of the justices of the supreme judicial court, after notice given to the attorney-general or other attorney for the state.

Upon all other judgments in criminal cases, writs of error shall issue of course; but they shall not stay or delay the execution of the sentence or judgment, unless they shall be allowed by a justice of the supreme judicial court, with an express order thereon, for a stay of all proceedings on such judgment or sentence.

order of the court in the premises, in which such trial was had, and in the mean time to keep the peace and be of good behavior.

If such person shall not so recognize, he shall be committed to prison, to await the decision of the supreme court; and in that case the clerk of the court in which the conviction was had, shall file a certified copy of the record and proceedings in the case, in the supreme court; and such court shall have jurisdiction to hear and determine the questions of law arising on such exceptions or report; and shall certify their determination to the court in which the trial was had, together with directions as to a new trial, or such other proceedings as right and justice shall require; but the proceedings herein prescribed shall not deprive any party of his writ of error, for any error or defect appearing of record.

The court, in which the party so convicted and recognized shall be bound to appear as aforesaid, shall have power to continue such recognizance, or require a new recognizance, with further or other sureties until the decision of the supreme court shall be had in the premises, and in default of compliance with any such requisition, such court may commit the party so convicted to close custody. Rev. Sta. of Michigan, pp. 703, 703, secs. 2 to 7, inclusive.

A person convicted of an offence by a justice of the peace may appeal from the judgment of such justice of the peace to the circuit court; provided said person shall enter into a recognizance with one or more sufficient sureties conditioned to appear before said court and abide the judgment of the court therein. And the justice from whose judgment an appeal is taken, shall make a special return of the proceedings had before said justice; and shall cause the warrant and return, together with the recognizance or recognizances to be filed in said circuit court on or before the first day of the circuit court next to be holden for said county, and the complainant and witnesses may also be required to enter into recognizances with or without sureties, in the discretion of the court, to appear at said circuit court at the time last aforesaid, and to abide the order of the court therein. Ibid. 419.

VERMONT.—Every question of law, decided by the county court, arising on demurrer, or upon a trial by jury, in a prosecution by indictment or information for any crime or misdemeanor, may, after verdict of guilty is returned, be allowed and placed upon the record, if the court, upon consideration of the difficulty and importance of such question, shall so direct, and not otherwise; and the same shall thereupon pass to the supreme court for a final decision, and judgment, sentence and execution shall be thereupon respited and stayed.

Exceptions to the decision of the county court, upon any motion in arrest of judgment made in a prosecution by indictment or information, may be allowed and placed upon the record, if such court, upon consideration of the difficulty and importance of the question, shall so direct, and not otherwise; and the same shall thereupon pass to the supreme court for a final decision; and judgment, sentence and execution shall thereupon be respited and stayed.

If, on inspection of the record in any cause, the supreme court shall be of opinion that judgment ought to be rendered upon the verdict, such court shall proceed to render judgment and sentence thereon, according to law, and cause execution thereof to be done; otherwise the cause shall be removed to the county court for trial, or judgment of acquittal shall be rendered by the supreme court, as law and justice may require.

No writ of error shall be allowed in a criminal cause, prosecuted by indictment or information. Rev. Sta. of Vermont, pp. 228, 229, secs. 72 to 75, inclusive.

The supreme court shall have exclusive jurisdiction of all such petitions, not triable by jury, as may by law be brought before such court, and shall have power to issue and determine all writs of error, certiorari, mandamus, prohibition and quo warranto, and all other writs and processes to courts of inferior jurisdiction, to corporations and individuals, that shall be necessary to the furtherance of justice and the regular execution of the laws, and shall have power to try and determine all such questions of law as shall be removed from the county court, agreeably to the provisions of this chapter. Rev. Sta. of Vermont, pp. 219, 220, sec. 5.

VIRGINIA.—A party, in a criminal case or proceeding for contempt, for whom a writ of error lies to a higher court, may except to an opinion of the court and tender a bill of excep-

tions, which, (if the truth of the case be fairly stated therein,) the judge, judges or justices, or the greater part of those present, shall sign; and it shall be a part of the record of the case. This section shall not be construed to authorize a bill of exceptions to an opinion of an examining court. Rev. Code of Va., p. 779, sec. 1.

An appeal may be taken, in Virginia, from the judgment of a conservator of the peace, to the court of the county or corporation. Rev. Code of Va., of 1849, tit. 55, ch. 201.

In the case of a negro convicted of a misdemeanor, by a justice, there may be an appeal from the decision to the county or corporation court, by the negro, or if he be a slave, by his owner. Such negro shall, unless let to bail, be committed by the justice to jail until the next term of such court, and the witnesses shall also be recognized to appear then.

Every such appeal shall be tried without pleadings in writing, and without a continuance, except for good cause; the court shall hear all the evidence produced on either side, and give such judgment as seems to it proper, and enforce the execution thereof. Rev. Code of Va., p. 788, secs. 15. 16.

WISCONSIN.—Every person convicted before a justice of the peace of any offence, may appeal from the sentence to the circuit court then next to be held in the same county, and such appellant shall be committed to abide the sentence of said justice until he shall recognize to the state of Wisconsin in such reasonable sum with such sureties as said justice shall require, with condition to appear at the court appealed to, and there to prosecute his appeal and to abide the sentence of the court thereon, and in the mean time to keep the peace and be of good behavior.

The justice, on such appeal, shall make a copy of the conviction and other proceedings in the case, and transmit the same, together with the recognizance, if any shall be taken, to the clerk of the court appealed to; and the fees of the justice therefor shall be paid from the county treasury in like manner as other costs in criminal prosecutions are paid.

The appellant shall not be required to advance any fees in claiming his appeal, nor in prosecuting the same; but if convicted in the circuit court, or if sentenced for failing to prosecute his appeal, he may be required, as part of his sentence, to pay the whole or any part of the costs of prosecution.

If the appellant shall fail to enter and prosecute his appeal, he shall be defaulted on his recognizance, if any was taken, and the circuit court may award sentence against him for the offence whereof he was convicted, in like manner as if he had been convicted thereof in that court. And if he is not then in custody, process may be issued to bring him into court to receive sentence.

Whenever, upon suit brought upon any recognizance to prosecute an appeal, the penalty thereof shall be adjudged to be forfeited, or when by leave of the court such penalty shall have been paid to the county treasurer or to the clerk of the court, without a suit or before judgment shall be given in manner by law provided, if by law any forfeiture shall accrue to any person by reason of the offence of which the appellant was convicted, the court may award to him such sum as he may be entitled to out of such forfeiture.

The circuit court may, at the term in which the trial of any indictment shall be had, or within one year thereafter, or the supreme court within one year thereafter, on the petition or motion in writing of the defendant, grant a new trial for any cause for which by law a new trial may be granted, or when it shall appear to the court that justice has not been done, and on such terms or conditions as the court may direct.

Any person who shall be convicted of an offence before the circuit court, being aggrieved by any opinion, direction or judgment of the court in any matter of law, may allege exceptions to such opinion, direction or judgment, which exceptions being reduced to writing in a summary mode, and presented to the court any time before the end of the term, and found conformable to the truth of the case, shall be allowed and signed by the judge, and thereupon all further proceedings in that court shall be stayed, unless it shall clearly appear to the judge that such exceptions are frivolous, immaterial or intended only for delay; and in that case judgment may be entered and sentence awarded in such manner as the judge may deem reasonable, notwithstanding the allowance of such exceptions.

If upon the trial of any person who shall be convicted in said circuit court, any question

no jurisdiction in the matter, as where a commission authorizes an indictment to be taken before A., B., C. and twelve others, and by color thereof the commissioners proceed on an indictment taken before eight persons only, there [\*199] the books say that the judgment may be falsified, by showing the special matter, without writ of error, because it is void; (a) which appears to me to mean, that upon the record being brought before the court of Queen's Bench by *certiorari*, that court upon a statement of the special matter on affidavit, uncontradicted, will quash the whole proceeding. Or, if such matter appear upon the face of the record, the judgment may be reversed upon writ of error. (b)

But judgment must have been given, otherwise a writ of error will not lie. And therefore formerly where a man was indicted for felony and found guilty, and he prayed his clergy, which was allowed to him he could not afterwards have a writ of error; for he was convicted only not attained. (c)

And the judgment must have been upon an indictment; for no writ of error will lie upon a mere summary conviction; (d) not even upon a conviction of forcible entry by justices of the peace upon view; (e) nor in any other case.

And it must be a judgment against the defendant; (g) for there is no instance of error being brought upon a judgment for a defendant after an acquittal.

If the indictment be against two, and judgment against both, error may be brought by either, but it must be in the names of both; but if upon an indictment against two, judgment be against one only, then he may bring error in his own name alone.

(b) *Attorney general's fiat.*

Before a writ of error in a criminal case, however, is sued out the attorney-general's fiat for it must first be obtained. (h) First, therefore,

(a) 3 Inst. 231; 2 Hawk. c. 50, s. 3; 4 Bl. Com. 390, 391. ry's case, 2 Jon. 167; Vin. Abr. Error, D.; 2 Bac. Abr. Error, A.

(b) 2 Bac. Abr. Error, A. 1.

(c) *Anon.* Vent. 171.

(c) *Long's case*, Cro. Eliz. 489; 2 Bac. Abr. Error, A. 2; Vin. Abr. Error, C.

(g) 3 Inst. 214; 2 Bac. Abr. Error, A. 1.

(h) 2 Hawk. c. 50, s. 13.

(d) *Anon.* Vent. 33. *Anon.* Id. 171. Ber-

book, and a certified copy of the entry must be forthwith remitted to the clerk where the original judgment was rendered.

After the certificate of the judgment has been remitted as provided in the preceding section the supreme court has no farther jurisdiction of the proceedings thereon, and all orders which may be necessary to carry the judgment into effect must be made by the court to which the certificate is remitted. Code of Iowa, pp. 427, 428, secs. 3088 to 3102, inclusive.

obtain a certificate from counsel that there is error in the record; and upon producing that, and a verified copy of the indictment or record to the attorney-general, he usually grants his fiat for the writ of error. This is granted as a matter of course in misdemeanors, upon sufficient cause being shown for it; but in cases of felony, it is granted only *ex gratia*.(a)

(c) *The writ and return.*

There seems to be two modes of proceeding, either of which the party may adopt at his option: he may bring the writ of error directed to the judges, justices, or recorder, who pronounced the judgment, and have the record returned to the court of Queen's Bench under and by \*virtue of it; or he may have the record removed into [\*200] the court of Queen's Bench by *certiorari*, and then bring a writ of error *coram nobis* upon it.(b) The former, however, seems to be the most approved mode of proceeding. Upon producing the *fiat* for the writ at the petty bag office, the clerk there will make out the writ. Deliver the writ then to the clerk of assize (if the trial were at the assizes,) or to the clerk of the peace (if the trial were at sessions,) and he will make a return to it. For this purpose he must get the record made up, and engrossed on parchment.(c) He then indorses the writ thus: "The record and proceedings, whereof mention is within made, appear in a certain schedule to this writ annexed. The answer of the commissioners [*or justices or recorder,*] within named." He then annexes the record to the writ, and transmits it to the crown office.

(d) *Bail.*

In cases of misdemeanor, the defendant, in order to stay execution of the judgment, or, if in custody, to be set at liberty, pending the writ, may enter into recognizance, with two sufficient sureties, before any judge of the court of Queen's Bench, or any commissioner for taking bail in the country, in such sum as the judge or commissioner shall direct, conditioned to prosecute the writ of error with effect, and, in case the judgment shall be affirmed, forthwith to render the defendant to prison according to the judgment, if imprisonment be adjudged.(d) If the defendant be under disability, then a recognizance with two sufficient sureties shall be taken.(e) The sureties justify, &c., in the same manner as in civil actions.(g)

(a) 4 Bl. Com. 392. See Com. Dig. Error, A. *Gargrave's case*, Ro. Rep. 175. Vin. Abr. Error, F.

(b) *R. v. Fozley*, 1 Salk. 266; 3 Com. Dig. Error, B.

(a) See the form, *ante*, p. 193.

(d) 8 & 9 Vict. c. 68, s. 1.

(e) *Id.*

(g) *Id.*

Upon the recognizance being transmitted to the crown office of the court of Queens bench, the clerk there will give a certificate thereof to the defendant's agent, which, being duly verified by affidavit made before one of the judges of any of the superior courts of common law or a commissioner, shall be a sufficient warrant to the jailer to discharge the defendant, or, if a fine have been levied, to authorize the person having the amount, to repay it to the defendant.(a)

If the judgment be affirmed, and imprisonment were adjudged, then, if the defendant had been imprisoned any time under the judgment at the time he was discharged, he shall be imprisoned for the remainder of the time only, which was adjudged.(b)

(e) *Assignment of errors.*

As soon as the writ is returned, and the return filed, get the assignment of errors drawn and signed by counsel, engross it on paper, and, in misdemeanors, file it in the crown office; but in cases of felony, the defendant must appear in court, assign errors in person.

[\*201] \*It may be necessary to mention, that in cases of misdemeanor, if at this or any other stage of the proceedings, the court of error, upon motion, decide that the defendant has wilfully delayed or neglected to prosecute the writ of error with effect, they may order the writ to be quashed; and thereupon the defendant will be liable to execution on the judgment.(c)

(f) *Joinder in error.*

After filing the assignment of errors, let the plaintiff in error obtain a side bar rule to join in error, and serve it, together with a copy of the assignment, on the prosecutor or his attorney; and if he do not file a joinder in error within eight days after service of the rule, the plaintiff in error may sign judgment as for want of a joinder, at the opening of the office on the morning of the ninth day, unless an order of the court or of a judge, extending such time, shall have been obtained and served, and in such case judgment shall not be signed until the day after the expiration of the time granted by such order.(d)

The prosecutor, within the time here mentioned, must get his joinder in error drawn, engrossed on paper, and signed by counsel, and must file it at the crown office.(e)

(g) *Argument, &c.*

Upon the joinder in error being filed, either party may obtain a rule

(a) 8 & 9 Vict. c. 68, s. 2.

(b) Id. s. 3.

(c) Id. s. 5.

(d) Reg. Cr. Off. 17, 18.

for a concilium at the crown office and serve it on the opposite party; and then the case is set down in the crown paper for argument. The rule specifies the day for which the case will be put into the paper, and must be drawn up and served six days at least before such day within forty miles of London, or within eight days in other cases.<sup>(a)</sup> But in all cases where the defendant is in prison, or otherwise undergoing his sentence, the court upon application on his behalf, will in general fix some early day in the term for the argument, and a rule must be drawn up accordingly, which must be served on the prosecutor or his attorney.

Paper books are then delivered by the parties respectively to the judges, and the case argued, as in ordinary cases upon a demurrer; and the court then deliver their judgment.

(h) *Judgment, &c.*

The judgment of the court of error is either that the judgment of the court below be affirmed, or, *quod cassetur*. If it be affirmed, the court will remand the defendant to his former custody, in order that he may undergo his punishment. If it be reversed, then by stat. 11 & 12 Vict. c. 78, s. 5, it shall be competent for the court of error either to pronounce the proper judgment, or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, &c. \*This latter provision seems to [\*202] have reference only to cases, where the error is in the judgment itself; as where the judgment is for ten years transportation, where by law it should only be for seven; or where the judgment is for transportation, where by law the offence is punishable with imprisonment only; or the like. Formerly, in such a case, where the judgment was reversed the court had no power to pronounce any other judgment but merely that of reversal, and the defendant was consequently discharged.<sup>(b)</sup>

Where an outlawry is reversed for error, the party is put to plead to the indictment.<sup>(c)</sup>

(a) Reg. Cr. Off. 21.

(c) 2 Hawk. c. 50, s. 18.

(b) *R. v. Bourne et al.*, 7 Ad. & El. 58.



## SECTION VII.

## EXECUTION.[1]

(a) *Death.*

If sentence of death be passed by a court of oyer and terminer or

[1] MASSACHUSETTS.—The punishment of death shall, in every case, be inflicted by hanging the convict by the neck, until he is dead; and the sentence shall, at the time directed by its warrant, be executed within the walls of a prison of the county in which the conviction was had, or within the enclosed yard of such prison.

The sheriff of such county shall be present at the execution, unless he shall be prevented by sickness or other casualty, and also two of his deputies, to be designated by him, and he shall request the presence of the district attorney, clerk or clerks of the county courts, and twelve reputable citizens, including a physician or surgeon; and he shall permit the counsel of the criminal, such ministers of the gospel as the criminal shall desire, and his relations to be present, and also such officers of the prison, deputies and constables, military guard or other assistants, as he shall see fit.

Whenever a sheriff shall inflict the punishment of death upon any convict, in obedience to a warrant from the governor, he shall make return thereof under his hand, with his doings therein, to the secretary's office, as soon as may be, and shall also file in the clerk's office of the court, where the conviction was had, an attested copy of the warrant and return; and the clerk shall subjoin a brief abstract of such return to the record of the conviction and sentence. Rev. Sts. of Mass., p. 767, secs. 13, 14, 15.

NEW YORK.—Whenever any convict shall be sentenced to the punishment of death, the court, or a major part thereof, of whom the presiding judge shall always be one, shall make out, sign and deliver to the sheriff of the county, a warrant, stating such conviction and sentence, and appointing the day on which such sentence shall be executed:

Such day shall not be less than four weeks and not more than eight weeks from the time of the sentence.

The presiding judge of the court at which such conviction shall have taken place, shall immediately thereupon transmit to the governor of this state by mail, a statement of such conviction and sentence with the notes of testimony taken by such judge on the trial.

The governor shall be authorized to require the opinion of the judges of the court of appeals, justices of the supreme court and of the attorney-general, or of any of them upon any statement so furnished.

No judge, court or officer, other than the governor, shall have any authority to reprieve or suspend the execution of any convict sentenced to the punishment of death; except sheriffs, in the cases and in the manner hereinafter provided.

Whenever for any reason, any convict sentenced to the punishment of death, shall not have been executed pursuant to such sentence, and the same shall stand in full force, the supreme court, on the application of the attorney-general or of the district attorney of the county where the conviction was had, shall issue a writ of *habeas corpus* to bring such convict before such court; or if he be at large, a warrant for his apprehension may be issued by the said court or any justices thereof.

Upon such convict being brought before the court, they shall proceed to inquire into the facts and circumstances, and if no legal reasons exist against the execution of such sentence, they shall sign a warrant to the sheriff of the proper county, commanding him to do execution of such sentence, at such time as shall be appointed therein; which shall be obeyed by such sheriff accordingly.

jail delivery in the country, the sheriff of the county or city for which the assizes are holden must execute the sentence, within such county

The punishment of death shall in all cases be inflicted, by hanging the convict by the neck, until he be dead.

Whenever any person shall be condemned to suffer death for any crime of which such person shall have been convicted in any court of this state, such punishment shall be inflicted within the walls of the prison of the county in which such conviction shall have taken place, or within a yard or enclosure adjoining said prison.

It shall be the duty of the sheriff or under sheriff of the county, to be present at such execution, and to invite the presence by at least three days' previous notice, of the judges, district attorney, clerk and surrogate of said county, together with two physicians and twelve reputable citizens, to be selected by said sheriff or under sheriff: And the said sheriff or under sheriff shall, at the request of the criminal, permit such minister or ministers of the gospel, not exceeding two, as said criminal shall name, and any of the immediate relatives of said criminal, to attend and be present at such execution; and also such officers of the prison, deputies and constables as said sheriff or under sheriff shall deem expedient to have present; but no other persons than those herein mentioned shall be permitted to be present at such execution, nor shall any person under age be allowed to witness the same.

The sheriff or under sheriff and judges attending such execution, shall prepare and sign, officially, a certificate setting forth the time and place thereof, and that such criminal was then and there executed in conformity to the sentence of the court and the provisions of this act; and shall procure to said certificate the signatures of the other public officers and persons, not relatives of the criminal, who witnessed such execution: And the sheriff or under sheriff shall cause such certificate to be filed in the office of the clerk of said county and a copy thereof to be published in the state paper, and in one newspaper, if any, printed in said county.

If in any county there shall not be a jail, or the jail erected shall become unfit or unsafe for the confinement of prisoners, or shall be destroyed by fire or otherwise, and the county judge of such county shall have according to law designated the jail of some contiguous county for the confinement of the prisoners of the county; it shall be the duty of the sheriff of the county in which any convict sentenced to death shall be confined, to attend upon the day appointed for the executing of the sentence at the jail of said county designated by said judge, and there conduct the proceedings, and execute the sentence in all respects as if the jail was located in the county where such conviction was had. 2 R. S. (4th ed., Banks, Gould & Co., 1852,) 844-846, secs. 11-29.

PENNSYLVANIA.—That whenever hereafter any person shall be condemned to suffer death by hanging for any crime of which he or she shall have been convicted, the said punishment shall be inflicted on him or her within the walls or yard of the jail of the county in which he or she shall have been convicted; and it shall be the duty of the sheriff or coroner of the said county to attend and be present at such execution, to which he shall invite the presence of a physician, attorney-general or deputy attorney-general of the county, and twelve reputable citizens, who shall be selected by the sheriff; and the said sheriff shall, at the request of the criminal, permit such ministers of the gospel, not exceeding two, as he or she may name, and any of his or her immediate relatives, to attend and be present at such execution, together with such officers of the prison and such of the sheriff's deputies as the said sheriff or coroner in his discretion may think it expedient to have present, and it shall be only permitted to the persons above designated to witness the said execution: *Provided*, That no person under age shall be permitted on any account to witness the same.

After the execution, the said sheriff or coroner shall make oath or affirmation in writing, that he proceeded to execute the said criminal within the walls or yard aforesaid at the time designated by the death warrant of the governor, and the same shall be filed in the office of the clerk of the court of oyer and terminer of the aforesaid county, and a copy thereof published in two or more newspapers, one at least of which shall be printed in the county where the execution took place.

or city, and not elsewhere. The only exception to this is, where the record and prisoner have been removed into the court of Queen's Bench.

Passed 10th April, 1834.—Pamph. L. p. 234. Dunlop's *Laws of Pennsylvania*, pp. 685, 606, secs. 1, 2.

MAINE.—When any person shall be convicted of any crime punishable with death, and sentenced to suffer such punishment, he shall, at the same time, be sentenced to hard labor in the state prison, until such punishment of death shall be inflicted.

And no person, so sentenced and imprisoned, shall be executed in pursuance of such sentence, within one year from the day such sentence of death was passed, nor until the whole record of such proceedings or case shall be certified by the clerk of said court, under the seal thereof, to the supreme executive authority of the state, nor until a warrant shall be issued by said executive authority, under the great seal of this state, directed to the sheriff of the county wherein the state prison shall be situated, commanding the sheriff to cause the said sentence of death to be carried into execution.

The punishment of death shall, in every case, be inflicted by hanging the convict by the neck until he is dead, and the sentence shall, at the time directed by the warrant, be executed within the walls of the state prison, or the enclosed yard of the same.

The sheriff of the county shall be present at the place of execution, unless prevented by sickness or other casualty, and also two of his deputies designated by him. He shall request the county attorney and twelve citizens, including a surgeon or physician, and shall permit the counsel of the prisoner, such minister of the gospel as the criminal shall desire, and his relations, to be present, and such officers of the prison, deputies, constables and military guard as he may see fit, but no others.

Whenever a sheriff shall inflict the punishment of death upon any convict, in obedience to a warrant from the governor, he shall make return thereof under his hand with his doings thereon, to the secretary's office as soon as may be; and shall also file in the clerk's office of the court, where the conviction was had, an attested copy of the warrant and return thereon; and the clerk shall place the same on file with the indictment, and subjoin to the record of the sentence a brief abstract of the sheriff's return on the warrant. *Rev. Sta. of Maine*, pp. 706, 707, secs. 8, 9, 10, 11, 12.

MARYLAND.—A sentence of death cannot be executed in less than twenty days after the judgment. *Dorsey's Laws of Md.*, vol. 1, p. 583, sec. 1.

*Be it enacted by the general assembly of Maryland*, That the governor for the time being shall have full power and authority, and he is hereby required, whenever sentence of death is pronounced against any criminal by the judgment of any court of this state, to issue, under his hand, a warrant to the sheriff of the county who by such judgment ought by law to execute the same, to order and direct the said sheriff to execute the said judgment, at such time as in his warrant he shall appoint, pursuant to such judgment.

*And be it enacted*, That the governor for the time being shall have full power and authority, in his discretion, to commute or change any sentence or judgment of death, passed on any criminal by any court of this state, into other punishment of labor, or to banishment of such criminal from this state, upon such terms and conditions, and for such period, as he shall think expedient, and if such criminal be a slave, against whom any such judgment or sentence is or may be passed, to commute and change the said judgment into transportation and sale in some foreign country, for the benefit of the state. *Dorsey's Laws of Md.*, vol. 1, p. 328, ch. 82, secs. 1, 2.

OHIO.—That the mode of inflicting the punishment of death, in all cases under this act, shall be by hanging by the neck until the person is dead; and the sheriff, and in case of his death, inability or absence, the coroner of the proper county in which sentence of death, shall be pronounced, by virtue of this act, shall be the executioner. *Rev. Sta. of Ohio*, p. 238, sec. 40.

VIRGINIA.—Sentence of death, except for insurrection or rebellion, shall not be executed sooner than thirty days after the sentence is pronounced.

which I shall notice presently, and where a prisoner, for a capital offence committed in the county of a city, or town, is tried and convicted—

The clerk of the court pronouncing such sentence shall, as soon as may be, after the sentence, deliver a certified copy thereof to the officer of said court, who shall cause the sentence to be executed. Under such sentence, death shall be inflicted by hanging the convict by the neck until he is dead.

The officer executing a sentence of death shall certify the fact to the clerk of the court, who shall file the certificate with the papers in the case. Rev. Code of Virginia, p. 780, secs. 8, 9, 10.

MICHIGAN.—The punishment of death shall, in every case, be inflicted by hanging the convict by the neck until he is dead; and the sentence shall, at the time directed by the warrant, be executed within the walls of the state prison, or within the enclosed yard thereof.

The sheriff of the county shall be present at the place of execution, unless prevented by sickness or other casualty, and also two of his deputies, designated by him: and he shall request the presence of the prosecuting attorney, and twelve respectable citizens, including a surgeon or physician, and shall permit the counsel of the prisoner, and such ministers of the gospel as the criminal shall desire, and his relations, to be present, and also such officers of the prison, deputies, constables and military guard as he may see fit, but no others. Rev. Stat. of Mich. p. 706, secs. 11, 12.

MISSISSIPPI.—Whenever any convict shall be sentenced to the punishment of death, the court or a major part thereof, of whom the presiding judge shall always be one, shall make out, sign, and deliver to the sheriff of the county, a warrant, stating such conviction and sentence, and appointing the day on which said sentence shall be executed.

Such day shall not be less than four weeks, and not more than eight weeks, from the time of the sentence.

The judge of the court at which such conviction shall have taken place, shall immediately thereupon, transmit to the governor of this state, by mail, a statement of such conviction and sentence, with the notes of testimony taken by such judge on the trial.

The governor shall be authorized to require the opinion of the chancellor, the judges of the high court of errors and appeal, and of the attorney-general, or of any of them, upon any statement so furnished. Hutch. Miss. Code, p. 955, secs. 10, 11, 12, 13.

VERMONT.—The manner of inflicting the punishment of death shall be by hanging the person convicted, by the neck, until dead.

When any person shall be convicted of any crime punishable with death, and sentenced to suffer such punishment, he shall at the same time be sentenced to solitary confinement in the state prison, until such punishment shall be inflicted.

No person, so sentenced and imprisoned, shall be executed in pursuance of such sentence, previous to the expiration of one year from the day such sentence was pronounced, nor until the court which passed the sentence of death, shall have issued their warrant under the seal of said court, directed to the sheriff of the county where the state prison is situated, commanding said sheriff to cause the said sentence to be carried into execution.

Said court shall, within three months after the expiration of one year from the day of passing sentence of death against any person, issue their warrant to the sheriff of the county in which the state prison is situated, agreeably to the provisions of section two of this act, (§ 8 of this chap.) and the sentence shall, at the time directed by the warrant, be executed within the walls of the prison, or in the inclosed yard of the same, unless previous to that time, the legislature of the state shall have commuted the punishment of such person.

The sheriff of said county shall be present at the place of execution, unless prevented by sickness or other casualty, and also two of his deputies designated by him. He shall request the state's attorney of the county and twelve citizens, including a surgeon or physician, and shall permit the counsel of the prisoner, such minister of the gospel as the prisoner shall desire, and his relatives, to be present, and such officers of the prison, deputies, constables and military guard as he may deem best, and no others.

in the adjoining county; in the latter of which cases, the judge order the judgment to be executed either in the same county in

When a sheriff shall inflict the punishment of death upon any convict in obedience to a warrant as aforesaid, he shall return a copy thereof with his doings thereon to the clerk of the court, and the secretary of state as soon as may be; and shall also return the original warrant with his doings thereon to the court from which said warrant issued, and the clerk shall submit the record of the sentence, a brief abstract of the sheriff's return upon said warrant, to the court. Stat. of Ver. pp. 568, 569, secs. 6, 7, 8, 9, 10, 11.

WISCONSIN.—When any person shall be convicted of any crime for which sentence of death shall be awarded against him, the clerk of the court, as soon as may be, shall cause to be made out and deliver to the sheriff of the county a certified copy of the whole record of the conviction and sentence, and the sheriff shall forthwith transmit the same to the governor; the sentence of death shall not be executed upon such convict until a warrant shall be issued by the governor, under the seal of the state, with a copy of the record thereto annexed, commanding the sheriff to cause execution to be done, and the sheriff shall thereupon cause to be executed the judgment and sentence of the law upon such convict.

If it shall appear to the satisfaction of the governor that any convict who is under sentence of death has become insane, the warrant for his execution may be delayed, or if such warrant has been issued, the execution thereof may be respited from time to time, so long as the governor shall think proper; and if any female convict who is under the sentence of death shall be quick with child, the governor shall forbear to issue a warrant for her execution, or if such warrant has been issued, the execution thereof shall be respited until it shall appear to the satisfaction of the governor that such female is no longer quick with child.

The punishment of death shall in all cases be inflicted by hanging the convict by the neck until he be dead; and the sentence shall, at the time directed by the warrant, be executed at such place within said county as the sheriff shall select.

Whenever the punishment of death shall be inflicted upon any convict, in obedience to a warrant from the governor, the sheriff of the county shall be present at the execution, unless he shall be prevented by sickness or other casualty, and he may have such military guard as he may think proper; he shall return the warrant with a statement under his hand of his doings therein, as soon as may be after the said execution, to the governor, and shall also file in the clerk's office of the court where the conviction was had, an attested copy of the warrant and statement aforesaid; and the clerk shall subjoin a brief abstract of such statement to the record of conviction and sentence. Rev. Stat. of Wis. pp. 730, 731, secs. 7, 8, 9, 10.

IOWA.—When judgment of death is rendered, the judge of the court shall sign and deliver to the sheriff of the county a warrant stating the conviction and judgment and appointing a time on which the judgment shall be executed, which shall not be less than thirty days from the time of judgment.

If for any reason a judgment of death has not been executed and the same remains in force, the district court, on the application of the prosecuting attorney of the county where the conviction was had, must order the defendant to be brought before it, or if he be at large a warrant for his apprehension may be issued by that court.

Upon the defendant being brought before the court it shall inquire into the facts, and if no legal objection exist must make an order that the sheriff execute the judgment, and may fix the time and place of execution.

The punishment of death must be inflicted by hanging the defendant by the neck until he is dead.

The court in issuing its warrant for the execution of the sentence of death against a defendant must direct in such warrant whether the execution be public or private.

If private, the sheriff must notify the judge of the county court, clerk of the district court and prosecuting attorney, together with two physicians and twelve respectable citizens to be present as witnesses of such execution. And the sheriff, at the request of the defendant,

the prisoner was tried, or in the county of the city, &c., in which the offence was committed.(a) The judge, however, may order him to be imprisoned, until execution, in any house of correction, provided it be within the county, &c., for which the assizes are holden.(b)

The court of Queen's Bench, however, has power to award execution, not only against those who are attainted or sentenced there, but also against persons attainted in parliament, or any other court of record, the record of their attainder or a transcript thereof being first removed there, and the party brought thither by *habeas*.(c) And in a case not very long since, where the sheriff of Chester refused to execute certain persons for murder, the attorney-general moved for a *habeas corpus* and *certiorari*, to bring up the prisoners and the record of their conviction; and the court held that he was entitled to the writs, as of course.(d) In the same case, on the prisoners being brought up and the record removed, the court gave them three days time, to examine the record, and to instruct counsel to show \*cause why execution [\*203] should not be awarded against them.(e) And afterwards, the prisoners insisting on having the benefit of a free pardon, which had been promised by a proclamation, and which the court held could not be pleaded as a pardon, the court in their discretion deferred awarding execution, until the prisoners should have time to apply to the secretary of state for a pardon, according to the terms of the proclamation.(g) A rule of the court was afterwards made for their execution in the county of Surrey (the county in which the prison of the court was situate,) by the marshal of the Marshalsea, assisted by the sheriff of Surrey, and they were executed accordingly: for the court of Queen's Bench, by law, has authority to order the sheriff of any county in England or Wales, to carry into execution their sentence, or the sentence of any other court, even a sentence of death, where the record and prisoner

(a) 51 G. 3, c. 100, s. 1. 14 & 15 Vict. c. 55, s. 23.

(b) 5 & 6 W. 4, c. 38, s. 4.

(c) 2 Hawk. c. 51, s. 1.

(d) *R. v. Garstide*, 2 Ad. & El. 266.

(e) *Id.*

(g) *Id.*

may permit any minister of the gospel whom the defendant shall name and any of his relatives to attend the execution; and also such magistrates, peace officers, and guards as the sheriff shall deem proper. But no other person than those mentioned in this section must be present at the execution.

If the sheriff, from sickness or otherwise, is unable to act, the warrant mentioned in the preceding section must be executed by his deputy.

Whenever a sheriff inflicts the punishment of death upon a defendant in obedience to a warrant he must make return thereof under his hand with his doings thereon to the clerk of the court from whence it issued, and the clerk shall place the same on file with the indictment and subjoin to the record of the sentence a brief abstract of the sheriff's return on the warrant. Code of Iowa, p. 426 secs. 3079—3086.

have been removed there.(a) And they may order this without writ:(b) they usually do it by a rule of the court; in the central criminal court the judgment is executed under a warrant from the recorder; but in the country, where the trial has been at the assizes, there is nothing more than a mere memorandum of the sentence, written opposite to the name of the prisoner in the calender or list of prisoners, which is signed by the judge, as a warrant to the sheriff to execute the prisoner.(c) In the rule of the court of Queen's Bench, and in the warrant of the recorder of London, the time of the execution is specified; but it is not so at the assizes; the judge however usually reprieves the prisoner for a certain time, (for every court having the power to award execution, has a discretionary power of granting a reprieve,)(d) but as soon as that time has expired, or where there is no reprieve, the sheriff may execute the party at such time as he may deem most convenient. As the sentence is, that the defendant shall be hanged by the neck until he be dead,—if he be hanged, but come to life afterwards, he must be hanged again; for the judgment is not executed, until he is dead.(e)

If a woman, when condemned to death, be quick with child, she may allege the fact, in order to have the execution respited until after her delivery; and thereupon the sheriff shall be ordered to impanel a jury of matrons to examine her in a private room, to try the fact, and if they find that she is quick with child, her execution shall be respited until her delivery.(g)

In the case of murder, the prisoner, after conviction, must be kept apart from the other prisoners, fed on bread and water only (unless in the case of sickness or wound the surgeon order to the contrary;) and no person shall have access to him but the jailer and his servants, the chaplain and the surgeon \*of the prison, without the written permission of the judge, or the sheriff or his deputy.(h) And when executed, he must be buried within the precincts of the prison.(i)

(b) *Transportation.*

Her Majesty, by warrant under her sign manual, may appoint places of confinement within England or Wales, either at land or on board vessels in the river Thames or some other river, or port, or harbour, for the confinement of male offenders under sentence or order of transportation;(k) where they may be kept to hard labor;(l) and the time of such confinement shall be reckoned in discharge or part discharge of the

(a) *R. v. Garside, supra.*

(b) 2 Hawk. c. 51, s. 4.

(c) 4 Bl. Com. 403, 404.

(d) 2 Hawk. c. 51, s. 8.

(e) *Id.* s. 7.

(g) 2 Hawk. c. 51, ss. 9, 10.

(h) 9 G. 4, c. 31, s. 6.

(i) 2 & 3 W. 4, c. 75; see *ante*, p. 181.

(k) 5 G. 4, c. 84, s. 10.

(l) *Id.* s. 18.

term of their transportation.(a) And they may be sent for that purpose to any of Her Majesty's penitentiaries in Great Britain.(b) But where an order for the transportation of any convict, male or female, shall be delivered to the sheriff or jailer, he shall forthwith remove him or her to the ship employed for the purpose, and there deliver the offender to the contractor, together with a copy (attested by the sheriff or jailer) or the caption and order of the court, and its sentence or order for transportation, and a certificate of his crime, his age, trade, &c., temper, disposition, and his behavior whilst in prison; and the contractor shall give the sheriff or jailer a receipt for his discharge.(c)

(c) *Imprisonment.*

By stat. 5 & 6 W. 4, c. 88, s. 4, where any person shall be convicted at any assizes or sessions for an offence for which he shall be liable to the punishment of imprisonment, transportation, or death, it shall be lawful for the court (if it shall so think fit) to commit him to any house of correction for such county, in execution of his judgment. Or, in cases at the assizes, he may be and usually is, committed to the county jail. In cases where, for an offence committed in the county of a city or town, the offender is tried and convicted at the assizes for the adjoining county, and judgment of imprisonment is passed upon him, the judge may order such judgment to be executed, either in the same county, or in the county of the city, &c., in which the offence was committed.(d) In what cases hard labor or solitary imprisonment may be inflicted,(e)[1]

(a) 5 G. 4, c. 84, s. 19.

(b) 10 & 11 Vict. c. 67.

(c) 5 G. 4, c. 84, s. 4; and see the rest of that Act, and stat. 11 G. 4 & 1 W. 4, c. 39.

(d) 51 G. 3, c. 100, s. 1; 14 & 15 Vict. c. 55, s. 23.

(e) See *ante*, p. 183.

[1] NEW YORK.—Whenever, by statute, an offender is declared punishable by imprisonment in a state prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court may sentence the defendant to imprisonment for life, or for any time not less than that specified. But no person can, in any case, be sentenced to imprisonment in a state prison for any term less than two years. 2 R. S. 700, § 12. There is an exception to this general rule, however, to be found in the "Act to preserve the purity of elections." Laws of 1839, p. 365. By the fourteenth section of that act, voting or offering to vote, in this state, by an inhabitant of another state, is declared a felony, and the person so voting or offering to vote is liable, on conviction, to be imprisoned in a state prison for a period not exceeding one year, at the discretion of the court.

A sentence of imprisonment in a state prison for any term less than for life, suspends all the civil rights of the person so sentenced, and forfeits all public offices and private trusts, authority, or power, during the term of such imprisonment. And a person sentenced to imprisonment, in a state prison for life, shall, thereafter be deemed civilly dead. 2 R. S. 701, sec. 19, 20.

MASSACHUSETTS.—When any person shall be convicted of an offence, punishable at the



discretion of the court, either by fine or imprisonment in the county jail, or house of correction, or by a fine or imprisonment in the state prison, the court may award against such offender a conditional sentence, and order him to pay a fine, with or without the costs of prosecution, within a limited time, to be expressed in the sentence, and in default thereof, to suffer such imprisonment as is provided by law, and awarded by the court.

The person, against whom any such conditional sentence shall be awarded, shall be forthwith committed to the custody of an officer in court or to the county jail, to be detained until the sentence be complied with; and if he shall not pay the fine imposed, within the time limited, the sheriff shall cause the other part of the sentence to be executed forthwith.

Whenever it is provided, that an offender shall be punished by imprisonment in the county jail and a fine, or by imprisonment in the house of correction and a fine, such offender may, at the discretion of the court, be sentenced to be punished by such imprisonment, without the fine, or by such fine without the imprisonment.

Every court, before whom any person shall be convicted upon an indictment for any offence not punishable with death, or by imprisonment in the state prison, may, in addition to the punishment prescribed by law, require such person to recognize with sufficient sureties, in a reasonable sum, to keep the peace, or to be of good behavior, or both, for any term not exceeding two years, and to stand committed until he shall so recognize.

In case of a breach of the condition of any such recognizance, the same proceedings shall be had, that are prescribed in the one hundred and thirty fourth chapter, in relation to recognizances to keep the peace, and be of good behavior.

Whenever any person, convicted of an offence, shall be sentenced to pay a fine or costs, or to be imprisoned in the county jail, or in the house of correction, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county, or to some other officer in court, a transcript from the minutes of the court, of such conviction and sentence, duly certified by such clerk, which shall be a sufficient authority for the sheriff to execute such sentence, and he shall execute the same accordingly.

In every case, in which the punishment of imprisonment in the state prison is awarded against any convict, the form of the sentence shall be, that he be punished by confinement at hard labor, and he shall also be sentenced to solitary imprisonment, for such term as the court shall direct, not exceeding twenty days at one time; and in the execution of such sentence, the solitary imprisonment shall precede the punishment by hard labor, unless the court shall otherwise order.

No convict shall be sentenced to imprisonment in the state prison for any less time than one year.

When any convict shall be sentenced to imprisonment in the state prison, the clerk of the court shall make out a warrant, under the seal of the court, directed to the warden of the prison, requiring him, as soon as may be, to cause such convict to be removed from the county jail to the state prison; and the clerk shall also annex to the warrant, a certified transcript of such conviction and sentence, and shall deliver the warrant and transcript to the sheriff of the county, who shall cause the same to be transmitted and delivered to the warden, to the end that the warden may, by himself, or such person as he may appoint for that purpose, cause the warrant to be duly executed, by the removal of such convict to the state prison, in the manner prescribed in the one hundred and forty-fourth chapter. *Rev. Stat. of Mass. pp. 766, 767, secs. 2 to 10.*

Any person, convicted of an offence, punishable wholly or in part by imprisonment in the county jail, may be sentenced to suffer such imprisonment in the house of correction, instead of the jail, or to suffer solitary imprisonment and be confined at hard labor, either in the jail or the house of correction.

If any boy, under the age of sixteen years, shall be convicted of an offence, which is punishable by imprisonment in the state prison, such convict not having been before sentenced to imprisonment in the state prison in this state, or in any state prison or penitentiary within the United States, the court, if sentence of solitary imprisonment and confinement at hard labor, for a term not exceeding three years, is awarded against such convict, and also when the sentence of confinement, at hard labor, for any term of time, is awarded against a female

convict of whatever age, shall order such sentence to be executed, either in the house of correction or in the county jail, and not in the state prison; but the provisions of this and the preceding section shall not prevent the courts in the city of Boston, from sentencing such convicts to confinement in any place, in which juvenile offenders may be by law confined.

When the punishment of solitary imprisonment, and confinement at hard labor for a term not exceeding three years, shall be awarded by the court against any convict, who has not been before sentenced to the like punishment, by any court in this state, or within the United States, such sentence may be executed, either in the house of correction, or in the county jail, or in the state prison.

When any convict shall be sentenced to solitary imprisonment and hard labor, in any house of correction or jail, the master or keeper thereof shall execute such sentence of solitary imprisonment, by confining the convict in one of the cells, if there be any in such house of correction or jail, and if there be none, then in the most retired and solitary part of such house or jail; and, during the time of solitary imprisonment, such convict shall be fed with bread and water only, unless other food shall be necessary for the preservation of his health; No intercourse shall be allowed with any convict in solitary imprisonment, except for the conveyance of food, and other necessary purposes, unless some minister of the gospel shall be disposed to visit him, in the manner hereafter provided.

As soon as the term of solitary imprisonment shall have expired, the master or keeper shall furnish the convict with tools and materials, or with other means, to work in any suitable manner, in which he can be usefully or profitably employed, either in the said house of correction or jail, or within the close yard thereof; such convict may, if necessary, be confined by a log and chain, or in such other manner as shall prevent his escape, without unnecessarily inflicting bodily pain, or interrupting his labor; the overseers of the house of correction, or, when such punishment is inflicted in the jail, the sheriff of the county, shall oversee the execution of all such sentences.

If any convict shall be refractory, or, during the time for which he is sentenced to hard labor, shall refuse or neglect, without reasonable cause, to labor in any suitable manner, when required, such convict, so long as he shall continue to be refractory, or shall refuse or neglect to labor, shall be kept in solitary confinement, and fed with bread and water only, in the manner before provided. Rev. Sta. of Mass. pp. 782, 783, secs. 17 to 22.

When any person shall be convicted of any offence, and shall be duly sentenced therefor to confinement in the state prison of this state, for one year or more, and it shall be alleged in the indictment upon which such conviction is had, and admitted or proved on the trial, that the convict has before been sentenced to a like punishment by any court in this state, or in any other of the United States, for a period of not less than one year, he shall be sentenced to confinement to hard labor, for a term not exceeding seven years, in addition to the punishment prescribed by law for the offence of which he shall then be convicted.

When any such convict shall have twice before been sentenced to confinement to hard labor, for a period of not less than one year at each time, by any court in this state, or in any other of the United States, he shall be sentenced to confinement to hard labor for his life, or for a term of not less than seven years, in addition to the punishment prescribed by law for the offence of which he shall then be convicted.

When the last conviction, in any case mentioned in the two preceding sections, shall be had for any offence committed before this statute shall take effect, the additional punishment shall be regulated according to the statutes which were in force in this state at the time when such last offence was committed, and the sentence shall be awarded accordingly, notwithstanding the repeal of those former statutes.

Whenever the warden shall be satisfied that any convict in the state prison has before been sentenced to imprisonment in the same prison, or in some other state prison within the United States, for not less than one year, it shall be the duty of the warden to give notice thereof to the county attorney for the county of Suffolk, who shall by an information filed in the municipal court of the city of Boston, or otherwise, make the same known to the judge of the said court; and thereupon such convict shall be brought before the court, by such

process or order as the judge shall direct, to hear and answer to the said charge: If the convict, by his plea or answer, shall deny the truth of the charge, the same shall be tried by a jury, in due course of law, who shall be instructed to inquire, and by their verdict find, whether the charge in such information is or is not true.

If it shall appear, by confession of the convict, verdict of a jury, or otherwise according to law, that the charge is true, such convict shall be sentenced to imprisonment in the state prison for a term not exceeding seven years, in addition to the sentence to which he stood committed.

Whenever it shall appear to the warden that any convict in the state prison has been twice before sentenced to imprisonment in the same prison, or in any other state prison in the United States, for a period of not less than one year at each time, the convict shall be brought before the municipal court of the city of Boston, in the manner before provided in this chapter, in the case of a convict who has been once before sentenced as aforesaid, and the like proceedings as are provided in that case shall be had for ascertaining the truth of the charge; and if it shall thereupon appear to the court that the charge is true, the convict shall be sentenced to confinement to hard labor for his life, or for a term of not less than seven years, in addition to the sentence on which he stood committed; and he shall have the same right to appeal from the judgment rendered in pursuance of this section, as in other cases tried before the said municipal court. Rev. Sta. of Mass. pp. 809, 810, 811, secs. 16, 17, 18, 34, 35, 54.

**MAINE.**—Any person convicted before the supreme judicial court or district court, of any crime or offence punishable, in part or in whole, by imprisonment in the county jail, may be sentenced to suffer imprisonment, either in the county jail or house of correction at their discretion, to be employed and kept at work there, in the same manner as rogues, vagabonds and idlers are by law to be employed, when committed to such house.

Either of said courts may sentence any person, convicted of any offence mentioned in the preceding section, conditionally, to pay a fine with costs of prosecution, or, in case he do not pay the same within ten days, that he be immediately thereafter conveyed to the house of correction, and there be kept at work as aforesaid, for a term, not exceeding six months.

Whenever it is provided that an offender shall be punished by imprisonment and a fine, the court may sentence him to either of those punishments without the other, or to both.

Every court, before whom any person shall be convicted of an offence, not punishable by death or confinement in the state prison, may, in addition to the punishment by law prescribed, require such person to recognize to the state, with sufficient sureties, in a reasonable sum, to keep the peace or be of good behavior, or both, for a term not exceeding two years, and stand committed till he shall so recognize.

When a person, convicted of an offence, shall be sentenced to pay a fine or costs, or to be imprisoned in the county jail or house of correction, the clerk of the courts, shall, as soon as may be, make out and deliver to the sheriff or some officer in court, a transcript of the minutes of the court of the conviction and sentence duly certified by him: and this shall be a sufficient authority for the officer to execute such sentence.

When any convict is sentenced to confinement in the state prison, the clerk of the court before whom the conviction may take place, shall make out a warrant, under seal of the court directed to the warden, of the prison, requiring him to cause such convict, without needless delay, to be removed from the county jail to the state prison; and the warden and all sheriffs and jail keepers are required strictly to obey the directions of it; and the clerk shall, as soon as may be, deliver the same warrant to the sheriff of the county, who is required forthwith to deliver the same to said warden. Rev. Sta. of Maine, pp. 606, 607, secs. 2 to 7.

**PENNSYLVANIA.**—Penitentiary punishments are annexed to the conviction of felonies, by act of assembly, the nature and term of the imprisonment being prescribed in reference to the specific offence by name. Such punishment is inflicted for misdemeanors, by act of assembly, either in cases in which the specific offence is named, or in those which are included in the class of offences formerly punishable with whipping, pillory, &c., and by the act of 1790 made punishable with fine and imprisonment in the county jail, for a term not ex-

ceeding two years; and by the act of 1807 for a term not exceeding seven years, and if the imprisonment be for two years or upwards, it might have been at the discretion of the court, in the jail of Philadelphia county, and by the act of April 10, 1826, in the western district, it shall be in the western penitentiary; and by the act of March 28, 1831, and the act of April 14, 1835, sec. 13, in the eastern district, if the imprisonment is for one year, or upwards, it shall be in the eastern penitentiary, and if for a term less than one year it shall be in the jail of the proper county. M'Kinney's Am. Mag. pp. 633, 634.

MICHIGAN.—When any convict shall be sentenced to solitary imprisonment and hard labor in any jail, the keeper thereof shall execute such sentence of solitary imprisonment, by confining the convict in one of the cells, if there be any in such jail, and if there be none, then in the most retired and solitary part of such jail.

No intercourse shall be allowed with any convict in solitary imprisonment, except for the conveyance of food and other necessary purposes, unless some minister of the gospel shall be disposed to visit him, in the manner hereinafter provided.

All charges and expenses of safe keeping and maintaining convicts, and of persons charged with offences, and committed for examination or trial, to the county jail, shall be paid from the county treasury; the accounts therefor being first settled and allowed by the board of supervisors.

The board of supervisors may, in their discretion, provide by contract for all necessary supplies for the use of the jail, including fuel and food, clothing, bedding, and medical attendance, for prisoners committed on criminal charges.

It shall be the duty of the keepers of the said prisons, to keep the prisoners committed to their charge, as far as may be practicable, separate and apart from each other, and to prevent all conversation between the said prisoners.

Prisoners detained for trial may converse with their counsel, and with such other persons as the keeper, in his discretion, may allow: prisoners under sentence shall not be permitted to hold any conversation with any person except the keepers or inspectors of the prison, unless in the presence of a keeper or inspector.

Prisoners detained for trial, and those under sentence, shall be provided with a sufficient quantity of wholesome food, at the expense of the county; and prisoners detained for trial may, at their own expense, and under the direction of the keeper, be supplied with any other proper article of food.

It shall be the duty of the keepers of the said several prisons, whenever any person shall be sentenced to hard labor therein, and any mode of labor shall be provided, to cause such prisoner to be kept constantly employed during every day, except Sunday: and annually to account with the board of supervisors of the county for the proceeds of such labor.

The keepers of the said prisons shall respectively have power, with the consent of the supervisors of the county, from time to time, to cause such of the convicts under their charge, as are capable of hard labor, to be employed upon any of the public avenues, streets, highways, or other works, in the county in which such prisoners shall be confined; or in any of the adjoining counties, upon such terms as may be agreed upon between the said keepers and the officers or other persons under whose direction such convicts shall be placed.

Whenever any convicts shall be employed under the last section, they shall be well chained and secured; and shall be subject to such regulations as the keeper legally charged with their custody, shall from time to time prescribe.

Whenever any prisoner who shall be sentenced to pay a fine and costs, or either, and to be committed until the same be paid, shall be employed at hard labor pursuant to the foregoing provisions, he shall be allowed the sum of seventy-five cents for each day's labor, and when he shall have earned the amount of such fine and costs, he shall be discharged. Rev. Stat. of Mich. pp. 712, 713.

When any convict shall be delivered to the keeper of the state prison, the officer having such convict in his charge, shall deliver to such keeper the certified copy of the sentence received by such officer from the clerk of the court, and shall take from such keeper a cer-

tificate of the delivery of such convict; and such certified copy of the sentence of any convict shall be evidence of the facts therein contained. Rev. Stat. of Mich. p. 722.

VERMONT.—When any person shall be sentenced to confinement at hard labor, during life, in the state prison, such sentence shall operate as the natural death of such person, so far as it in any way relates to his marriage, or the settlement of his estate.

Whenever any person shall be convicted of any offence, the punishment whereof is imprisonment in the state prison, he shall be confined to hard labor, during the whole of his imprisonment. Rev. Stat. Vermont, p. 570.

In this country, the legislatures of the several states, have provided by law, for the erection, and maintenance of state prisons, or penitentiaries, in their respective states, for the confinement, at hard labor, of persons convicted of public offences.

The subject of prison discipline, has, of late been much discussed in Europe and this country. Numerous theories have been started, and some experiments have been made, having for their object the reformation of the offender. Through the efforts of humane and benevolent men, the condition of prisoners, confined for state offences, has, within a few years, been greatly ameliorated.

For the purpose of giving the reader some idea of prison discipline in the United States, we append the statutory provisions on this subject, of the states of New York, Massachusetts, Pennsylvania, and Virginia.

*Prison Regulations in New York.*—(Rev. St. of N. Y.,) (4th ed. Banks, Gould & Co. 1851,) part 4, ch. 3.)

The common jails in the several counties of this state shall be kept by the sheriffs of the counties in which they are respectively situated, and shall be used as prisons.

For the detention of persons duly committed, in order to secure their attendance as witnesses in any criminal cases;

For the detention of persons charged with crime, and committed for trial;

For the confinement of persons duly committed for any contempt, or upon civil process, and

For the confinement of persons sentenced to imprisonment therein, upon conviction for any offence.

Each county prison shall contain

A sufficient number of rooms for the confinement of persons committed on criminal process and detained for trial, separately and distinct from prisoners under sentence:

A sufficient number of rooms for the confinement of prisoners under sentence:

A sufficient number of rooms for the separate confinement of persons committed on civil process for contempt, or as witnesses.

The keepers of the several county prisons shall receive and safely keep every person duly committed to their custody for safe keeping, examination or trial, or duly sentenced for imprisonment in such prison upon conviction for any contempt or misconduct, or for any criminal offence; and shall not, without lawful authority, let out of prison, on bail or otherwise, any such person.

Prisoners committed on criminal process, and detained for trial, and persons committed for contempt, or upon civil process, shall be kept in rooms separate and distinct from those in which persons convicted and under sentence shall be confined; and on no pretence whatever shall prisoners be detained for trial, or persons committed for contempt, or upon civil process, be kept or put in the same room with convicts under sentence.

Male and female prisoners (except husband and wife) shall not be kept or put in the same room.

It shall be the duty of the keepers of the said prison to keep the prisoners committed to their charge, as far as may be practicable, separate and distinct from each other, and to prevent all conversation between the said prisoners.

Prisoners detained for trial, may converse with their counsel, and with such other persons as the keeper in his discretion, may allow; prisoners under sentence shall not be permitted

to hold any conversation with any person, except the keepers or inspectors of the prison, unless in the presence of a keeper or inspector.

Prisoners detained for trial and those under sentence shall be provided with a sufficient quantity of inferior but wholesome food, at the expense of the county; but prisoners detained for trial, may at their own expense, and under the direction of the keeper, be supplied with any other proper articles of food.

It shall be the duty of the keeper of each county prison to cause each prisoner under sentence, except such as are under sentence of death, to be constantly employed at hard labor when practicable, during every day, except Sunday, and it shall be the duty of the county judge or of the inspectors appointed by him, to prescribe the kind of labor at which such prisoner shall be employed, and the keeper shall account at least annually, with the board of supervisors of the county for the proceeds of such labor.

The keepers of the said prison shall respectively have power with the consent of the supervisors of the county, from time to time, to cause such of the convicts under their charge, as are capable of hard labor, to be employed upon any of the public avenues, highways, streets, or other works, in the county in which such prisoners shall be confined, or in any of the adjoining counties, upon such terms as may be agreed upon between the said keepers and the officers or other persons under whose direction such convicts shall be placed.

Whenever any convicts shall be employed under the last section, they shall be well chained and secured; and shall be subject to such regulations as the keeper legally charged with their custody shall from time to time prescribe.

The provisions contained in the twenty-fourth, twenty-fifth, twenty-sixth, and twenty-seventh sections in the second article of the sixth title of the seventh chapter of the third part of Revised Statutes shall extend to prisoners confined upon any criminal process, or for a contempt, or under sentence, in like manner as for prisoners confined in civil cases.

It shall be the duty of the keeper of each county prison to provide a bible for each room in the prison to be kept therein, and he shall, if practicable, cause divine service to be performed for the benefit of the prisoners at least once each Sunday, provided there shall be a room in the prison that can be safely used for that purpose.

The provisions in relation to insane persons contained in the thirty-second section of the act entitled "An act to organize the state lunatic asylum and more effectually to provide for the care, maintenance and recovery of the insane," passed April 7th, 1842, shall be construed to apply to all prisoners in a county jail other than those who are committed for contempt or on civil process.

It shall be the duty of the keeper of each county prison to keep a daily record of the commitments and discharges of all prisoners delivered to his charge, which record shall exhibit the date of entrance, name, offence, term of sentence, fine, age, sex, country, color, social relations, parents, habits of life, cannot read, read only, read and write, well educated, classically educated, religious instruction, how committed, by whom committed, state of health when committed, how discharged, trade or occupation, whether so employed when arrested, number of previous convictions, value of articles stolen.

It shall be the duty of the keeper of each county prison to receive into the prison every person duly committed thereto, for any offence against the United States by any court or officer of the United States, and to confine such person in the prison until he shall be duly discharged, the United States supporting such person during his confinement. The provisions of this article relative to the mode of confining prisoners and convicts shall apply to all persons so committed by any court or officer of the United States.

It shall be the duty of the inspectors of the state prisons to visit and inspect, either separately or collectively, at least once in each year, all the jails or other county prisons, penitentiaries and houses of detention in this state. [So much of the first and second article of title first of the act entitled "An act for the better regulation of the county and state prisons of the state, and consolidating and amending the existing laws in relation thereto," passed December 14, 1847, as requires the inspectors of state prisons to visit and examine county jails, is hereby repealed. 1849, ch. 331, sec. 1.]

For the purpose of carrying into effect the provisions of the preceding section, they shall

as soon as practicable after entering upon their official duties, designate and set apart to each of their number the counties to be so visited by them respectively during the current year for the purpose of such inspection, and shall at the same time adopt such plan and regulation, not inconsistent with the laws of this state as they shall deem expedient and necessary to carry into effect a uniform system for the government and regulation of all the county prisons of this state, and for the modification and improvement of the structure of such jails and prisons with a view to such uniformity.

Such plan and regulations when agreed upon and adopted by the board of inspectors shall be by them immediately submitted to the governor, comptroller and attorney-general for their approval, but shall subsequently be subject to such modifications as the said board of inspectors may deem expedient and proper, a copy of which shall be furnished to the county judge and sheriff of each county, and to the keepers of each of the county prisons or penitentiaries of this state, whose duty it shall be to observe and carry the same into effect.

It shall be the duty of the sheriff and keeper of each of the jails and prisons to admit the said inspectors, or any one of them, into every part of said jail or prison; to exhibit to them, on demand, all the books, papers, documents and accounts pertaining to such jail or prison, or to the detention of persons confined therein; and to render them every other facility in their power to enable them to discharge the duties above prescribed, and to enable them to obtain any necessary information; the said inspectors shall have power to examine on oath, to be administered by any one of them, any of the keepers or officers of such prison or jail, and any person not under sentence confined therein, and to converse with any of the prisoners so confined, without the presence of the keepers thereof, or any of them.

Such inspector or inspectors, after a careful and thorough examination and inspection of each jail and prison, shall immediately make a detailed report of the same, stating the condition of the same at the time of such inspection, the number of persons confined therein for the year ending at the date of such report, the causes of such confinement, the manner in which convicts confined in such jail or prison during that period have been employed, the number of persons usually confined together in one room, the distinction, if any, usually observed in the treatment of persons therein confined, the evils and abuses, if any, found to exist in the prison, and particularly whether any of the rules and regulations prescribed by the said board of inspectors or the provisions contained in title first of this act have been violated, so far as the information required in this section can be obtained from the records of said jail or prison or otherwise.

It shall be the duty of such inspector or inspectors, to note and include in such report or append thereto any defect or defects he may deem to exist in the structure and arrangement of said jail or prison, and to suggest such improvements in the same as he may deem to be necessary to carry into successful operation and to ensure uniformity in the system by them adopted, and he or they shall then immediately leave with the county judge of such county a duplicate copy of such report and suggestions, whose duty it shall be to file the same with the clerk of said county, and cause a copy thereof, and if he shall approve the same, or any part thereof, with such approval indorsed thereon, to be delivered to the clerk of the board of supervisors of said county.

It shall be the duty of the clerk of the board of supervisors to present such report and suggestions (so indorsed by the county judge,) to the board of supervisors at their next meeting, who are authorized and required to cause such alterations to be made in the plan and construction of the jail or prison of such county, and such additional rooms to be constructed as shall have been so suggested and approved by the county judge, and as shall be necessary to remedy such deficiencies, and to levy and cause the expenses so to be incurred to be assessed upon the county as other county expenses are levied and assessed. In all cases where there shall exist any deficiency in room or apartments in such county jail or prison as is required for the classification named in this act, it shall be the duty of the supervisors to cause such deficiency to be supplied without unnecessary delay. As amended 1829, ch. 331.

It shall be the duty of the board of inspectors, annually on or before the fifteenth day of January in each year, to make an abstract report of their inspections of such county jails and

prisons, to the legislature, in which report shall be included, in tabular form, a summary of the record required by the fifteenth section of this act, to be kept by the keepers of such county jails and prisons.

It shall be the duty of the keeper of every prison enumerated in this title, to present to every court of oyer and terminer, and to every court of sessions to be held in his county, at the opening of such court, a calendar stating,

The name of every prisoner then detained in such prison;

The time when such prisoner was committed and by virtue of what process or precept; and,

The cause of the detention of every such person.

Within twenty-four hours after the discharge of any grand jury, by any court of oyer and terminer, or court of sessions, it shall be the duty of such court to cause every person so confined in such prison upon any criminal charge, who shall not have been indicted, to be discharged without bail, unless satisfactory cause shall be shown to such court for detaining such person in custody, or upon bail, as the case may require, until the meeting of the next grand jury in such county.

After the court of oyer and terminer shall commence its sittings in any county, no prisoner detained in the common jail of any such county upon any criminal charge, shall be removed therefrom by any writ of *habeas corpus*, unless such writ shall have been issued by such court of oyer and terminer, or shall be made returnable before it.

When any person shall be confined in any county prison for the non-payment of any fine not exceeding two hundred and fifty dollars, imposed for any criminal offence, and against whom no other cause of detention shall exist, on satisfactory proof being made to the county court of the county in which such prisoner may be confined, that he is unable, and has been ever since his conviction, unable to pay such fine, the court may, in its discretion, order his discharge.

There shall continue to be maintained for the security and reformation of convicts in this state, three state prisons; one at Sing Sing, in Westchester county; one at Auburn, in the county of Cayuga; and one at Clinton, in the county of Clinton; which prisons shall respectively be denominated the Sing Sing prison, the Auburn prison, and the Clinton prison.

The state prisons shall be under the charge and superintendence of three inspectors, to be chosen at a general election according to the provisions of the fourth section in the fifth article of the constitution of this state.

The governor shall have the power to remove every inspector so elected, for misconduct or malversation in office, giving to such inspector a copy of the charge against him, and an opportunity of being heard in his defence.

The inspectors elected at the last general election, shall enter upon the duties of their office on the first day of January, eighteen hundred and forty-eight, and each inspector to be hereafter chosen shall enter on the duties of his office on the first day of January, next following his election.

The inspectors shall hold their first joint meeting on the first Wednesday in January next at the state prison in Sing Sing, and at such meeting shall choose one of their number as president of the board for the ensuing year, and shall assign to each inspector the special charge and supervision of one of the state prisons to be designated, for the ensuing quarter of the year; and they shall make a similar assignment and designation at the commencement of each quarterly term thereafter.

The inspectors of the state prisons shall have the power, and it shall be their duty,

To visit jointly each of the state prisons that now are or hereafter may be established in this state, at least four times in each year.

To examine and enquire into all matters connected with the government, discipline and police of each prison, the punishment and employment of the convicts therein confined, the money concerns and contracts for work and the purchases and sales of the articles provided for each prison or sold, on account thereof.

To require reports from the agent, warden or other officers of the prison in relation to any or all of the preceding matters.



have been removed there.(a) And they may order this without writ:(b) they usually do it by a rule of the court; in the central criminal court, the judgment is executed under a warrant from the recorder; but in the country, where the trial has been at the assizes, there is nothing more than a mere memorandum of the sentence, written opposite to the name of the prisoner in the calender or list of prisoners, which is signed by the judge, as a warrant to the sheriff to execute the prisoner.(c) In the rule of the court of Queen's Bench, and in the warrant of the recorder of London, the time of the execution is specified; but it is not so at the assizes; the judge however usually reprieves the prisoner for a certain time, (for every court having the power to award execution, has a discretionary power of granting a reprieve,)(d) but as soon as that time has expired, or where there is no reprieve, the sheriff may execute the party at such time as he may deem most convenient. As the sentence is, that the defendant shall be hanged by the neck until he be dead,—if he be hanged, but come to life afterwards, he must be hanged again; for the judgment is not executed, until he is dead.(e)

If a woman, when condemned to death, be quick with child, she may allege the fact, in order to have the execution respited until after her delivery; and thereupon the sheriff shall be ordered to impanel a jury of matrons to examine her in a private room, to try the fact, and if they find that she is quick with child, her execution shall be respited until her delivery.(g)

In the case of murder, the prisoner, after conviction, must be kept apart from the other prisoners, fed on bread and water only (unless in the case of sickness or wound the surgeon order to the contrary;) and no person shall have access to him but the jailer and his ser-  
[\*204] vants, the chaplain and the surgeon \*of the prison, without the written permission of the judge, or the sheriff or his deputy.(h) And when executed, he must be buried within the precincts of the prison.(i)

(b) *Transportation.*

Her Majesty, by warrant under her sign manual, may appoint places of confinement within England or Wales, either at land or on board vessels in the river Thames or some other river, or port, or harbour, for the confinement of male offenders under sentence or order of transportation;(k) where they may be kept to hard labor;(l) and the time of such confinement shall be reckoned in discharge or part discharge of the

(a) *R. v. Garside, supra.*

(b) 2 Hawk. c. 51, s. 4.

(c) 4 Bl. Com. 403, 404.

(d) 2 Hawk. c. 51, s. 8.

(e) *Id.* s. 7.

(g) 2 Hawk. c. 51, ss. 9, 10.

(h) 9 G. 4, c. 31, s. 6.

(i) 2 & 3 W. 4, c. 75; see *ante*, p. 181.

(k) 5 G. 4, c. 84, s. 10.

(l) *Id.* s. 18.

term of their transportation.(a) And they may be sent for that purpose to any of Her Majesty's penitentiaries in Great Britain.(b) But where an order for the transportation of any convict, male or female, shall be delivered to the sheriff or jailer, he shall forthwith remove him or her to the ship employed for the purpose, and there deliver the offender to the contractor, together with a copy (attested by the sheriff or jailer) of the caption and order of the court, and its sentence or order for transportation, and a certificate of his crime, his age, trade, &c., temper, disposition, and his behavior whilst in prison; and the contractor shall give the sheriff or jailer a receipt for his discharge.(c)

(c) *Imprisonment.*

By stat. 5 & 6 W. 4, c. 38, s. 4, where any person shall be convicted at any assizes or sessions for an offence for which he shall be liable to the punishment of imprisonment, transportation, or death, it shall be lawful for the court (if it shall so think fit) to commit him to any house of correction for such county, in execution of his judgment. Or, in cases at the assizes, he may be and usually is, committed to the county jail. In cases where, for an offence committed in the county of a city or town, the offender is tried and convicted at the assizes for the adjoining county, and judgment of imprisonment is passed upon him, the judge may order such judgment to be executed, either in the same county, or in the county of the city, &c., in which the offence was committed.(d) In what cases hard labor or solitary imprisonment may be inflicted,(e)[1]

(a) 5 G. 4, c. 84, s. 19.

(b) 10 & 11 Vict. c. 67.

(c) 5 G. 4, c. 84, s. 4; and see the rest of that Act, and stat. 11 G. 4 & 1 W. 4, c. 39.

(d) 51 G. 3, c. 100, s. 1; 14 & 15 Vict. c. 55, s. 23.

(e) See *ante*, p. 183.

[1] NEW YORK.—Whenever, by statute, an offender is declared punishable by imprisonment in a state prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court may sentence the defendant to imprisonment for life, or for any time not less than that specified. But no person can, in any case, be sentenced to imprisonment in a state prison for any term less than two years. 2 R. S. 700, § 12. There is an exception to this general rule, however, to be found in the "Act to preserve the purity of elections." Laws of 1839, p. 365. By the fourteenth section of that act, voting or offering to vote, in this state, by an inhabitant of another state, is declared a felony, and the person so voting or offering to vote is liable, on conviction, to be imprisoned in a state prison for a period not exceeding one year, at the discretion of the court.

A sentence of imprisonment in a state prison for any term less than for life, suspends all the civil rights of the person so sentenced, and forfeits all public offices and private trusts, authority, or power, during the term of such imprisonment. And a person sentenced to imprisonment, in a state prison for life, shall, thereafter be deemed civilly dead. 2 R. S. 701, secs. 19, 20.

MASSACHUSETTS.—When any person shall be convicted of an offence, punishable at the

discretion of the court, either by fine or imprisonment in the county jail, or house of correction, or by a fine or imprisonment in the state prison, the court may award against such offender a conditional sentence, and order him to pay a fine, with or without the costs of prosecution, within a limited time, to be expressed in the sentence, and in default thereof, to suffer such imprisonment as is provided by law, and awarded by the court.

The person, against whom any such conditional sentence shall be awarded, shall be forthwith committed to the custody of an officer in court or to the county jail, to be detained until the sentence be complied with; and if he shall not pay the fine imposed, within the time limited, the sheriff shall cause the other part of the sentence to be executed forthwith.

Whenever it is provided, that an offender shall be punished by imprisonment in the county jail and a fine, or by imprisonment in the house of correction and a fine, such offender may, at the discretion of the court, be sentenced to be punished by such imprisonment, without the fine, or by such fine without the imprisonment.

Every court, before whom any person shall be convicted upon an indictment for any offence not punishable with death, or by imprisonment in the state prison, may, in addition to the punishment prescribed by law, require such person to recognize with sufficient sureties, in a reasonable sum, to keep the peace, or to be of good behavior, or both, for any term not exceeding two years, and to stand committed until he shall so recognize.

In case of a breach of the condition of any such recognizance, the same proceedings shall be had, that are prescribed in the one hundred and thirty fourth chapter, in relation to recognizances to keep the peace, and be of good behavior.

Whenever any person, convicted of an offence, shall be sentenced to pay a fine or costs, or to be imprisoned in the county jail, or in the house of correction, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county, or to some other officer in court, a transcript from the minutes of the court, of such conviction and sentence, duly certified by such clerk, which shall be a sufficient authority for the sheriff to execute such sentence, and he shall execute the same accordingly.

In every case, in which the punishment of imprisonment in the state prison is awarded against any convict, the form of the sentence shall be, that he be punished by confinement at hard labor, and he shall also be sentenced to solitary imprisonment, for such term as the court shall direct, not exceeding twenty days at one time; and in the execution of such sentence, the solitary imprisonment shall precede the punishment by hard labor, unless the court shall otherwise order.

No convict shall be sentenced to imprisonment in the state prison for any less time than one year.

When any convict shall be sentenced to imprisonment in the state prison, the clerk of the court shall make out a warrant, under the seal of the court, directed to the warden of the prison, requiring him, as soon as may be, to cause such convict to be removed from the county jail to the state prison; and the clerk shall also annex to the warrant, a certified transcript of such conviction and sentence, and shall deliver the warrant and transcript to the sheriff of the county, who shall cause the same to be transmitted and delivered to the warden, to the end that the warden may, by himself, or such person as he may appoint for that purpose, cause the warrant to be duly executed, by the removal of such convict to the state prison, in the manner prescribed in the one hundred and forty-fourth chapter. Rev. Stat. of Mass. pp. 766, 767, secs. 2 to 10.

Any person, convicted of an offence, punishable wholly or in part by imprisonment in the county jail, may be sentenced to suffer such imprisonment in the house of correction, instead of the jail, or to suffer solitary imprisonment and be confined at hard labor, either in the jail or the house of correction.

If any boy, under the age of sixteen years, shall be convicted of an offence, which is punishable by imprisonment in the state prison, such convict not having been before sentenced to imprisonment in the state prison in this state, or in any state prison or penitentiary within the United States, the court, if sentence of solitary imprisonment and confinement at hard labor, for a term not exceeding three years, is awarded against such convict, and also when the sentence of confinement, at hard labor, for any term of time, is awarded against a female

convict of whatever age, shall order such sentence to be executed, either in the house of correction or in the county jail, and not in the state prison; but the provisions of this and the preceding section shall not prevent the courts in the city of Boston, from sentencing such convicts to confinement in any place, in which juvenile offenders may be by law confined.

When the punishment of solitary imprisonment, and confinement at hard labor for a term not exceeding three years, shall be awarded by the court against any convict, who has not been before sentenced to the like punishment, by any court in this state, or within the United States, such sentence may be executed, either in the house of correction, or in the county jail, or in the state prison.

When any convict shall be sentenced to solitary imprisonment and hard labor, in any house of correction or jail, the master or keeper thereof shall execute such sentence of solitary imprisonment, by confining the convict in one of the cells, if there be any in such house of correction or jail, and if there be none, then in the most retired and solitary part of such house or jail; and, during the time of solitary imprisonment, such convict shall be fed with bread and water only, unless other food shall be necessary for the preservation of his health; No intercourse shall be allowed with any convict in solitary imprisonment, except for the conveyance of food, and other necessary purposes, unless some minister of the gospel shall be disposed to visit him, in the manner hereafter provided.

As soon as the term of solitary imprisonment shall have expired, the master or keeper shall furnish the convict with tools and materials, or with other means, to work in any suitable manner, in which he can be usefully or profitably employed, either in the said house of correction or jail, or within the close yard thereof; such convict may, if necessary, be confined by a log and chain, or in such other manner as shall prevent his escape, without unnecessarily inflicting bodily pain, or interrupting his labor; the overseers of the house of correction, or, when such punishment is inflicted in the jail, the sheriff of the county, shall oversee the execution of all such sentences.

If any convict shall be refractory, or, during the time for which he is sentenced to hard labor, shall refuse or neglect, without reasonable cause, to labor in any suitable manner, when required, such convict, so long as he shall continue to be refractory, or shall refuse or neglect to labor, shall be kept in solitary confinement, and fed with bread and water only, in the manner before provided. Rev. Sta. of Mass. pp. 782, 783, secs. 17 to 22.

When any person shall be convicted of any offence, and shall be duly sentenced therefor to confinement in the state prison of this state, for one year or more, and it shall be alleged in the indictment upon which such conviction is had, and admitted or proved on the trial, that the convict has before been sentenced to a like punishment by any court in this state, or in any other of the United States, for a period of not less than one year, he shall be sentenced to confinement to hard labor, for a term not exceeding seven years, in addition to the punishment prescribed by law for the offence of which he shall then be convicted.

When any such convict shall have twice before been sentenced to confinement to hard labor, for a period of not less than one year at each time, by any court in this state, or in any other of the United States, he shall be sentenced to confinement to hard labor for his life, or for a term of not less than seven years, in addition to the punishment prescribed by law for the offence of which he shall then be convicted.

When the last conviction, in any case mentioned in the two preceding sections, shall be had for any offence committed before this statute shall take effect, the additional punishment shall be regulated according to the statutes which were in force in this state at the time when such last offence was committed, and the sentence shall be awarded accordingly, notwithstanding the repeal of those former statutes.

Whenever the warden shall be satisfied that any convict in the state prison has before been sentenced to imprisonment in the same prison, or in some other state prison within the United States, for not less than one year, it shall be the duty of the warden to give notice thereof to the county attorney for the county of Suffolk, who shall by an information filed in the municipal court of the city of Boston, or otherwise, make the same known to the judge of the said court; and thereupon such convict shall be brought before the court, by such

process or order as the judge shall direct, to hear and answer to the said charge: If the convict, by his plea or answer, shall deny the truth of the charge, the same shall be tried by a jury, in due course of law, who shall be instructed to inquire, and by their verdict to find, whether the charge in such information is or is not true.

If it shall appear, by confession of the convict, verdict of a jury, or otherwise according to law, that the charge is true, such convict shall be sentenced to imprisonment in the said prison for a term not exceeding seven years, in addition to the sentence to which he stood committed.

Whenever it shall appear to the warden that any convict in the state prison has been twice before sentenced to imprisonment in the same prison, or in any other state prison in the United States, for a period of not less than one year at each time, the convict shall be brought before the municipal court of the city of Boston, in the manner before provided in this chapter, in the case of a convict who has been once before sentenced as aforesaid, and the like proceedings as are provided in that case shall be had for ascertaining the truth of the charge; and if it shall thereupon appear to the court that the charge is true, the convict shall be sentenced to confinement to hard labor for his life, or for a term of not less than seven years, in addition to the sentence on which he stood committed; and he shall have the same right to appeal from the judgment rendered in pursuance of this section, as in other cases tried before the said municipal court. Rev. Sta. of Mass. pp. 809, 810, 811, secs. 16, 17, 18, 34, 35, 54.

**MAINE.**—Any person convicted before the supreme judicial court or district court, of any crime or offence punishable, in part or in whole, by imprisonment in the county jail, may be sentenced to suffer imprisonment, either in the county jail or house of correction at their discretion, to be employed and kept at work there, in the same manner as rogues, vagabonds, and idlers are by law to be employed, when committed to such house.

Either of said courts may sentence any person, convicted of any offence mentioned in the preceding section, conditionally, to pay a fine with costs of prosecution, or, in case he do not pay the same within ten days, that he be immediately thereafter conveyed to the house of correction, and there be kept at work as aforesaid, for a term, not exceeding six months.

Whenever it is provided that an offender shall be punished by imprisonment and a fine, the court may sentence him to either of those punishments without the other, or to both.

Every court, before whom any person shall be convicted of an offence, not punishable by death or confinement in the state prison, may, in addition to the punishment by law prescribed, require such person to recognize to the state, with sufficient sureties, in a reasonable sum, to keep the peace or be of good behavior, or both, for a term not exceeding two years, and stand committed till he shall so recognize.

When a person, convicted of an offence, shall be sentenced to pay a fine or costs, or to be imprisoned in the county jail or house of correction, the clerk of the courts, shall, as soon as may be, make out and deliver to the sheriff or some officer in court, a transcript of the minutes of the court of the conviction and sentence duly certified by him: and this shall be a sufficient authority for the officer to execute such sentence.

When any convict is sentenced to confinement in the state prison, the clerk of the court before whom the conviction may take place, shall make out a warrant, under seal of the court directed to the warden, of the prison, requiring him to cause such convict, without needless delay, to be removed from the county jail to the state prison; and the warden and all sheriffs and jail keepers are required strictly to obey the directions of it; and the clerk shall, as soon as may be, deliver the same warrant to the sheriff of the county, who is required forthwith to deliver the same to said warden. Rev. Sta. of Maine, pp. 606, 607, secs. 2 to 7.

**PENNSYLVANIA.**—Penitentiary punishments are annexed to the conviction of felonies, by act of assembly, the nature and term of the imprisonment being prescribed in reference to the specific offence by name. Such punishment is inflicted for misdeameanors, by act of assembly, either in cases in which the specific offence is named, or in those which are included in the class of offences formerly punishable with whipping, pillory, &c., and by the act of 1790 made punishable with fine and imprisonment in the county jail, for a term not ex-

ceeding two years; and by the act of 1807 for a term not exceeding seven years, and if the imprisonment be for two years or upwards, it might have been at the discretion of the court, in the jail of Philadelphia county, and by the act of April 10, 1826, in the western district, it shall be in the western penitentiary; and by the act of March 28, 1831, and the act of April 14, 1835, sec. 13, in the eastern district, if the imprisonment is for one year, or upwards, it shall be in the eastern penitentiary, and if for a term less than one year it shall be in the jail of the proper county. M'Kinney's Am. Mag. pp. 633, 634.

MICHIGAN.—When any convict shall be sentenced to solitary imprisonment and hard labor in any jail, the keeper thereof shall execute such sentence of solitary imprisonment, by confining the convict in one of the cells, if there be any in such jail, and if there be none, then in the most retired and solitary part of such jail.

No intercourse shall be allowed with any convict in solitary imprisonment, except for the conveyance of food and other necessary purposes, unless some minister of the gospel shall be disposed to visit him, in the manner hereinafter provided.

All charges and expenses of safe keeping and maintaining convicts, and of persons charged with offences, and committed for examination or trial, to the county jail, shall be paid from the county treasury; the accounts therefor being first settled and allowed by the board of supervisors.

The board of supervisors may, in their discretion, provide by contract for all necessary supplies for the use of the jail, including fuel and food, clothing, bedding, and medical attendance, for prisoners committed on criminal charges.

It shall be the duty of the keepers of the said prisons, to keep the prisoners committed to their charge, as far as may be practicable, separate and apart from each other, and to prevent all conversation between the said prisoners.

Prisoners detained for trial may converse with their counsel, and with such other persons as the keeper, in his discretion, may allow: prisoners under sentence shall not be permitted to hold any conversation with any person except the keepers or inspectors of the prison, unless in the presence of a keeper or inspector.

Prisoners detained for trial, and those under sentence, shall be provided with a sufficient quantity of wholesome food, at the expense of the county; and prisoners detained for trial may, at their own expense, and under the direction of the keeper, be supplied with any other proper article of food.

It shall be the duty of the keepers of the said several prisons, whenever any person shall be sentenced to hard labor therein, and any mode of labor shall be provided, to cause such prisoner to be kept constantly employed during every day, except Sunday: and annually to account with the board of supervisors of the county for the proceeds of such labor.

The keepers of the said prisons shall respectively have power, with the consent of the supervisors of the county, from time to time, to cause such of the convicts under their charge, as are capable of hard labor, to be employed upon any of the public avenues, streets, highways, or other works, in the county in which such prisoners shall be confined; or in any of the adjoining counties, upon such terms as may be agreed upon between the said keepers and the officers or other persons under whose direction such convicts shall be placed.

Whenever any convicts shall be employed under the last section, they shall be well chained and secured; and shall be subject to such regulations as the keeper legally charged with their custody, shall from time to time prescribe.

Whenever any prisoner who shall be sentenced to pay a fine and costs, or either, and to be committed until the same be paid, shall be employed at hard labor pursuant to the foregoing provisions, he shall be allowed the sum of seventy-five cents for each day's labor, and when he shall have earned the amount of such fine and costs, he shall be discharged. Rev. Stat. of Mich. pp. 712, 713.

When any convict shall be delivered to the keeper of the state prison, the officer having such convict in his charge, shall deliver to such keeper the certified copy of the sentence received by such officer from the clerk of the court, and shall take from such keeper a cer-

ificate of the delivery of such convict; and such certified copy of the sentence of any convict shall be evidence of the facts therein contained. Rev. Stat. of Mich. p. 722.

VERMONT.—When any person shall be sentenced to confinement at hard labor, during life, in the state prison, such sentence shall operate as the natural death of such person, so far as it in any way relates to his marriage, or the settlement of his estate.

Whenever any person shall be convicted of any offence, the punishment whereof is imprisonment in the state prison, he shall be confined to hard labor, during the whole of his imprisonment. Rev. Stat. Vermont, p. 570.

In this country, the legislatures of the several states, have provided by law, for the erection, and maintenance of state prisons, or penitentiaries, in their respective states, for the confinement, at hard labor, of persons convicted of public offences.

The subject of prison discipline, has, of late been much discussed in Europe and this country. Numerous theories have been started, and some experiments have been made, having for their object the reformation of the offender. Through the efforts of humane and benevolent men, the condition of prisoners, confined for state offences, has, within a few years, been greatly ameliorated.

For the purpose of giving the reader some idea of prison discipline in the United States, we append the statutory provisions on this subject, of the states of New York; Massachusetts, Pennsylvania, and Virginia.

*Prison Regulations in New York.*—(Rev. St. of N. Y.,) (4th ed. Banks, Gould & Co. 1852,) part 4, ch. 3.)

The common jails in the several counties of this state shall be kept by the sheriffs of the counties in which they are respectively situated, and shall be used as prisons.

For the detention of persons duly committed, in order to secure their attendance as witnesses in any criminal cases;

For the detention of persons charged with crime, and committed for trial;

For the confinement of persons duly committed for any contempt, or upon civil process, and

For the confinement of persons sentenced to imprisonment therein, upon conviction for any offence.

Each county prison shall contain

A sufficient number of rooms for the confinement of persons committed on criminal process and detained for trial, separately and distinct from prisoners under sentence:

A sufficient number of rooms for the confinement of prisoners under sentence:

A sufficient number of rooms for the separate confinement of persons committed on civil process for contempt, or as witnesses.

The keepers of the several county prisons shall receive and safely keep every person duly committed to their custody for safe keeping, examination or trial, or duly sentenced for imprisonment in such prison upon conviction for any contempt or misconduct, or for any criminal offence; and shall not, without lawful authority, let out of prison, on bail or otherwise, any such person.

Prisoners committed on criminal process, and detained for trial, and persons committed for contempts, or upon civil process, shall be kept in rooms separate and distinct from those in which persons convicted and under sentence shall be confined; and on no pretence whatever shall prisoners be detained for trial, or persons committed for contempt, or upon civil process, be kept or put in the same room with convicts under sentence.

Male and female prisoners (except husband and wife) shall not be kept or put in the same room.

It shall be the duty of the keepers of the said prison to keep the prisoners committed to their charge, as far as may be practicable, separate and distinct from each other, and to prevent all conversation between the said prisoners.

Prisoners detained for trial, may converse with their counsel, and with such other persons as the keeper in his discretion, may allow; prisoners under sentence shall not be permitted

to hold any conversation with any person, except the keepers or inspectors of the prison; unless in the presence of a keeper or inspector.

Prisoners detained for trial and those under sentence shall be provided with a sufficient quantity of inferior but wholesome food, at the expense of the county; but prisoners detained for trial, may at their own expense, and under the direction of the keeper, be supplied with any other proper articles of food.

It shall be the duty of the keeper of each county prison to cause each prisoner under sentence, except such as are under sentence of death, to be constantly employed at hard labor when practicable, during every day, except Sunday, and it shall be the duty of the county judge or of the inspectors appointed by him, to prescribe the kind of labor at which such prisoner shall be employed, and the keeper shall account at least annually, with the board of supervisors of the county for the proceeds of such labor.

The keepers of the said prison shall respectively have power with the consent of the supervisors of the county, from time to time, to cause such of the convicts under their charge, as are capable of hard labor, to be employed upon any of the public avenues, highways, streets, or other works, in the county in which such prisoners shall be confined, or in any of the adjoining counties, upon such terms as may be agreed upon between the said keepers and the officers or other persons under whose direction such convicts shall be placed.

Whenever any convicts shall be employed under the last section, they shall be well chained and secured; and shall be subject to such regulations as the keeper legally charged with their custody shall from time to time prescribe.

The provisions contained in the twenty-fourth, twenty-fifth, twenty-sixth, and twenty-seventh sections in the second article of the sixth title of the seventh chapter of the third part of Revised Statutes shall extend to prisoners confined upon any criminal process, or for a contempt, or under sentence, in like manner as for prisoners confined in civil cases.

It shall be the duty of the keeper of each county prison to provide a bible for each room in the prison to be kept therein, and he shall, if practicable, cause divine service to be performed for the benefit of the prisoners at least once each Sunday, provided there shall be a room in the prison that can be safely used for that purpose.

The provisions in relation to insane persons contained in the thirty-second section of the act entitled "An act to organize the state lunatic asylum and more effectually to provide for the care, maintenance and recovery of the insane," passed April 7th, 1842, shall be construed to apply to all prisoners in a county jail other than those who are committed for contempt or on civil process.

It shall be the duty of the keeper of each county prison to keep a daily record of the commitments and discharges of all prisoners delivered to his charge, which record shall exhibit the date of entrance, name, offence, term of sentence, fine, age, sex, country, color, social relations, parents, habits of life, cannot read, read only, read and write, well educated, classically educated, religious instruction, how committed, by whom committed, state of health when committed, how discharged, trade or occupation, whether so employed when arrested, number of previous convictions, value of articles stolen.

It shall be the duty of the keeper of each county prison to receive into the prison every person duly committed thereto, for any offence against the United States by any court or officer of the United States, and to confine such person in the prison until he shall be duly discharged, the United States supporting such person during his confinement. The provisions of this article relative to the mode of confining prisoners and convicts shall apply to all persons so committed by any court or officer of the United States.

It shall be the duty of the inspectors of the state prisons to visit and inspect, either separately or collectively, at least once in each year, all the jails or other county prisons, penitentiaries and houses of detention in this state. [So much of the first and second article of title first of the act entitled "An act for the better regulation of the county and state prisons of the state, and consolidating and amending the existing laws in relation thereto," passed December 14, 1847, as requires the inspectors of state prisons to visit and examine county jails, is hereby repealed. 1849, ch. 331, sec. 1.]

For the purpose of carrying into effect the provisions of the preceding section, they shall



as soon as practicable after entering upon their official duties, designate and set apart to each of their number the counties to be so visited by them respectively during the current year for the purpose of such inspection, and shall at the same time adopt such plan and regulation, not inconsistent with the laws of this state as they shall deem expedient and necessary to carry into effect a uniform system for the government and regulation of all the county prisons of this state, and for the modification and improvement of the structure of such jails and prisons with a view to such uniformity.

Such plan and regulations when agreed upon and adopted by the board of inspectors, shall be by them immediately submitted to the governor, comptroller and attorney-general for their approval, but shall subsequently be subject to such modifications as the said board of inspectors may deem expedient and proper, a copy of which shall be furnished to the county judge and sheriff of each county, and to the keepers of each of the county prisons or penitentiaries of this state, whose duty it shall be to observe and carry the same into effect.

It shall be the duty of the sheriff and keeper of each of the jails and prisons to admit the said inspectors, or any one of them, into every part of said jail or prison; to exhibit to them, on demand, all the books, papers, documents and accounts pertaining to such jail or prison, or to the detention of persons confined therein; and to render them every other facility in their power to enable them to discharge the duties above prescribed, and to enable them to obtain any necessary information; the said inspectors shall have power to examine on oath, to be administered by any one of them, any of the keepers or officers of such prison or jails, and any person not under sentence confined therein, and to converse with any of the prisoners so confined, without the presence of the keepers thereof, or any of them.

Such inspector or inspectors, after a careful and thorough examination and inspection of each jail and prison, shall immediately make a detailed report of the same, stating the condition of the same at the time of such inspection, the number of persons confined therein for the year ending at the date of such report, the causes of such confinement, the manner in which convicts confined in such jail or prison during that period have been employed, the number of persons usually confined together in one room, the distinction, if any, usually observed in the treatment of persons therein confined, the evils and abuses, if any, found to exist in the prison, and particularly whether any of the rules and regulations prescribed by the said board of inspectors or the provisions contained in title first of this act have been violated, so far as the information required in this section can be obtained from the records of said jail or prison or otherwise.

It shall be the duty of such inspector or inspectors, to note and include in such report, or append thereto any defect or defects he may deem to exist in the structure and arrangement of said jail or prison, and to suggest such improvements in the same as he may deem to be necessary to carry into successful operation and to ensure uniformity in the system by them adopted, and he or they shall then immediately leave with the county judge of such county a duplicate copy of such report and suggestions, whose duty it shall be to file the same with the clerk of said county, and cause a copy thereof, and if he shall approve the same, or any part thereof, with such approval indorsed thereon, to be delivered to the clerk of the board of supervisors of said county.

It shall be the duty of the clerk of the board of supervisors to present such report and suggestions (so indorsed by the county judge,) to the board of supervisors at their next meeting, who are authorized and required to cause such alterations to be made in the plan and construction of the jail or prison of such county, and such additional rooms to be constructed as shall have been so suggested and approved by the county judge, and as shall be necessary to remedy such deficiencies, and to levy and cause the expenses so to be incurred to be assessed upon the county as other county expenses are levied and assessed. In all cases where there shall exist any deficiency in room or apartments in such county jail or prison as is required for the classification named in this act, it shall be the duty of the supervisors to cause such deficiency to be supplied without unnecessary delay. As amended 1829, ch. 331.

It shall be the duty of the board of inspectors, annually on or before the fifteenth day of January in each year, to make an abstract report of their inspections of such county jails and

prisons, to the legislature, in which report shall be included, in tabular form, a summary of the record required by the fifteenth section of this act, to be kept by the keepers of such county jails and prisons.

It shall be the duty of the keeper of every prison enumerated in this title, to present to every court of oyer and terminer, and to every court of sessions to be held in his county, at the opening of such court, a calendar stating,

The name of every prisoner then detained in such prison;

The time when such prisoner was committed and by virtue of what process or precept; and,

The cause of the detention of every such person.

Within twenty-four hours after the discharge of any grand jury, by any court of oyer and terminer, or court of sessions, it shall be the duty of such court to cause every person so confined in such prison upon any criminal charge, who shall not have been indicted, to be discharged without bail, unless satisfactory cause shall be shown to such court for detaining such person in custody, or upon bail, as the case may require, until the meeting of the next grand jury in such county.

After the court of oyer and terminer shall commence its sittings in any county, no prisoner detained in the common jail of any such county upon any criminal charge, shall be removed therefrom by any writ of *habeas corpus*, unless such writ shall have been issued by such court of oyer and terminer, or shall be made returnable before it.

When any person shall be confined in any county prison for the non-payment of any fine not exceeding two hundred and fifty dollars, imposed for any criminal offence, and against whom no other cause of detention shall exist, on satisfactory proof being made to the county court of the county in which such prisoner may be confined, that he is unable, and has been ever since his conviction, unable to pay such fine, the court may, in its discretion, order his discharge.

There shall continue to be maintained for the security and reformation of convicts in this state, three state prisons; one at Sing Sing, in Westchester county; one at Auburn, in the county of Cayuga; and one at Clinton, in the county of Clinton; which prisons shall respectively be denominated the Sing Sing prison, the Auburn prison, and the Clinton prison.

The state prisons shall be under the charge and superintendence of three inspectors, to be chosen at a general election according to the provisions of the fourth section in the fifth article of the constitution of this state.

The governor shall have the power to remove every inspector so elected, for misconduct or malversation in office, giving to such inspector a copy of the charge against him, and an opportunity of being heard in his defence.

The inspectors elected at the last general election, shall enter upon the duties of their office on the first day of January, eighteen hundred and forty-eight, and each inspector to be hereafter chosen shall enter on the duties of his office on the first day of January, next following his election.

The inspectors shall hold their first joint meeting on the first Wednesday in January next at the state prison in Sing Sing, and at such meeting shall choose one of their number as president of the board for the ensuing year, and shall assign to each inspector the special charge and supervision of one of the state prisons to be designated, for the ensuing quarter of the year; and they shall make a similar assignment and designation at the commencement of each quarterly term thereafter.

The inspectors of the state prisons shall have the power, and it shall be their duty,

To visit jointly each of the state prisons that now are or hereafter may be established in this state, at least four times in each year.

To examine and enquire into all matters connected with the government, discipline and police of each prison, the punishment and employment of the convicts therein confined, the money concerns and contracts for work and the purchases and sales of the articles provided for each prison or sold, on account thereof.

To require reports from the agent, warden or other officers of the prison in relation to any or all of the preceding matters.

To make such general regulations for the government and discipline of each prison, as they may deem expedient, and from time to time to alter and amend the same, and in making such regulations it shall be their duty to adopt such as in their judgment, while consistent with the discipline of the prison, shall best conduce to the reformation of the convicts.

To enquire into any improper conduct which may be alleged to have been committed by the warden or other officer of either of the said prisons, and for that purpose to issue subpoenas to compel the attendance of witnesses and the production before them of writings and papers, and to examine any witnesses on oath who shall appear before them.

To keep regular minutes of the meetings and proceedings at each prison which they shall visit, which minutes shall be signed by them and shall be entered by the clerk in a book which shall be kept for that purpose in each of said prisons.

To make an annual report to the legislature on or before the fifteenth day of January in each year, of the state and condition of each of said prisons, the convicts confined therein, of the money expended and received; and generally of all the proceedings during the past year.

To furnish to the legislature, with their respective annual reports, summary abstracts of all the returns which shall have been made to them during the past year, by the warden or any other officer of each of the said prisons; and also a list of all contracts entered into the past year for the employment of convicts, stating what portion of each contract may have been finished during the year, sums of money received thereon, the probable time of its completion and the amount which will then remain and become due.

To cause all orders, rules and regulations adopted by them, and the entries of their proceedings at each meeting, to be recorded by the clerk of the prison then visited, and to furnish to each officer of the prison, on his appointment, a printed copy of the general rules and regulations of the prison.

To employ artisans from abroad for the purpose of teaching such new branches of business in the state prisons as are not pursued in the state.

To prescribe the articles of food and the quantities of each kind that shall be inserted in each contract for the supply of provisions to each state prison, and to authorize each contract to be made for the term of one year, or for any less term in their discretion, or to cause such provisions to be furnished by the agent, in their discretion.

To employ a suitable matron and not exceeding one assistant matron to every twenty-five convicts, to supervise and have charge of all female convicts in the female convict prison at Sing Sing, and to prescribe rules and regulations for the government and discipline of such convicts, and to cause them to be employed as shall best conduce to their support and reformation.

To transmit to the comptroller of the state on or before the first day of January in each year, the account and inventory rendered to them by the agent of each state prison, with such observations and remarks thereon as they may deem necessary to enable the comptroller to understand the same, and to correct any errors that may be discovered therein.

To cause an estimate to be made of the value of the goods and other property of the state, of which an inventory has been rendered to them by the agent of each state prison, which estimate shall be made under oath by two or more competent persons, to be appointed for that purpose by the inspectors, and shall be transmitted by the inspectors to the comptroller with the inventory to which it relates.

To select, as far as practicable, such persons in appointing keepers to each prison, where manufacturing is carried on by the state, as are qualified to instruct the convicts in the trades and manufactures thus prosecuted in such prison.

The president of the board of inspectors of state prisons, shall have power to administer oaths and to take affidavits in all matters pertaining to the fiscal affairs, business transactions, discipline or government of said state prisons. In like manner the inspector having charge of any state prison, may administer oaths and take affidavits.

It shall be the duty of each inspector to spend at least one week at the prison assigned to him, at least once in each month, and he shall at that time diligently examine and enquire into the condition of such prison and give such general directions in writing, for its

government and discipline, as he shall deem to be necessary and expedient, provided the directions so given shall not conflict with the laws of the state or with the general regulations of the prison as established by the board of inspectors; each inspector shall keep a journal of his proceedings at each monthly or other visitation, and shall report the same to the board of inspectors at their first joint meeting thereafter held at such prison; such journal shall also be entered by the clerk in the book of the proceedings of the board of inspectors kept in the prison to which the journal shall relate.

Each inspector shall have power to suspend any of the officers of the prison at that time under his special charge until the next meeting of the board of inspectors, and may appoint some suitable person to supply the place and perform the duties of the officer suspended, during his suspension. He shall also have power to make temporary appointments to supply all other vacancies, which appointments shall be in force until the next meeting of the board of inspectors.

All appointments to office made by the inspectors or by an inspector, and all removals of any officer by the inspectors or an inspector, shall be made by an instrument in writing, to be signed by such inspectors or inspector, and in case of removal by any one inspector, the reason or causes of such removal shall be briefly stated in such instrument. The instrument by which such appointment or removal is made, within two days after the same shall have been signed, shall be delivered to the agent of the prison, who shall note the same on his next account to be rendered to the comptroller.

Neither the inspectors or an inspector shall knowingly appoint any person to any office in a state prison who shall be related to either of them by consanguinity or affinity within the third degree.

No inspector shall be agent of any state prison, to be concerned in the business of such agency, or hold any other appointment connected with said prison, nor shall he be interested directly or indirectly in any contract for the employment of the convicts, or the supply of provisions, or the purchase of materials.

The inspectors shall appoint to each of the state prisons the following officers: an agent, a principal keeper to be denominated a warden, a clerk, a chaplain, a physician and surgeon, and so many keepers, not exceeding the proportion of one to twenty-five convicts, as they may deem it expedient to employ.

Whenever any number of convicts in any state prison shall be less than three hundred, the warden of the prison shall have all the powers and perform all the duties herein imposed upon the agent.

Each of the inspectors and each of the officers of each prison shall, before entering on the duties of his office, take and subscribe the oath of office prescribed by the constitution of this state, which oath may be taken and subscribed before any officer authorized by law to take and administer an oath. The oath of an inspector shall be filed in the office of the secretary of state; and that of the officers of each prison in the office of the clerk of the county in which such prison is situated.

Each agent of a state prison, and each warden when required to perform the duties of an agent, before entering on the duties of his office, shall execute a bond to the people of this state, with sufficient sureties, to be approved by the inspectors, in the penal sum of twenty-five thousand dollars, conditioned for the faithful performance of his duties according to law, which bond shall be filed in the office of the comptroller of this state.

It shall be the duty of the inspectors, provided there shall be funds at the respective prisons sufficient to warrant the expenditure, to cause to be erected at as early a period as practicable in each of the state prisons of this state, separate rooms or cells, not less in their dimensions, in the clear, than nine hundred and ninety-six cubic feet, as follows: such number not exceeding twenty, as the said inspectors shall deem necessary and expedient at the Sing Sing prison, and under like restrictions, not exceeding ten at the Auburn prison, and not exceeding five at the Clinton prison, which cells shall be constructed of stone, in a manner that shall render them safe and secure, for the purposes mentioned in the next following section.

Whenever any convict shall be found incorrigibly disobedient to the rules of either of the

state prisons, it shall be the duty of the warden thereof to confine him in one of the solitary cells provided for in the preceding section, at hard labor, and when practicable he shall, when so confined, be employed at the same trade or business he shall have been employed in immediately previous to such solitary confinement.

The inspector having charge, at the time, of such prison, shall from time to time visit such cells, and examine into the causes of confinement of each convict thus confined, and may, if the warden shall concur, designate the length of time during which such solitary confinement, in each individual case shall continue, subject to the approval of the board of inspectors at each meeting thereof held at such prison, whose duty it shall be to regulate and control such solitary confinement; and they shall prescribe the fare and treatment of all convicts so confined, and shall adopt such rules and regulations in reference thereto as they shall deem proper, not inconsistent with the existing laws.

The duties of the agent of each of the state prisons shall be confined exclusively to the financial concerns thereof. He shall have the exclusive disposal of the services, and shall designate the employment of all the convicts, but shall exercise no control over their discipline or government, nor shall he interfere in the government of, or exercise any control over the officers of such prison, other than to require them to keep a correct daily account of the labor of the convicts under their charge, and to report the same to him at such periods as he shall require.

It shall be the duty of each agent of a state prison,

To attend constantly during business hours, at the prison to which he is appointed, except when performing some other necessary duties connected with his office.

To attend to the fiscal and business concerns of the prison, and to use his best endeavors to defray all the expenses of the prison by the labor of the convicts.

To make, under the direction of the inspectors, in the manner hereinafter provided, all contracts for the employment of the convicts, and for furnishing the necessary supplies for their support.

To superintend all the manufacturing and mechanical business that may be carried on in the prison, to receive the articles to be manufactured, and to sell and dispose of the same for the benefit of the state.

To purchase such raw materials as may be necessary to be manufactured by the convicts.

To take bills for all supplies and materials for the prison purchased by him, at the time of such purchase, and to take similar bills and receipts, for all services that shall be rendered, for either of the said prisons at the time of making payment therefor.

To enforce the payment of all debts due to the prison, as soon and with as little delay as possible, but with the approbation of the inspector having at the time charge of the prison; he may accept of any security from any debtor, on granting him time, that he may deem conducive to the interest of the state.

To submit any controversy that shall arise relative to any claim or demand of any person against the prison, or relative to any claim or demand which the agent may have against any person on account of the prison, to the arbitration of two or more persons, to be mutually chosen by the parties; but no such submission shall be made except with the consent and under the direction of the inspector having, for the time, charge of the prison.

To take charge of all money and other articles which may be brought to the prison by convicts, and to cause the same, immediately on the receipt thereof, to be entered by the clerk among the receipts of the prison, which money or other articles, whenever the convict from whom the same was or were received shall be discharged from prison, or the same shall be otherwise legally demanded, shall be returned by the agent to such convict or other person legally demanding the same. A separate account shall also be kept by the clerk, in a book provided for that purpose, of all money and other articles so received by the agent, in which account each convict shall be credited, with the money and other articles so received from him.

To furnish to each convict who shall be discharged from prison by pardon or otherwise, necessary clothing, not exceeding ten dollars in value, and a sum of money not exceeding, upon an average, three dollars to each convict, as he shall deem proper and necessary, and

the sum of three cents for each mile for which it may be necessary for such convict to travel to reach the place of his residence, and if he has no residence within the state, to the place of his conviction.

To draw from the treasurer of the state by a warrant of the comptroller upon the treasurer, in favor of the agent, all moneys appropriated to the use of the prison under his charge; but he shall not draw at any one time, or have in his hands unaccounted for at any one time, of moneys so appropriated, a greater sum than five thousand dollars.

To draw, each and every year, from the income of the literature fund the sum of one hundred dollars, to be expended in the purchase of books, maps and stationery for the use of the convicts, and shall append to his annual report a catalogue of such prison library.

To account monthly with the comptroller for all moneys so drawn by him from the treasurer of the state, and for all other moneys received by him as such agent, from whatever source the same may be derived.

To keep regular and correct account of all moneys received by him from any source whatever, by virtue of his office, including all moneys taken from convicts or received as the proceeds of property taken from them, and all sums paid by him and the persons to whom, and purposes for which the same were paid.

To close his account annually on the last day of September, of each year, and on or before the first day of December thereafter, to render to the inspectors a full and true account, accompanied by a copy of the necessary vouchers, of all moneys received by him on account of the prison under his charge, and all the moneys expended by him for the use thereof, and also an inventory of the goods, raw materials and other property of the state then on hand, exhibiting in detail, all the transactions of the prison for the year.

The monthly accounts to be rendered by the agent of each prison to the comptroller, shall embrace a general current account of the receipts and expenditures at his prison for the month, and an abstract of the expenditures in detail, which shall be accompanied by the necessary vouchers regularly numbered, according to their respective dates, with some short designation thereon of the consideration of the payment, evidenced by the vouchers, and the amount of the voucher carried out in figures; such account shall be attested by the affidavit of the agent and clerk thereunto annexed.

All the fiscal transactions and dealings on account of each prison shall be conducted by and in the name of the agent thereof, who shall be capable in law of suing and being sued in all courts and places, and in all matters concerning the prison by his name or office, and by that name shall be authorized to sue for and recover all sums of money due from any person to any former agent of the prison or to the people of this state on account of such prison.

It shall be the duty of the comptroller of the state to examine and audit the accounts of the respective agents, and annually to lay a statement thereof before the legislature.

The duties of the wardens of each of the state prisons shall be exclusively confined to the government, discipline and police regulation of the same.

It shall be the duty of the warden of each prison,

To reside in and attend constantly at the prison, and to exercise a general supervision over its government, discipline and police.

To give the necessary directions to the keepers and to examine whether they have been careful and diligent in the discharge of their several duties.

To examine daily into the state of the prison, and into the health, condition and safe keeping of the convicts, and to enquire into the justice of any complaints made by the convicts relative to their provisions, clothing and treatment by the keepers.

To make such general orders or rules, for the government of the subordinate officers of the prison as he may deem proper, and as shall be approved by the board of inspectors; such rules and orders shall be in writing and shall be entered in a book to be kept by the warden for that purpose, and shall be subject to any alteration or amendment by the inspectors.

To keep a daily journal of the proceedings of the prison, in which shall be entered a note of every infraction of the rules and regulations of the prisons by any officer thereof which shall come to his knowledge, and of every punishment inflicted on a convict, the nature and

amount thereof, and by whom it was inflicted, and also a memorandum of every well founded complaint made by any convict of bad or insufficient food, want of clothing, or cruel or unjust treatment by a keeper; such journal shall be kept open at all times to the examination of the inspector in charge of the prison, and of the board of inspectors.

To receive into the prison under his charge, on the order of the governor, any person convicted of any crime punishable with death or who shall be pardoned on condition of being confined either for life or a term of years in a state prison, and to confine such prisoner according to the terms of such condition.

To admit the inspectors of prisons or any one of them into every part of the prison, to exhibit to them on demand all the books, papers warrants and writings pertaining to the prison or to the business, management, discipline or government thereof, and to render to them every other facility in his power to enable them to discharge their duties under this title.

To make a monthly report, through the inspector having charge of the prison, to the inspectors, stating the names of all convicts received into the prison during the preceding month, the counties in which they were tried, the crimes of which they were convicted, the nature and duration of their sentences, their former trade, employment or occupation, the nature of their employment in prison, their habits, color, age, place of nativity, degree of instruction, and a description of their persons, and also stating whether such convicts have ever before been confined in any state or county prison, and if so, stating the offence for which they were confined, and the duration of their punishment, and also stating in such report the names of all the convicts pardoned or discharged during the past month, and all other particulars in relation to the parties so pardoned or discharged, that are required to be stated in relation to the convicts received in the prison.

Whenever there shall exist a vacancy in the office of agent of either of the prisons, all the powers and duties of such agent shall devolve upon, and be executed by the warden of said prison until such vacancy shall be filled.

The agent of each prison shall possess all the powers, and discharge all the duties of the warden of the prison during a vacancy in the office of warden, or disability in the warden from any cause to act.

The clerk of the prison shall act as clerk of the board of inspectors, and before entering on the duties of his office as such clerk, shall execute a bond to the people of the state, with sufficient sureties, to be approved by the inspectors, in the penal sum of four thousand dollars, conditioned for the faithful performance of the duties of his office as such clerk, which bond shall be filed in the office of the comptroller of the state.

It shall be the duty of each clerk of the prison to which he is appointed,

To attend at the prison daily during the proper business hours, unless by the direction of an inspector or of the agent he is otherwise engaged in transacting business on account of the prison.

He shall keep a register of convicts, in which the names of the convicts shall be alphabetically arranged, and in which shall be entered, under appropriate columns, the date of conviction, where born, age, occupation, complexion, stature, crime, court, county where convicted, term of sentence, number of previous convictions, to what prison or prisons previously sent, when discharged, and how discharged. The inspectors may require such additional facts to be stated on the register as they may deem proper.

To keep all the books and accounts of the financial transactions of the prison, and annually report to the inspectors on the thirty-first day of December, the number of convicts remaining in prison at the commencement of said year, the number received during the year, the number discharged by pardon, expiration of sentence, habeas corpus or by the courts, the number of deaths and escapes, and the number removed to the house of refuge and lunatic asylum, and the number then remaining in prison.

To examine all articles purchased by the agent for the use of the prison at the time of their reception, and compare them with bills thereof, to ascertain whether they correspond in weight, quality and quantity, and to inspect the supplies which are furnished for the prison on contract or otherwise, and to ascertain whether they correspond with the contract or

with the provisions of law regulating the same; and in case of any discrepancy, to report the same immediately to the agent.

To enter each bill taken by the agent of the prison, in the books of the prison, unless he shall know, or have reason to believe that such bill is erroneous; in which case he shall report the bill with his objections thereto, to the agent of the prison, and shall obey the directions of the agent in relation thereto. He shall do such writing as may be required of him by the superior officers of the prison, relating to the affairs of such prison.

To have charge and custody of all the books of account, registers, returns and other documents and papers relating to the affairs of the prison; all of which shall be preserved and remain in the prison as public property, and shall be open at all times to the examination of each inspector and of every other person authorized by law to examine the same.

To preserve in the prison a set of all official reports made to the legislature respecting the same, and a set of similar reports in relation to each of the other state prisons, for which purpose a suitable number of such reports, when printed, shall be supplied to him by the secretary of state.

To make an annual report to the secretary of state on or before the first Tuesday of February in each year, stating the names of convicts discharged or pardoned during the preceding year from said prison, and all the particulars in relation to such convicts as are required to be stated in the warden's monthly report to the inspectors, and stating also, in cases of pardon, the time unexpired of the time for which the convicts so pardoned were respectively pardoned, when such pardons were granted, and the conditions, if any, on which they were granted, and also the state of health of each convict so pardoned, at the time of his discharge.

To make an annual report to the inspectors on or before the first day of December in each year, exhibiting the number of convicts then confined therein, the various branches of business in which they are employed, and the number employed in each branch.

The keepers in each prison shall preserve proper discipline among the convicts under their respective charge; shall take care that they are diligently employed in the labor or business assigned to them. It shall also be the duty of each keeper having the charge of convicts employed upon contracts or otherwise, to keep a correct daily account of the labor of each convict, so employed, in the manner that shall be prescribed by the agent, and shall make reports to him of the same at such periods as the agent shall require.

The matron of the female convict prison at Sing Sing, shall have the same powers, and perform the same duties in relation to that prison as are herein given and imposed upon the wardens of prisons, and the powers and duties of assistant matron shall be the same as those of the keepers of the prison; but such matron and assistant matron shall in all cases be bound to obey such regulations and instructions as the inspectors shall from time to time prescribe.

It shall be the duty of the chaplain of the prison,

To perform religious services in the prison, under such regulations as the inspectors may prescribe, and to attend to the spiritual wants of the convicts.

To visit the convicts in their cells for the purpose of giving them religious and moral instruction, and to devote at least one hour in each week-day, and the afternoon of each Sunday to such instruction.

To furnish, at the expense of the state, a bible and hymn-book to each convict.

To take charge of the library, and to take care that no improper books are introduced into the cells of the convicts, and if any such books shall be found either in the cells or in the possession of a convict, to take away and return the same to the agent, and for the purpose of properly discharging these duties, to visit weekly each cell in the prison.

To visit daily the sick in the hospital.

To make an annual report to the inspectors, up to the first day of December, relative to the religious and moral conduct of the prisoners during the past year, stating therein what services he shall have performed, and the fruits, if any, of his instructions, and shall append thereto, as far as practicable, in tabular form, a statement exhibiting the number of convicts then in prison, the number of white males between the ages of twenty and thirty, thirty and forty, forty and fifty, fifty and over, and in like manner of black males, white females, and



black females, the number born in the United States, foreigners and of what country, the number that can not read, that can read only, read and write, well educated, classically educated, temperate, intemperate, health, scrofulous, whether employed at the time of the commission of the crime, counties where convicted, occupation, sentence, how many times re-committed, and social state.

Two instructors shall be appointed by the board of inspectors for each of the prisons at Sing Sing and Auburn, and one for the Clinton state prison; it shall be the duty of such instructors, in conjunction with and under the supervision of the chaplain, to give instruction in the useful branches of an English education, to such convicts as, in the judgment of the warden or the chaplain may require the same and be benefitted by it; such instruction shall be given for not less than one hour and a half daily, Sunday excepted, between the hours of six and nine in the evening.

The inspectors of state prisons shall appoint one instructress for the female convict prison at Sing Sing, whose duty it shall be, in conjunction with and under the supervision of the chaplain, to give instruction in the useful branches of learning to such convicts as in the judgment of the matron or the chaplain, may require the same and be benefitted by it; such instruction to be given for not less than one hour and a half daily, (Sundays excepted,) between the hours of four and six in the afternoon.

Such instructress shall receive an annual salary of one hundred and forty-four dollars, to be paid monthly at the end of each month, by the agent, out of the funds of the prison.

The chaplain shall make a quarterly report to the inspectors, stating the number of convicts that shall have been instructed during the last quarter, the branches of education in which they shall have been instructed, the text-book used in such instruction, and the progress made by the convicts, and to note especially, any cases in which an unusual progress has been made by a convict.

The physician of each prison shall have charge of the hospital, and shall attend at all times to the wants of the sick convicts, whether in the hospital or in their cells, and if the inspectors shall deem it necessary, they shall require the physicians at the Sing Sing and Clinton prisons respectively, to reside in the prison, and in that case they may, in their discretion, add not exceeding one hundred dollars, to the salary of each of the said physicians respectively, and it shall be the further duty of such physician,

To examine weekly the cells of the convicts for the purpose of ascertaining whether they are kept in a proper state of cleanliness and ventilation, and report the same weekly to the warden;

To report monthly to the inspectors the number of patients received into the hospital during the month, stating their respective ages, color, disease and occupations in prison, the quantity and kind of medicines administered during the month, the number of those discharged, their condition when discharged, the time they shall have remained in the hospital; the number of deaths, stating the cause of such deaths, and it shall be his further duty to state in such report the number of sick convicts not received into the hospital for whom he shall have prescribed during the last month, and the quantity and kind of the medicines so prescribed, and the number of days during which such convicts, in consequence of sickness shall have been relieved from labor;

To examine daily into the quality and state of the provisions delivered to the prisoners, and whenever he shall have reason to believe that any of such provisions are prejudicial to the health of the prisoners, he shall immediately make a report thereof to the warden and agent of the prison: he shall also have power, and it shall be his duty to prescribe the diet of sick convicts, whether in the hospital or in their cells or elsewhere, and his directions in relation thereto shall be followed by the agent and warden;

To keep a daily record of all admissions to the hospital, indicating the sex, color, nativity, age, occupation, habits of life, crime, period of entrance and discharge from the hospital, date of admission to the prison, time in county prison before conviction, disease, if afflicted with scrofula before admission, scrofula during the first, second and third six months after admission to prison, and of the prescriptions and treatment of each case;

To make a yearly report to the inspectors of the sanitary condition of the prison for the

past year, in which all the information contained in his daily record and his monthly reports shall be condensed.

There shall continue to be maintained at each state prison, a guard, to be employed by the inspectors, to consist of one sergeant and so many privates as the inspectors may from time to time direct; but the guard at Sing Sing, including the sergeant shall not exceed thirty in number; the guard at Auburn shall not exceed the number of twenty, and that at Clinton shall not exceed the number of twenty-five.

The said guards shall continue to be furnished from the arsenal of this state with sufficient arms, ammunition and accoutrements, and shall be subject to the command and direction of the warden of the prison, who may also dismiss at pleasure, any of the said guard, and employ others in their stead until the pleasure of the inspector shall be known.

The annual salaries of the officers and guards shall be as follows, viz:

The agents and wardens of the several state prisons shall respectively receive a salary of one thousand dollars; but the warden of the Clinton prison, so long as there shall be no separate agent for such prison shall receive in addition, the sum of five hundred dollars, all which salaries shall be payable monthly at the end of each month.

The clerk of each prison shall receive a salary of eight hundred dollars; the chaplain of six hundred dollars; the physician, of five hundred dollars, and the instructor of one hundred and fifty dollars, to be paid monthly at the end of each month.

The keepers in each prison shall receive an annual salary of five hundred and fifty dollars.

The salary of the guards shall be three hundred and sixty dollars.

The salaries of the keepers and guards shall also be paid monthly at the end of each month.

The principal matron at Sing Sing shall receive a salary of five hundred dollars, and each assistant matron a salary of three hundred and fifty dollars, to be paid monthly at the end of each month.

The salaries of the officers of each prison, and all other expenses in relation to each prison, shall be paid by the agent of each prison out of the funds thereof.

The comptroller is hereby authorized to audit and allow from time to time, all necessary travelling expenses and subsistence of the agent and warden of each state prison, when necessarily travelling on official business, or when the attendance of such agent or warden is required at the seat of government; the necessity of such travel and attendance to be decided by the comptroller, and the accounts when audited to be paid by the treasurer on the warrant of the comptroller.

The agent, wardens and other officers, and the guards of the respective prisons, shall support themselves from their own salaries and resources, and shall not receive any perquisites or emoluments for their services other than the compensation provided in this article, except that the agents, wardens, physicians and chaplains shall keep their offices at the respective prisons, and that the wardens shall reside therein; they shall all be furnished with the fuel for their offices, and those who are required to reside in the prison, for themselves and families, from the stock provided for the use of the state, and from the same stock the warden shall furnish fuel for the barracks of the guards.

It shall be the duty of the court in which any person shall be convicted of an offence punishable in a state prison, before passing the sentence, to ascertain by the examination of such convict on oath, and in addition to such oath, by such other evidence as can be obtained, whether such convict had learned and practiced any mechanical trade, and the clerk of the court shall enter the facts as ascertained and decided by the court, on the minutes thereof, and shall deliver a certificate stating the facts as ascertained, to the sheriff of the county, who shall cause the same to be delivered to the warden of the proper prison at the same time that such convict is delivered to the said warden pursuant to his sentence.

No convict who shall hereafter be sentenced to imprisonment in either of the state prisons shall be permitted to work therein at any other mechanical trade than that which, as shall appear by the certificate of the clerk of the court in which he was convicted, such convict had learned and practiced previous to his conviction, except in the making or manufacture of articles for which the chief supply for the consumption of this state is imported from

other countries or states, except also, that the convicts at Sing Sing may be employed in the cutting and manufacture of stone; and the convicts at Clinton in the manufacture of iron.

If the agent or warden of the prison in which any convict shall be detained shall ascertain that such convict had been previously in a state prison or penitentiary, he may in his discretion, direct such convict to be employed in the same kind of labor in which he had been employed during such former imprisonment, notwithstanding it may appear from the certificate of the convict that a different trade had been learned or practiced by him; and if the agent of either prison shall ascertain to his entire satisfaction, that any convict so certified, had not in fact learned and practiced previous to his conviction, the trade mentioned in his certificate, he may, with the approbation of the inspector then having charge of such prison, direct such convict to be employed in the trade or kind of labor which he shall have ascertained by competent proof that such convict had previously learned and practiced.

The inspectors may, by order from time to time, prescribe the kind of labor in which the female convicts in the Sing Sing prison shall be employed, having due regard, in making such order, to the mechanical interest of the citizens of the state.

No inspector, agent, warden or other officer of either of the prisons of this state shall employ the labor of any convict or other persons employed in such prison on any work in which such inspector, agent or other officer shall be interested.

Any inspector, agent or warden of either the state prisons who shall knowingly let or hire, or consent to the letting or hiring of the labor or services of a convict contrary to law, and any officer of either prison who shall, knowingly or wilfully, cause a convict to be employed at work prohibited by law, shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by fine, in a sum not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year.

Whenever a complaint shall be made to the attorney-general, accompanied by satisfactory information that any of the provisions of the two last preceding sections have been violated by an inspector, or by an officer of either of the prisons, it shall be his duty to cause the offender to be prosecuted, and any indictment for such an offence may be found or tried in any county in which the offence was committed or in an adjoining county.

Whenever the inspector shall direct a contract to be made for the labor of convicts, at least two months notice of the time and place of letting every contract, shall be given in the paper in which legal notices are required by law to be published in the city of Albany, and in one newspaper printed in each city in this state, which notice shall specify the particular branch of business in which the convicts are to be employed, the length of time for which their services are to be let, not exceeding five years, and the number of convicts to which the contracts are to be limited.

The convicts in each prison shall be supplied with provisions by contract, to be made by the agent under the direction of the inspectors, with such person, and for such a term not exceeding one year as the inspectors may determine to be most advantageous to the state, at a fixed price per day for each convict, or they may at their option require the agent of the prison to furnish the rations by purchase.

The articles of food, and the quantities of each kind shall be prescribed by the inspectors and inserted in the contract; and so many rations shall be delivered at the prison daily, or at such other times as may be agreed on, as there are convicts confined therein.

For the purpose of ascertaining who will furnish supplies on the lowest terms, the agent shall cause a notice to be published in a newspaper printed in the county in which the prison is situated, and in such other newspapers and for such time as the inspectors shall direct, stating the particular supplies wanted, the manner in which they are to be delivered, and the time, during which proposals will be received by such agent, for furnishing the same.

The proposals to be offered pursuant to such notice, shall specify the lowest price per ration per day, and the contracts shall be made with those persons whose terms shall be most advantageous to the state, and who shall give satisfactory security for the performance of their contracts, unless the inspectors shall deem it expedient to decline all proposals and advertise anew.

All contracts to be made under this article shall be reduced to writing and signed by the parties; a duplicate so signed of every such contract shall be filed with the clerk of the prison, and a copy thereof shall be delivered to the inspector.

No inspector, agent or other officer or person employed at either of the prisons, shall be directly or indirectly interested in any contract, purchase or sale, for, by, or on account of such prison, under the penalty of two hundred and fifty dollars.

All male convicts sentenced in the first and second judicial districts to an imprisonment in a state prison, shall be confined in the state prison at Sing Sing, and all so sentenced in the fifth, sixth, seventh and eighth judicial districts, in the state prison at Auburn, and all so sentenced in the other judicial districts of the state, in the Clinton state prison; but whenever it shall appear to the inspectors that either prison has, or is likely to have more convicts than there are cells therein, they may by warrant, order the agent of such prison to transport such a number of convicts therefrom to one or each of the other prisons as the relief of the prison so overstocked may require; and such warrants may be renewed by them so often as the necessity may exist.

All male convicts sentenced in the third and fourth judicial districts to an imprisonment in a state prison, shall be confined in the state prisons at Auburn or Sing Sing, in the discretion of the court sentencing such convicts, except such counties in the fourth judicial district as may be designated by the inspectors of the state prisons; such counties designated shall continue to send the male convicts so sentenced to the Clinton state prison. 1849, ch. 141, § 2.

All female convicts sentenced in any county in the state to imprisonment in a state prison, shall be confined in the female convict prison at Sing Sing.

Whenever any convict shall be delivered to the warden of the state prison, the officer having such convict in his charge shall deliver to such warden the certified copy of the sentence received by such officer from the clerk of the court by which such convict shall have been sentenced, and to take from the warden a certificate of the delivery of such convict.

When in the opinion of the inspectors of state prisons it shall appear that there is a greater number of convicts in any of the state prisons of this state, than can well be accommodated therein, or that such convicts can not be employed profitably to the state, then the inspectors of state prisons may cause the removal of as many of such convicts to any other state prison in this state as they shall deem proper; but the inspectors shall not reduce the number of convicts in any one prison of the state below one hundred. [1849, ch. 132, § 1.]

All necessary expenses of such removal of convicts shall be deemed a part of the incidental expenses of the prison they shall be removed from. [1849, ch. 132, § 2.]

The agents of each state prison shall pay to the sheriffs or their deputies for transporting convicts to the prison, the fees to which such sheriffs or their deputies shall by law be entitled, provided there shall be funds belonging to such prison sufficient to warrant such expenditure and meet the current demands for its support; if not, the agent shall so certify, and in that case, such fees shall be paid from the treasury upon the warrant of the comptroller.

Whenever a removal of convicts from one prison to another shall be ordered, the warden shall cause the convicts so to be removed to be sufficiently chained in pairs, and transported to the prison to which they shall be sent, and shall deliver such convicts, with the certified copies of their sentences to the warden of the prison to which they shall be removed, the warden of which prison shall receive and keep them according to their sentences, as if they had been originally committed to such prison.

The persons so employed to conduct such convicts, shall prohibit all intercourse between them and other persons, and may inflict any reasonable and necessary correction upon the convicts for disobedience or misconduct in any respect.

The expenses of sustaining such convicts while traveling, with all other expenses necessarily incurred in their removal, shall be audited by the comptroller, and paid by the agent of the prison whence the prisoner shall be removed, out of any moneys in his hands belonging to the state.

The agent of each prison, whenever the inspectors shall so direct by a warrant under their

hands, shall convey any convicts who shall be under the age of seventeen years, to the house of refuge in the city of New York, who shall there be confined according to the rules and regulations of the said house of refuge, the expenses of such removal shall be the same as allowed to sheriffs for like services, and a charge upon such prison as a part of its ordinary expenses, to be certified by the inspector.

The expenses of such removal shall be first paid out of any funds of the prison not otherwise appropriated, and shall be certified by the agent; it shall also be the duty of the agent of the prison to make out a certificate of such expenses, and transmit the same or a counterpart thereof, to the sheriff in each county in which any such convicts were sentenced; the sheriffs receiving such certificate shall present the same to the board of supervisors of the county, at the first annual meeting thereafter.

The board of supervisors shall raise the amount specified in such certificate, as a county charge, and the treasurer of the county, within ten days after receiving the amount, shall remit the same to the agent of the prison.

All convicts under the age of seventeen years who shall be confined in the Auburn or Clinton prisons, and who shall hereafter be ordered by the inspectors of state prisons to be removed to a House of Refuge, shall be removed to said "Western House of Refuge" in the city of Rochester under the same regulations and conditions as is contained in the ninety-first, ninety-second, and ninety-third sections of the act entitled "An act for the better regulation of the county and state prisons of this state, and consolidating and amending the existing laws in relation thereto," passed December 14, 1847.

In case any pestilence or contagious disease should break out among the convicts in either of the state prisons, or in the vicinity of such prisons, the inspectors may cause the convicts confined in such prison, or any of them, to be removed to some suitable place of security where such of them as may be sick shall receive all necessary care and medical assistance; such convicts shall be returned as soon as may be to the state prison from which they were taken, to be confined therein according to their respective sentences.

Whenever by reason of any state prison or any building contiguous to such prison being on fire, there shall be reason to apprehend that the convicts may be injured or endangered by such fire, or may escape, it shall be the duty of the warden to remove such convicts to some safe and convenient place and there confine them until the necessity of such removal shall have ceased.

Whenever the warden, physician or chaplain of a state prison, shall duly report to any of the inspectors of state prisons, that any convict confined therein is so far insane as to render him dangerous, or an improper subject of prison discipline, it shall be the duty of such inspector fully to investigate the case, and take the testimony of at least two physicians, and of such other witness as the said inspector may deem proper as to the fact of insanity, and if such inspector shall after such investigation be satisfied that such convict is so far insane as to be an improper subject of prison discipline, he may make an order for his removal to and confinement in the state lunatic asylum, and it shall thereupon be the duty of the warden to remove such convict to the said asylum, and the officer having charge of such asylum shall receive such convict and retain him at the expense of the state, so long as he shall continue insane, or until the superintendent of the asylum shall certify and report to the warden of the prison, that the convict so sent to the asylum is not insane, or that such convict has so far recovered, that he is in the opinion of the superintendent of the said asylum not dangerous, and not an improper subject of prison discipline.

If such insane person shall recover from his insanity before the expiration of the term for which he was sentenced, the officer having the principal charge of the asylum shall give notice of such recovery to the agent of the prison from which such convict was sent, as soon as in his judgment such convict may be safely removed; and it shall then be the duty of the agent to cause the convict to be returned to such prison.

Whenever the warden of a prison shall have reason to believe that any convict in the prison was insane at the time he committed the offence for which he was sentenced, such warden shall communicate in writing to the governor his reason for such opinion, and shall

refer the governor to all the sources of information with which he may be acquainted, in relation to the insanity of such convict.

When any convict sent to the state lunatic asylum under and by virtue of the provisions of this act, shall have remained in the asylum until the term of his sentence has expired, the managers of said asylum may cause such insane convict to be removed at the expense of the state from the asylum to the county of which he is a resident, to be placed under the care and charge of the superintendents of the poor of such county, in case the superintendent of the asylum shall certify that such insane convict will not be benefitted by longer remaining in the asylum, and that he can probably be made comfortable in the county poor house. The managers of said asylum shall be authorized to give at the expense of the state, to any patient sent to the asylum under the provisions of this act, and who shall after the expiration of the term of his sentence, be discharged from the asylum recovered, such sum not exceeding ten dollars, as will defray his necessary travelling expenses from the asylum to the county in which he last resided.

The preceding six sections shall all be construed to apply to the convicts in the female convict prison at Sing Sing.

The expense of removing insane convicts to the lunatic asylum, and returning them to the prison from which they were sent, shall be paid by the agent of said prison, out of any funds belonging to the prison, in his hands.

Whenever a convict shall die in any state prison, it shall be the duty of the inspector having charge of the prison and of the warden, physician and chaplain of the prison, if they or either of them shall have reason to believe that the death of the convict arose from any other than ordinary sickness, to call upon the coroner having jurisdiction, to hold an inquest upon the body of such deceased convict.

All convicts in a state prison other than such as are confined in solitude, shall be kept constantly employed at hard labor during the day time, except when incapable of laboring by reason of sickness or bodily infirmity.

Whenever there shall be a sufficient number of cells in the prison, it shall be the duty of the warden to keep each convict single in their cell at night, and also in the day time when not employed.

The clothing and bedding of the convicts shall be of coarse materials, and shall be manufactured, as far as practicable, in the prison; they shall be supplied with a sufficient quantity of inferior but wholesome food.

When several convicts combined or any single convict shall offer violence to any officer of the state prison or to any other convict, or do or attempt to do any injury to the building or any work shop or to any appurtenances thereof, or shall attempt to escape or shall resist or disobey any lawful command, the officers of the prison shall use all suitable means to defend themselves, to enforce the observance of discipline, to secure the persons of the offenders and to prevent any such attempt or escape.

No person not authorized by law or by a written permission from an inspector, shall visit any state prison, or communicate with any convict therein without the consent of the warden, nor without such consent shall any person bring into or convey out of a state prison any letter or writing to or from any convict, nor shall any letter or writing be delivered to a convict, or if written by a convict, be sent from the prison until the same be examined and read by the warden, or by some other officer of the prison duly authorized by the warden: Whoever shall violate this provision shall be deemed guilty of a misdemeanor.

No keeper in any state prison shall inflict any blows whatever upon any convict, unless in self defence or to suppress a revolt or insurrection. If in the opinion of the warden of such prison, it shall be deemed necessary, in any case to inflict unusual punishment in order to produce the entire submission or obedience of any convict, it shall be the duty of such warden to confine such convict immediately in a cell, upon a short allowance, and to retain him therein until he shall be reduced to submission and obedience. The short allowance to each convict so confined shall be prescribed by the physician, whose duty it shall be to visit such convict and examine daily into the state of his health, until the convict be released from solitary confinement and returned to his labor.

Whenever any convict confined in a state prison shall escape therefrom, it shall be the duty of the warden of the prison to take all proper measures for the apprehension of the convict so escaped, and in his discretion he may offer a reward not exceeding fifty dollars for the apprehension and delivery of such convict; with the consent of the inspector having charge of the prison, such reward may be increased to a sum not exceeding two hundred and fifty dollars.

All suitable rewards and other sums of money necessarily paid for advertising and apprehending any convict who may escape from a state prison, shall be paid by the agent out of the funds of the prison.

The moneys which may from time to time be in the hands of the agent of the Sing Sing prison; and which are not required for the current expenses of the prison, shall be paid into the treasury of this state, and the comptroller shall keep an account with the prison in which the sums so paid into the treasury, with the annual interest thereon, shall be credited to the prison; the sums thus credited shall be set apart for the use of the prison, and whenever the same may be required for the ordinary expenses of the prison, or for any expenses authorized by law connected with the prison, they may be drawn on the treasury by the agent of the prison on the written direction of the inspectors; all sums thus drawn from the treasury shall be charged to the prison in the account kept by the comptroller.

For the safety of the Sing Sing state prison a military company shall continue to be organized in the village of Sing Sing; and for the safety of the Auburn state prison, a similar company shall continue to be organized in the village of Auburn.

Each of the said companies shall be formed from persons liable to militia duty residing in the vicinity of the prison to which it is attached, and shall consist of one captain, one first and second lieutenant, four sergeants, four corporals, two drummers, two fifers and forty-five privates, who shall from time to time, as may be necessary, receive arms, accoutrements and ammunition from the state arsenal at Albany, upon the order of the agent of the prison.

The arms, accoutrements and ammunition received by the members of each company shall be kept by them in good order for their use when called upon in defence of the prison, and whenever such arms, accoutrements and ammunition shall be delivered, the person receiving the same shall execute a precept therefor, stating the purpose to which the same are to be applied.

Each of said companies shall always be ready for immediate service and shall repair with their arms on the first alarm or notice from the warden or principal officer of the prison, to the prison, and there aid and assist under his direction, in defence of the prison and in preventing the escape of the convicts, or the execution of any injury threatened or premeditated by them, and shall be under his sole control.

Each of said companies shall be formed and organized by the commander-in-chief, and the officers thereof designated, appointed and commissioned as in the case of uniform companies and the persons composing said companies shall be exempt from all other militia duty, and from serving on any grand or petit jury so long as they shall respectively continue to be members of such companies.

No person duly enlisted into said companies, shall, without the written consent of the commanding officers of the company to which he belongs, leave the same to serve as fireman in any fire company, or to enlist into any other company of militia, except in case of a removal from out of the beat of said company.

The said companies shall respectively be called and known, the first by the name of the Sing Sing Guards, and the other by the name of the Auburn Guards, and shall be ordered out for drill and exercise by the commanding officer thereof not less than six nor more than ten times in any one year.

Whenever the office of captain or subaltern in either of the said companies shall be vacant the same shall be filled in the manner now provided by law for filling vacancies in the companies of the militia of this state, except that the wardens of the prison to which the companies in which any such vacancy should happen shall be attached, shall cause the necessary notices of an election to fill vacancies, to be served on the members of the companies.

The commanding officer of each company shall return as delinquents, to the inspector hav-

ing charge of the prison, any non-commissioned officer, musician or private of the company, who shall not appear on parade in the complete uniform of the company, or who shall be guilty of any neglect of duty or improper conduct on parade.

The inspectors of the prison may summon any person so returned as a delinquent to appear before them at such time and place as they shall appoint, to answer to such alleged delinquency, and upon proof of such summons having been served, may proceed at the time and place therein specified, to impose upon such delinquent such fine not exceeding five dollars for each offence, ~~and in their judgment the case may require.~~

The president of the board of inspectors shall make out his warrant for the collection of such fines, in like manner and with like effect as a president of a court martial; the warrant shall be directed to any constable in the county in which the fine shall be imposed, commanding him to levy and collect such fine; and such constable shall collect such fine in like manner as other militia fines are now directed by law to be collected.

All moneys collected by virtue of such warrant shall be paid over to the commanding officer of the company to which the delinquent, upon whom such fines may be imposed shall belong, and may be disposed of by a vote of the company for any beneficial purpose that the company may direct.

If any officer of either of the said companies shall neglect to perform any duty enjoined upon him by law, it shall be the duty of the commander-in-chief, upon such neglect being reported by the inspectors, to dismiss such officer from the company; and if any non-commissioned officer or private shall refuse or neglect to perform his duties, such delinquent, in addition to the fine herein before prescribed, may be discharged by the commanding officer of the company to which he shall belong, and another person may be enrolled in his stead.

Every non-commissioned officer, musician or private of either of said companies who shall serve faithfully therein for the period of ten years, shall hereafter be exempt from military duty in this state except in cases of insurrection or invasion.

It shall be the duty of the inspectors to keep in repair the armories hereafter erected or used at Sing Sing or Auburn for the use and convenience of the company of guards attached to the prison, and the expense attending such repairs shall be paid out of the funds of the prison.

There shall continue to be organized in the vicinity of the prison at Auburn, one fire company, to consist of one foreman and thirty-six men residing in that vicinity.

It shall be the duty of the said company, on the first alarm or notice of a fire in the prison, or in any of the adjacent buildings, to repair to the prison, and there to use and manage, under the direction of the warden, the engine belonging to the prison, and to aid by all means in their power, in the preservation of the prison, and of the persons confined therein.

It shall also be the duty of the said company to attend to the said engine, and to exercise and try it at such stated times as the inspectors or agent shall prescribe, and the inspectors may in their discretion, remove any member of the company and appoint another person in his stead.

The members of the said company shall upon the certificate of the board of inspectors be exempt from serving on juries, and from serving in the militia, except in cases of invasion or insurrection, so long as they shall continue such members.

The members of the company, after a service of nine years therein, shall be forever exempt from militia duty, except in time of war or insurrection, and shall be entitled to a discharge from the company.

Whenever a convict shall die in the Sing Sing prison, it shall be the duty of the warden, unless the body of such convict be taken away for interment by the relatives or friends of the deceased within twenty-four hours after his death, to deliver on demand, such dead body to the agent of the college of physicians and surgeons in the city of New York, or to the agent of the medical faculty of the university of the city of New York, so that one half of the number of such dead bodies shall be delivered to each institution.

It shall in like manner be the duty of the warden of the Auburn state prison, whenever a convict shall die in that prison, whose body shall not be taken away for interment by his relatives or friends within twenty-four hours after his death, to deliver, on demand, such dead



body to the agent of the medical faculty of the university of Buffalo, or to the agent of the medical faculty of Geneva college, so that one half of the number of such dead bodies shall be delivered to each institution.

All children that have been or shall be born of female convicts in the female convict prison at Sing Sing, may by an order of the agent having at the time charge of the prison, be sent to the poor house in the county of Westchester, to be there supported upon such terms as may be agreed upon between the agent and the superintendents of the poor of the said county, and all expenses incurred thereby shall be paid by the agent of the prison out of the funds thereof.

The agent of the Clinton prison is authorized to draw from time to time from the state arsenal in the city of Albany, such arms and ammunitions as he may deem necessary for the use of the keepers and guards of the prison.

The said agent is authorized to sell and dispose of ore that may be prepared by the convicts at the state prison for cash only, and not on credit; the proceeds of such sales shall be applied to the support of the prison.

The agent of said prison is authorized to appropriate to the use thereof, all waters upon the tract purchased for the establishment of said prison; and any person claiming damages in consequence of such appropriation of water, shall, within six months thereafter, make application to the county judge of the county of Clinton, who shall appoint three commissioners not interested in lands through which the stream or streams of water so appropriated may have previously run, who shall personally examine the lands of the applicant and make an estimate of the damages he has sustained by reason of such appropriation of water, which estimate shall be reduced to writing, subscribed and sworn to by said commissioners, and then transmitted to the comptroller of this state, who shall thereupon pay the estimated damages of the applicant out of the funds appropriated for said prison.

All uncultivated lands belonging to the state of New York, or which may hereafter become the property of said state, and which shall be situated within twenty miles of the said prison, shall be withdrawn from sale and shall be retained by the state for the purpose of furnishing fuel for the manufacture of iron by the convicts in the said prison.

All necessary clothing for the use of the convicts in the Clinton prison shall be manufactured by the convicts in the Auburn and Sing Sing prisons, whenever a written order for that purpose shall be made by the inspectors and be delivered to the respective agents of those prisons.

The Sing Sing and Auburn prisons shall respectively have credit on the books of the comptroller for the value of any cloth or clothing manufactured in such prisons in conformity to law, for the use of the Clinton prison, on making specific returns thereof, verified as to quantity and value by the affidavit of the agent of the prison manufacturing the same. The sum so to be credited shall be paid by the treasurer on the warrant of the comptroller, out of any moneys in the treasury not otherwise appropriated, to the order of the inspectors, whenever such payment shall become necessary to defray the expenses of the prison entitled to the credit.

The agent of the Clinton prison shall not deposit or pledge any article produced by the labor of the convicts, by way of security for moneys borrowed on the credit thereof or otherwise, and all articles purchased by him for the use of the prison or to be employed in conducting any of its operations, shall be purchased for cash and not upon credit, unless the inspector having charge of the prison shall otherwise direct. The agent shall make sale of the articles produced by the labor of the convicts, in such manner and on such terms as shall be prescribed by the rules and regulations established from time to time by the board of inspectors.

The said agent shall, under the direction of the comptroller, deposit to the credit of the state, all moneys he may receive from the sale of any manufactures produced in the said prison, whenever the same shall exceed the sum of one thousand dollars, and shall not be required within fifteen days after the receipt thereof to defray the expenses of the prison.

The agent of the Sing Sing prison shall continue to have charge of the farm and premises on which the same is situated, and it shall be his duty to rent or otherwise use or improve

the same to the best advantage for the benefit of the state, but no lease shall be made by him for a longer term than three years.

No license shall hereafter be granted for the sale of intoxicating liquors within three miles of the Clinton prison; and every person who shall, directly or indirectly sell or dispose of any alcoholic drinks within the distance of three miles from said prison, shall, upon conviction thereof, before any justice of the peace of the county of Clinton, be subject to a penalty of fifty dollars; one half thereof to be paid to the person prosecuting for the same, and the other half to be paid to the overseers of the poor of the town in which said offence shall have been committed.

It shall be the duty of the respective keepers of each of the county and state prisons, to receive into the said prisons and safely to keep therein, subject to the discipline of such prison, any criminal convicted of any offence against the United States, sentenced to imprisonment therein, by any court of the United States, sitting within this state, until such sentence be executed, or until such convict shall be discharged by due course of law; the United States supporting such convict, and paying the expenses attendant upon the execution of such sentence.

In case any such prisoner shall escape, or attempt to escape out of the custody of any keeper to whom such prisoner may have been so committed, he shall be liable to the like punishment as if he had been committed by virtue of a commitment or conviction under the authority of this state.

The keeper of any prison to whom any such prisoner may have been committed, shall be liable to the like penalties and punishment, for any neglect or violation of duty in respect to the custody of such prisoner, as if such prisoner had been committed by virtue of a commitment or conviction under the authority of this state.

The keeper of every county or state prison, and all persons employed in any such prison, shall be exempted during their continuance in office, from serving on juries and from military duty.

No female confined in any prison shall be punished by whipping, for any misconduct in such prison.

Whenever any convict confined in any county or state prison shall be considered an important witness in behalf of the people of this state, upon any criminal prosecution against any other convict, by the district attorney conducting the same, it shall be the duty of any officer authorized by law to allow writs of *habeas corpus*, upon the affidavit of such district attorney, to grant a *habeas corpus* for the purpose of bringing such prisoner before the proper court to testify upon such prosecution.

Such convict may be examined on such trial, and shall be considered a competent witness against any fellow prisoner, for any offence actually committed whilst in prison, and whilst the witness so offered shall have been confined in the prison in which such offence shall have been committed.

No spirituous or fermented liquors shall, on any pretence whatever, be sold within any county or state prison, nor shall any kind of spirituous or fermented liquor be brought into any county prison for the use of any convict confined therein, without a written permit, signed by the physician to such prison, specifying the quantity and quality of the liquor which may be furnished to any convict, the name of the prisoner for whom, and the time when the same may be furnished, except for the ordinary hospital supply of the state prisons, which permit shall be delivered to and kept by the keeper of the prison.

No permit shall be granted, unless it shall satisfactorily appear to such physician that the liquor allowed to be furnished is necessary for the health of the prisoner for whose use it is permitted, which shall be stated in such permit.

Any person who shall sell, or bring into any of said prisons, any spirituous or fermented liquor contrary to the foregoing provisions, and every keeper or other officer employed in or about any such prison, who shall suffer any spirituous or other liquor to be sold or used therein contrary to the foregoing provisions, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be subject to imprisonment, not exceeding one year, or to a fine

not exceeding two hundred and fifty dollars, or both, in the discretion of the court; and every sheriff or other officer so convicted, shall forfeit his office.

Whenever it shall appear to the court in which an indictment is pending, and to be tried against any person for any offence committed by him while imprisoned in any county prison or any one of the state prisons, on the person of any other individual confined in such jail or state prison, that any other person confined in any county prison, or in any of the state prisons, is an important witness in behalf of the person so indicted, such court is hereby authorized to grant a writ of *habeas corpus* for the purpose of bringing such prisoner before such court to testify upon the trial of such indictment, in behalf of the party making the application.

Every person when brought up on such writ may be examined as a witness on such trial, and shall be competent to testify thereon in behalf of the defendant or the people, notwithstanding his conviction and imprisonment.

The court in which any indictment is pending against any person imprisoned on conviction of a crime in any county jail or state prison, for an offence committed during such imprisonment, is hereby authorized to issue a writ of *habeas corpus* for the purpose of bringing the individual so indicted before the court for arraignment or trial on such indictment.

The court in which any indictment is pending for a felony against any person imprisoned on conviction of a crime in any county jail or state prison, is hereby authorized to issue a *habeas corpus* for the purpose of bringing the individual so indicted before such court for arraignment or trial, on such indictment.

The following persons shall be authorized to visit at pleasure all county and state prisons: The governor and lieutenant governor, secretary of state, comptroller and attorney-general, members of the legislature, judges of the court of appeals, supreme court and county judges, district attorneys and every minister of the gospel having charge of a congregation in the town wherein any such prison is situated. No other person not otherwise authorized by law shall be permitted to enter the rooms of a county prison in which convicts are confined, unless under such regulations as the sheriff of the county shall prescribe, nor to enter a state prison except under such regulations as the inspectors shall prescribe.

*Prison Regulations in Massachusetts.*—(Rev. Stat of Mass. ch. 144.)

The state prison in Charlestown, in the county of Middlesex, shall be the general penitentiary and prison of the Commonwealth, for the reformation as well as for the punishment of offenders; in which shall be securely confined, employed in hard labor, and governed in the manner hereafter directed, all offenders, who have been convicted and sentenced, according to law, to the punishment of solitary imprisonment and confinement therein at hard labor.

The organization of the state prison shall include three inspectors, one warden, one deputy warden, one chaplain, one physician and surgeon, one clerk, one superintendent of the stone department, who shall also be an overseer, eight turnkeys, who shall be overseers, and ten watchmen.

The inspectors shall be appointed by the governor, with the advice and consent of the council; and one of them shall be designated in his commission as chairman; they shall hold their offices during the pleasure of the executive, but not more than four years under one appointment.

The warden, the chaplain, and the physician and surgeon, shall be appointed by the governor, with the advice and consent of the council, and commissioned to hold their offices during the pleasure of the executive.

The deputy warden, and all other officers of the prison, shall be appointed by the warden, subject to the approval of the inspectors, and shall hold their offices during the pleasure of the warden and inspectors; but if the warden shall think any such officer ought to be removed, and the inspectors shall not consent thereto, the warden may appeal to the governor and council, who, after reasonable notice to the inspectors, may make such removal.

The warden shall report immediately to the inspectors all appointments of officers which he shall make; he shall, from time to time, propose in writing, to the inspectors, such altera-

tions as he shall think advisable in the rules and regulations for the direction of the officers, and for the government of the prison, and with the advice and consent of the inspectors, he may appoint two additional watchmen.

The warden and deputy warden shall reside constantly within the precincts of the prison; and neither the warden, nor any officer appointed by the warden and inspectors, shall, during the time of holding his office, be employed in any business for private emolument, nor in any business which does not pertain to the duties of his office.

The officers of the prison shall receive the following salaries, to wit: each inspector, one hundred dollars a year; the warden, fifteen hundred dollars; the deputy warden, eight hundred dollars; the chaplain, eight hundred dollars; the physician and surgeon, three hundred dollars; the clerk, eight hundred dollars; the superintendent of the stone department, one thousand dollars; each of the turnkeys, five hundred dollars; and each watchman shall receive four hundred and fifty dollars a year; all which sums shall be paid in quarterly payments, by the warden, out of the treasury of the prison, and shall be in full for all services; and no other perquisite, reward or emolument, shall be allowed to, or received by, any of them, except that the warden, with the advice of the inspectors, may allow to the superintendent of the stone department an additional sum, not exceeding three hundred dollars a year, when it will be, in their opinion, for the interest of the Commonwealth to make such allowance, and to the overseer or turnkey, who may act as an assistant of the said superintendent, an additional sum not exceeding one hundred dollars.

The inspectors shall, from time to time, establish rules and regulations, consistent with the laws of the Commonwealth, for the direction of the officers of the prison, in the discharge of their duty, the government, employment and discipline of the convicts, and for the custody and preservation of the public property; and as soon as may be, after the establishment of any such rules and regulations by the inspectors, they shall cause authentic copies thereof to be laid before the governor and council, who may approve, annul or modify the same; and the inspectors shall cause a copy of all such rules and regulations, as shall have been approved by the governor and council, to be certified, as soon as may be, by the clerk of the prison, and delivered to the warden.

The inspectors, or one of them, shall visit the prison at least once in each week, and it shall be visited by the board of inspectors once a month, and oftener if they shall think necessary, for the purpose of inspecting the books and all the concerns of the prison, and ascertaining whether the law, and the rules and regulations relating to the prison, are duly observed, and whether the officers are competent and faithful, and the convicts are properly governed and employed.

The inspectors shall report to the governor and council, forthwith, all violations of law and omissions of duty by the warden, chaplain, or physician and surgeon, that shall come to their knowledge; and every officer who holds his place at the pleasure of the inspectors and warden, and who shall be found to be unfaithful or incompetent, shall be by them forthwith removed; the said inspectors shall also on the last day of September, in each year, make a detailed report to the governor and council, which shall contain a full statement of all the concerns of the prison for the year next preceding.

The chaplain shall perform divine service in the chapel of the prison, instruct the convicts in their moral and religious duties, visit the sick on suitable occasions, and devote his whole time to the performance of the duties of his office.

The physician and surgeon shall visit the hospital of the prison, at least once in each day, and as much oftener as may be necessary, prescribe for convicts who may be sick, and attend to the regimen clothing and cleanliness of such of them as are in the hospital; he shall keep a regular journal, which shall remain at the prison, of all admissions to the hospitals stating the time, the nature of the disease, with his prescriptions, and the treatment of each patient, and the time of his discharge from the hospital, or of his death; the said journal shall also contain regular entries of all orders which shall be given for supplies for the hospital department, specifying the articles ordered; all such orders shall be in writing, and the warden shall provide the supplies so ordered.

Whenever any convict shall complain of such illness as requires medical aid, notice thereof

shall be given to the physician, who shall visit such convict; and if, in the opinion of the physician, the illness is such as to require his removal to the hospital, the warden may order such removal, and the convict shall remain in the hospital, until the physician shall determine that he may leave it without injury to his health.

Before the warden enters upon the duties of his office, he shall give bond to the Commonwealth, in the sum of twenty thousand dollars, with sufficient sureties, to be approved by the governor and council, with condition that he shall faithfully account for all moneys placed in his hands as treasurer, and perform all the duties incumbent on him as warden of the said prison; and such bond, with the approval of the sureties indorsed thereon, shall be filed in the office of the treasurer.

The warden shall have the charge and custody of the prison, with the lands, buildings, furniture, tools, implements, stock and provisions, and every other species of property pertaining thereto, or within the precincts thereof; he shall be treasurer of the prison, and shall receive and pay out all moneys, granted by the legislature for the support thereof; and shall cause to be kept, in suitable books, regular and complete accounts of all the property, expenses, income, business and concerns of the establishment.

All the books and documents, relating to the concerns of the prison, shall at all times be open to the examination of the inspectors, who shall, semi-annually, carefully examine the said books, and compare them with the vouchers and documents relating thereto.

The warden shall, as soon as may be, after the last day of September, in each year, cause to be made full and detailed accounts, to be closed on that day, of all the disbursements and expenses, and all the receipts and profits of the prison, accompanied by sufficient vouchers; which accounts, after having been examined and approved by the inspectors, shall be audited and settled by the treasurer of the Commonwealth, who shall file the same in his office, for the inspection of the legislature.

All contracts, on account of the prison, shall be made by the warden, in writing, and when approved in writing by the inspectors, shall be binding in law, and the warden, or his successor, may sue or be sued thereon to final judgment and execution; no such suit shall abate, by reason of the office of warden becoming vacant, but any successor of the warden, pending such suit, may take upon himself the prosecution or defence thereof, and upon motion of the adverse party, and notice, he shall be required so to do.

Whenever a controversy shall arise, respecting any contract made by the warden on account of the prison, or a suit shall be pending thereon, the warden may submit the same to the final determination of arbitrators or referees, to be approved by the inspectors.

The principal articles, purchased for the use of the prison, such as the rations, fuel, stone, iron and steel, with the transportation and truckage, shall be contracted for by the year, when such contracts can be advantageously made; and the warden shall give previous public notice, in two newspapers at least of the articles wanted, the quantity and quality thereof, the time and manner of delivery, and the period during which proposals therefor will be received; and such notice shall be published a sufficient time, for the information of persons who may desire to offer proposals for such contracts.

All such proposals shall be in writing, and sealed up, and on the day appointed, they shall be opened by the warden, in presence of the inspectors, who shall cause all such offers to be entered in a book, and compared; the person offering the best terms, with satisfactory security for the performance, shall be entitled to the contract, unless it shall appear to the warden and inspectors, that none of the offers are so low as the fair market price; in that case, no offer shall be accepted, and the warden, with the consent of the inspectors, may advertise again as before, or he may proceed to make contracts for any of the articles wanted for the prison, in the best way he can, for the interest of the Commonwealth, without further notice.

Every such contractor shall give bond in a reasonable sum, with satisfactory surety or sureties, for the performance of his contract; no officer of the prison shall be concerned or interested, directly or indirectly, in any contract, purchase or sale, made on account of the prison.

The warden shall take bills of the quantity and price of supplies, furnished for the prison, at the time of the delivery; and the clerk, or such officer as the warden shall direct, shall

compare the bills with the articles delivered; if the bills are found correct, he shall enter them, with the date, upon a book to be kept for that purpose; in like manner, bills shall be taken and entered, of all services rendered for the prison; if any bill, for supplies or services, shall be discovered to be incorrect, the clerk shall omit to enter it, and immediately give notice to the warden, that the error may be corrected.

All process, to be served within the precincts of the prison, shall be directed to, and served and returned by, the warden or his deputy; all convicts in the prison shall be in the charge and custody of the warden, who shall govern and employ them, in the manner prescribed by law, the rules and regulations of the prison, and in conformity to the respective sentences under which they shall be committed.

Whenever the office of warden shall be vacant, or the warden shall be absent from the prison, or unable to perform the duties of his office, the deputy warden shall have all the powers, and perform all the duties, and shall be subject to all the obligations and liabilities of the warden.

If the office of warden shall become vacant, when the governor and council are not in session, the inspectors may require the deputy warden to give a bond to the Commonwealth, in the sum of ten thousand dollars, with sufficient sureties, to be by them approved, with condition for the faithful performance of the duties incumbent on him as deputy warden and treasurer, until a warden shall be appointed; and from the time such bond shall be approved, the deputy shall receive the salary of the warden, in lieu of his former salary, so long as he shall perform the duties of the office; if the deputy warden shall not give such bond, when required the inspectors may remove him from office, and appoint a warden pro tempore, who shall give such a bond as was required of the deputy warden, and shall have the power and authority, and perform all the duties, and receive the salary of the warden, until a warden shall be duly appointed and enter upon the discharge of the duties of the office.

The deputy warden, clerk, superintendent of the stone department, the overseers and watchmen, shall perform such duties, in the charge and oversight of the prison, the care of the property thereto belonging, and the custody, government, employment and discipline of the convicts, as shall be required of them by the warden, in conformity to law, and the rules and regulations of the prison.

Whenever the warden shall receive, from the sheriff of any county, a warrant, in the manner prescribed in the one hundred and thirty-ninth chapter, requiring him to cause any convict to be removed from the county jail to the state prison, pursuant to his sentence, he shall, by himself, or such person as he shall appoint for that purpose, as soon as may be, cause such warrant to be duly executed, according to the precept thereof, and he shall make return of the manner in which he has caused the warrant to be executed, and shall file the warrant and the return, with the transcript of the record, in his office; he shall also cause an attested copy of the warrant, and of his return thereon, to be filed in the office of the clerk from whence the same was issued; and all sheriffs, jailers, and other officers, are enjoined, if need be, to aid the warden, or person by him appointed, in the execution of such warrant.

The warden shall receive into the state prison all persons convicted before any court of the United States, held within the district of Massachusetts, and sentenced, by such court, to the punishment of imprisonment at hard labor in the said prison, and he shall safely keep and employ such convicts, pursuant to their sentence, and the rules and regulations of the prison, until such sentence shall be performed, or the said convicts shall be otherwise discharged, by due course of the law of the United States.

Whenever any convict, sentenced by any court of this Commonwealth or of the United States, to be punished by imprisonment in the state prison, shall, at the time of conviction and sentence, hold any office, under the constitution or laws of this Commonwealth, such office shall be deemed to be vacated, from the time of his commitment to the said prison; and if the judgment against such convict shall be reversed upon writ of error, he shall be restored to his office, with all its rights and emoluments, but if pardoned, he shall not by reason thereof be restored, unless it shall be so expressly ordered by the terms of the pardon.

Every convict, against whom the punishment of solitary imprisonment shall be awarded by sentence of court, or for the violation of any of the rules and regulations of the prison, shall be confined in one of the solitary cells, and during such confinement, he shall be fed with bread and water only, unless the physician of the prison shall certify to the warden, that the health of such convict requires other diet.

All convicts, sentenced to the punishment of hard labor in the said prison, shall be constantly employed for the benefit of the Commonwealth; no communication shall be allowed between them and any person without the prison; they shall be confined in separate cells in the night time, and in the day time, all intercourse between them shall, as far as is practicable, be prevented.

Whenever the warden shall be satisfied, that any convict in the state prison has, at two several times before, been sentenced to imprisonment in the same prison, or in some other state prison within the United States, and at each time for more than one year, he shall give notice thereof to the attorney of the Commonwealth for the county of Suffolk, who shall, by an information filed in the municipal court, of the city of Boston, or otherwise, make the same known to the judge of the said court, and thereupon, such convict shall be brought before the court, by such process or order as the judge shall direct, to hear and answer to the said charge; if the convict, by his plea or answer, shall deny the truth of the charge, the same shall be tried by a jury, in due course of law, who shall be instructed to inquire, and by their verdict to find, whether the charge in such information is or is not true.

If it shall appear, by confession of the convict, verdict of a jury, or otherwise according to law, that the charge is true, such convict shall be sentenced to imprisonment in the said prison for life, or for a term not less than seven years, in addition to the sentence, on which he stood committed.

Any convict, against whom such additional punishment may be awarded by the municipal court, shall have the same right to appeal, as in other cases tried before the said court; but if the charge against such convict shall not be established, as above mentioned, he shall be remanded to the said prison by the court, there to remain in execution of his former sentence.

If any convict, committed to the state prison under sentence for any limited time, shall escape therefrom, or shall attempt by violence to escape, or shall assault the warden, or any inspector, or other officer or person employed in the government or custody of the said prison, he shall be punished by imprisonment in the said prison not more than ten years, in addition to his former sentence, and also by solitary imprisonment not more than one year, to be executed forthwith, or at any such time or times, either before or after the expiration of any former sentence, as the court shall direct.

If any convict in the state prison, under sentence of imprisonment for life, shall escape therefrom, or shall attempt by violence to escape, or shall commit any such assault, as is mentioned in the preceding section, he shall be punished by solitary imprisonment not more than one year, to be executed at such time or times as the court shall direct.

If any officer, or other person employed in the state prison, shall voluntarily suffer any convict confined therein to escape, or shall in any way consent to such escape, he shall be punished by imprisonment in the said prison, not more than twenty years.

If any officer, or person employed in the state prison, shall suffer any convict, under sentence of solitary confinement, to be at large, or out of the cell assigned to him, or shall suffer any convict, confined in said prison, to be at large out of the prison, or to be visited, conversed with, or in any way relieved or comforted, contrary to the regulations of the prison, he shall be punished by fine not exceeding five hundred dollars.

Every person who shall convey into the state prison any disguise, instrument, tool, weapon, or other thing, adapted or useful to aid any convict in making his escape therefrom, with intent to facilitate the escape of any convict there lawfully committed or detained, or who shall, by any means, aid any convict in his endeavor to escape, whether such escape be effected or attempted, or not, and every person, who shall forcibly or fraudulently rescue, or attempt to rescue, any convict held in custody by any officer or other person, under sen-

tence of imprisonment in the state prison, shall be punished by imprisonment in the said prison, not more than ten years, or by fine not exceeding five hundred dollars.

If any officer, contractor, teamster, truckman, boatman, or other person, who is employed in or about the state prison or its dependencies, shall deliver or procure to be delivered, or shall have in his possession, with intent to deliver, to any convict confined in the prison, or shall deposit or conceal, in or about the said prison or the dependencies thereof, or in any boat, carriage, or other vehicle going into the premises belonging to the said prison, any article or thing whatever, with intent that any convict confined in the prison should obtain or receive the same, without the knowledge and permission of the warden or an inspector of the prison, he shall be punished by imprisonment in the state prison or the county jail, not more than two years, or by fine not exceeding five hundred dollars.

The courts and magistrates of the counties of Suffolk and Middlesex shall have concurrent jurisdiction of all crimes and offences, committed within the state prison, and the precincts thereof; and for the purpose of all judicial proceedings, the said prison, and the precincts thereof, shall be deemed in law to be within [and] a part of the county of Suffolk, as well as the county of Middlesex.

The daily sustenance of the convicts, not in solitary confinement, nor in the hospital, shall consist of the following rations, to wit; one pound of number one beef, or twelve ounces of number one pork, ten ounces of rye meal, and ten ounces of Indian meal, and three quarters of a gill of molasses, for each prisoner, to which there shall be added, for every hundred rations, two bushels and a half of potatoes, or, at the discretion of the warden, the value thereof in peas, beans, or other vegetables; two quarts of vinegar, four quarts of salt, two ounces of black pepper, two quarts of rye or barley, to be furnished to the convicts in a warm drink, at their meals, in the morning and evening, and for six months, during the warmest season, one gallon of molasses, and twelve ounces of hops.

When the warden shall be of opinion that the rations above mentioned are insufficient for any of the convicts, he may make an addition thereto, in favor of such convicts, not exceeding two ounces of beef or pork, or the value thereof in meal, rice, or vegetables, for each convict; he may also furnish fish one day in a week, instead of beef, for the rations of the convicts, when their health would, in his opinion, be thereby promoted; and may, with the assent of the inspectors, substitute fresh beef, for the rations of salt beef, and wheat flour or [for] rye meal and Indian meal, for a part of the time not exceeding three months in the year: no snuff, nor tobacco, nor any other article of subsistence other than those before mentioned, either for food, or for drink, except water, shall be allowed to any convict: the beverage to be made from the rye or barley, and the beer to be made from the molasses and hops, as before provided, shall be distributed among the convicts, at the discretion of the warden, as the condition of each of them may require.

The subsistence and diet of the convicts, in the hospital, shall be under the direction of the physician; but for all articles of comfort or indulgence, not included in his regular hospital rations, his order therefor shall be in writing, and for a term not exceeding one week.

Each convict shall be allowed, for his yearly clothing, one thick jacket, one pair of thick pantaloons, one thin jacket, and one pair of thin pantaloons, three shirts, two blankets, two pairs of socks, two pairs of shoes, all which articles shall be of a coarse kind, but strong, substantial and comfortable; and when it shall be necessary, in the opinion of the warden, in order to prevent suffering, he may allow the convicts caps, beds, and bedding, and may increase or diminish the yearly allowance of clothing, to individuals provided the aggravate expense of clothing shall not be thereby increased; and as an inducement to industry and good behaviour, the warden may, with the consent in writing of the inspectors, allow the convicts some additional articles of clothing.

All necessary means shall be used, under the direction of the warden, to maintain order in the prison, enforce obedience, suppress insurrection, and effectually prevent escapes; for which purpose, he may at all times require the aid and utmost exertions of all the officers of the institution, the inspectors, chaplain and physician excepted.

The state prison shall be visited by the governor and council annually and as much oftener, as they may think proper, for the purpose of examining into its concerns, and ascertaining



its condition; they shall inquire into all alleged abuses, or neglects of duty, and may make such alterations in the general discipline of the prison, as, on examination, they may find necessary.

The governor, with the advice and consent of the council, may, from time to time, cause additional buildings to be erected, or alterations to be made in the existing buildings of the prison, so that there shall be, at all times, as many separate cells, as there are convicts in the prison; he may, in like manner, cause such additions or alterations to be made, as shall be found necessary, for the accommodation of such of the officers, as are required by law to reside constantly within the precincts of the prison.

Whenever an appropriation of money is made by the legislature, for the support of the state prison, the governor, with the consent of the council, shall draw a warrant, in favor of the warden, for such portions thereof, from time to time, or for the whole amount at one time, as he shall think proper.

The warden, and all the officers of the prison shall treat the convicts with kindness, so long as they shall merit such treatment by their obedience, industry and good conduct.

The warden may pay to any convict, who shall, in his opinion, deserve it by his good conduct, on his leaving the prison a sum not exceeding five dollars, out of the treasury of the prison; and no convict shall leave the said prison, without being furnished with decent clothing.

*Prison Regulations in Pennsylvania.*—(Dunlop's Laws of Penn., pp. 490 to 495.)

The following rules and regulations for the better ordering and government of said penitentiaries, shall be and continue in force until altered by the legislature, or in the manner hereinafter stated.

They shall, at their first meeting, and annually thereafter, appoint out of their number a president, secretary and treasurer, and keep regular minutes of their proceedings; they shall hold stated meetings once a month, and adjourned and special meetings whenever necessary; the treasurer shall give bond, with sufficient surety, in such amount as the inspectors may fix and determine, and shall receive and disburse all monies belonging to the prison according to the order of the board; they shall semi-annually appoint a warden, a physician, and clerk for the institution, and shall fix their salaries as well as those of the underkeepers or overseers, and the persons employed about the prison; they shall serve without any pecuniary compensation, and be exempted from military duty, from serving on juries and arbitrations, or as guardians of the poor: they shall visit the penitentiary at least twice in every week, to see that the duties of the several officers and attendants are performed, to prevent all oppression, speculation, or other abuse or mismanagement of the said institutions; they shall have power, if they on conference find it necessary, to make such rules for the internal government of said prison as may not be inconsistent with the principles of solitary confinement, as set forth and declared by this act.

They shall attend to the religious instruction of the prisoners, and procure a suitable person for this object, who shall be the religious instructor of the prisoners: *Provided*, their services shall be gratuitous.

They shall direct the manner in which all raw materials to be manufactured by the convicts in said prisons, and the provisions and other supplies for the prisons shall be purchased, and also the sale of all articles manufactured in said prisons.

They shall cause accurate accounts to be kept by the clerk of all expenditures and receipts in the penitentiaries, which accounts respectively shall be annually examined and settled by the auditors of the county of Allegheny and of the county of Philadelphia.

They shall, on or before the first day of January, in every year, make a report in writing to the legislature, of the state of the penitentiaries.

The report shall contain the number of prisoners in confinement, their age, sex, place of nativity, time of commitment, term of imprisonment during the preceding year, noticing also those who have escaped or died, or who were pardoned or discharged, designating the offence for which the commitment was made, and whether for a first or repeated offence, and

when and in what court, or by whose order: and in such return the inspectors shall make such observations as to the efficiency of the system of solitary confinement as may be the result of their experience, and give such information as they may deem expedient for making the said institution effectual in the punishment and reformation of offenders.

They shall have power to examine any person upon oath or affirmation relative to any abuse in the said places of confinement or matter within the purview of their duties; they shall direct in what manner the rations for the subsistence of the prisoners shall be composed, in conformity with the general directions on that subject hereinafter contained.

The inspectors in their weekly visits to the several places of confinement, shall speak to each person confined therein, out of the presence of any of the persons employed therein; shall listen to any complaints that may be made of oppressions or ill conduct of the persons so employed; examine into the truth thereof, and proceed therein when the complaint is well founded; and on such visits they shall have the calendar of the prisoners furnished to them by the warden, and see by actual inspection whether all the prisoners named in the said calendar are found in the said prison in the situation in which, by the said calendar, they are declared to be.

A majority of the said inspectors shall constitute a board, and may do any of the acts required of the said inspectors; two of the inspectors shall be a quorum for the weekly visitations hereby directed to be made.

The warden shall not, nor shall any inspector, without the direction of a majority of the inspectors, sell any article for the use of the said penitentiaries, or either of them, or of the persons confined therein during their confinement, nor derive any emolument from such purchase or sale, nor shall he or they, or either of them, receive under any pretence whatever from either of the said prisoners, or any one on his behalf, any sum of money, emolument or reward whatever, or any article of value, as a gratuity or gift, under the penalty of five hundred dollars fine, to be recovered in the name of the commonwealth by an action of debt, in any court of record thereof having jurisdiction of sums of that amount.

The warden shall reside in the penitentiary; he shall visit every cell and apartment, and see every prisoner under his care at least once in every day; he shall keep a journal, in which shall be regularly entered the reception, discharge, death, pardon or escape of any prisoner, and also the complaints that are made and the punishments that are inflicted for the breach of prison discipline, as they occur; the visits of the inspector and the physician, and all other occurrences of note that concern the state of the prison, except the receipt and expenditures, the account of which is to be kept in the manner hereinafter directed.

The warden shall appoint the under-keepers, who shall be called overseers, and all necessary servants, and dismiss them whenever he thinks proper, or the board of inspectors direct him so to do.

He shall report all infractions of the rules to the inspectors, and, with the approbation of one of them, may punish the offender, in such manner as shall be directed in the rules to be enacted by the inspectors concerning the treatment of prisoners.

He shall not absent himself from the penitentiary for a night without permission in writing from two of the inspectors.

He shall not be present when the inspectors make their stated visits to the prisoners under his care, unless thereto required by the inspectors.

It shall be the duty of the overseers to inspect the condition of each prisoner at least three times in every day, to see that his meals are regularly delivered, according to the prison allowance, and to superintend the work of the prisoners.

They shall give immediate notice to the warden or physician whenever any convict shall complain of such illness as to require medical aid.

Each overseer shall have a certain number of prisoners assigned to his care.

He shall make a daily report to the warden of the health and conduct of the prisoners, and a like report to the inspectors, when required.

No overseer shall be present when the warden of the inspectors visit the prisoners under his particular care, unless thereto required by the warden or inspectors.

The overseers shall obey all legal orders given by the warden, and all rules established by the board of inspectors, for the government of the prison.

All orders to the overseers must be given through or by the warden.

The overseers shall not be absent themselves from the prison, without permission from the warden.

No overseer shall receive from any one confined in the penitentiary, or from any one in behalf of such prisoner, any emolument or reward whatever, or the promise of any, either for services or supplies, or as a gratuity, under the penalty of one hundred dollars and imprisonment for thirty days in the county jail, and when any breach of this article shall come to the knowledge of the warden or inspectors, the overseer or overseers so offending shall be immediately discharged from his office, and prosecuted for the said offence according to law.

No overseer who shall have been discharged for any offence whatever, shall again be employed.

The physician shall visit every prisoner in the prison twice in every week, and oftener if the state of their health require it, and shall report once in every month to the inspectors.

He shall attend immediately on notice from the warden that any person is sick.

He shall examine every prisoner that shall be brought into the penitentiary, before he shall be confined in his cell.

Whenever, in the opinion of the physician, any convict in the penitentiary is so ill as to require removal, the warden shall direct such removal to the infirmary of the institution, and the prisoner shall be kept in the infirmary until the physician shall certify that he may be removed without injury to his health, and he shall then be removed to his cell.

He shall visit the patients in the infirmary at least once in every day, and he shall give such directions for the health and cleanliness of the prisoners, and when necessary, as to the alteration of their diet, as he may deem expedient, which the warden shall have executed: *Provided*, they shall not be contrary to the provisions of this law, or inconsistent with the safe custody of the said prisoners; and the directions he may give, whether complied with or not, shall be entered on the journal of the warden and on his own.

The physician shall inquire into the mental as well as the bodily state of every prisoner, and when he shall have reason to believe that the mind or body is materially affected by the discipline, treatment or diet, he shall inform the warden thereof, and shall enter his observation on the journal hereinafter directed to be kept, which shall be an authority for the warden for altering the discipline, treatment or diet of any prisoner until the next meeting of the inspectors, who shall inquire into the case and make orders accordingly.

The physician shall keep a journal, in which opposite to the name of each prisoner shall be entered the state of his health, and if sick, whether in the infirmary or not, together with such remarks as he may deem important; which journal shall be open to the inspection of the warden and the inspectors, and the same, together with the return provided for in the first article in this section, shall be laid before the inspectors once in every month, or oftener if called for.

The prisoners under the care of the physician, shall be allowed such diet as he shall direct.

No prisoner shall be discharged while laboring under a dangerous disease, although entitled to his discharge, unless by his own desire.

The infirmary shall have a suitable partition between every bed, and no two patients shall occupy the same bed, and the physician and his attendants shall take every precaution in their power to prevent all intercourse between the convicts while in the infirmary.

Every convict sentenced to imprisonment in the penitentiary, shall, immediately after the sentence shall have been finally pronounced, be conveyed by the sheriff of the county in which he was condemned to the penitentiary.

On the arrival of a convict, immediate notice shall be given to the physician, who shall examine the state of his or her health, he or she shall then be stripped of his or her clothes and clothed in the uniform of the prison, in the manner hereinafter provided, being first bathed and cleaned.

He or she shall then be examined by the clerk and the warden, in the presence of as many of the overseers as can conveniently attend, in order to their becoming acquainted with his or her person and countenance, and his or her name, height, apparent and alleged age, place of nativity, trade, complexion, colour of hair, and eyes, and length of his or her feet, to be accurately measured, shall be entered in a book provided for that purpose, together with such other natural or accidental marks, or peculiarity of feature or appearance, as may serve to identify him or her, and if the convict can write, his or her signature shall be written under the said description of his or her person.

All the effects on the person of the convict, as well as his clothes, shall be taken from him or her, and specially mentioned and preserved under the care of the warden, to be restored to him or her on his or her discharge.

If the convict is not in such ill health as to require being sent to the infirmary, he or she shall then be conducted to the cell assigned to him or her, numerically designated by which he or she shall thereafter be known during his or her confinement.

The uniform of the prison for males shall be a jacket and trousers of cloth or other warm stuff for the winter, and lighter materials for the summer, the form and color shall be determined by the inspectors, and two changes of linen shall be furnished to each prisoner every week.

No prisoner is to receive anything but the prison allowance.

No tobacco in any form shall be used by the convicts, and any one who shall supply them with it, or with wine or spirituous or intoxicating fermented liquor, unless by order of the physician, shall be fined ten dollars, and if an officer, be dismissed.

No person who is not an official visiter of the prisons, or who has not a written permission according to such rules as the inspector may adopt as aforesaid, shall be allowed to visit the same: the official visitors are the governor, speaker and members of the senate, the speaker and members of the house of representatives, the secretary of the commonwealth, the judges of the supreme court, the attorney-general and his deputies, the president and associate judges of all the courts in the state, the mayor and recorder of the cities of Philadelphia, Lancaster and Pittsburg, commissioners and sheriffs of the several counties, and the acting committee of the Philadelphia society for the alleviation of the miseries of public prisons.

None but the official visitors can have any communication with the convicts, nor shall any visiter whatever be permitted to deliver to or receive from any of the convicts, any letter or message whatever, or to supply them with any article of any kind under the penalty of one hundred dollars fine, to be recovered as hereinbefore provided for other fines imposed by this act.

Any visiter who shall discover any abuse, infraction of law, or oppression, shall immediately make the same known to the board of inspectors of the commonwealth, if the inspectors or either of them are implicated.

Whenever a convict shall be discharged by the expiration of the term for which he or she was condemned, or by pardon, he or she shall take off the prison uniform, and have the clothes which he or she brought to the prison restored to him or her, together with the other property, if any, that was taken from him or her on his or her commitment, that has not been otherwise disposed of.

When a prisoner is to be discharged, it shall be the duty of the warden to obtain from him or her as far as is practicable, his or her former history; what means of literary, moral or religious instruction he or she enjoyed; what early temptations to crime by wicked associations or otherwise he or she was exposed to; his or her general habits; predominant passions and prevailing vices, and in what part of the country he or she purposes to fix his or her residence, all which shall be entered by the clerk in a book to be kept for that purpose, together with his or her name, age, and time of discharge.

If the inspectors and warden have been satisfied with the morality, industry, and order of his conduct, they shall give him a certificate to that effect, and shall furnish the discharged convict with four dollars, to be paid by the state, whereby the temptation immediately to commit offences against society, before employment can be obtained, may be obviated.

It shall be the duty of the instructor to attend to the moral and religious instruction of the convicts, in such manner as to make their confinement as far as possible the means of their reformation, so that when restored to their liberty, they may prove honest, industrious and useful members of society; and the inspectors and officer are enjoined to give every facility to the instructor, in such measure as he may think necessary to produce so desirable a result, not inconsistent with the rules and discipline of the prison.

The expenses of maintaining and keeping the convicts in the said eastern and western penitentiaries, shall be borne by the respective counties in which they shall be convicted, and the said expense shall be paid to the said inspectors by orders to be drawn by them on the treasurers of the said counties, who shall accept and pay the same: *Provided, That* the said orders shall not be presented to the said treasurers, before the first Monday of May in each and every year: *And provided also*, that the said inspectors shall annually on or before the first Monday of February, transmit by the public mail to the commissioners of such of the counties as may have become indebted for convicts confined in said penitentiaries, an account of the expense of keeping and maintaining said convicts, which account shall be signed by the said inspectors, and be sworn or affirmed to by them and attested by the clerk, and it shall be the duty of the said commissioners immediately on receipt of said accounts to give notice to the treasurers of their respective counties of the amount of said accounts, with instructions to collect and retain moneys for the payment of said orders when presented; and all salaries of the officers of the said penitentiaries shall be paid by the state; and it shall be the duty of the inspectors to transmit to the auditor-general the names of the persons by them appointed, and the salaries agreed to be paid to each of them under the provisions of this act, which sums shall be paid in the usual manner by warrants drawn by the governor upon the treasurer of the commonwealth.

That the several acts of assembly of this commonwealth, and such parts thereof, so far as the same are altered or supplied by this act, be and the same are hereby repealed, from and after the first day of July next: *Provided, That* the repeal thereof shall in no wise affect any indictment, trial, sentence or punishment of any of the said herein mentioned crimes or offences, which have been, or shall be committed before this act shall come into operation.

*Prison Regulations in Virginia.*—(Rev. Code of Va. of 1849, tit. 56, ch. 213.)

Every convict, when first brought to the penitentiary, shall be washed, cleansed and kept in a separate lodging, until the surgeon certifies he is fit to be put among the other prisoners; and the clothes he wore shall be either destroyed, or purified and preserved until he is discharged, and then returned to him.

The male and female convicts shall be kept separate from each other, and the males shall have their heads and beards close shaven or sheared, once a fortnight or oftener if need be. Every convict shall be clothed at public expense, in a distinctive uniform for each sex, made of coarse materials.

The convicts shall be kept to the hardest labor suitable to their sex and fitness, and such of them, as need it, instructed in some mechanic art.

Social intercourse, conversation and acquaintance between the convicts, shall be prevented as far as may be, and silence constantly observed by them as far as possible.

The convicts not disabled by ill health, shall, when their solitary confinement does not prevent it, labor each day, Sundays excepted, so long as the season will permit, (allowing an hour each for breakfast and dinner,) not exceeding eight hours in November, December, and January, nine in February and October, and ten in all other months.

The convicts shall be fed on bread of Indian meal, or other coarse bread, and have one meal a day of coarse meat. The board of directors may change or regulate the diet for good cause.

The superintendent may allow the convicts extra diet, when they whitewash the walls of the rooms and cells, or wash the floors thereof. This work shall be done by the prisoners in rotation; the whitewashing shall be at least twice a year, and the other washing once a week, or oftener if directed by the board.

He may allow them, at stated times, to walk for the benefit of their health, in the yard, and, with the approbation of two of the directors, to work therein; but in either case, in the presence or view of the superintendent or an assistant.

He shall, at the discretion and under the direction of the governor, employ them at *Richmond*, or within a mile thereof, in improving, repairing or working on the public buildings, grounds and property.

Each convict shall be locked up during the night and every Sunday, (except to attend religious service,) and when the number of apartments will permit, each separately, unless in the hospital.

A convict guilty of profanity, indecent behavior, idleness, neglect or wilful mismanagement of work, insubordination, an assault not amounting to felony, or a violation of any of the rules prescribed by the governor, may, under the orders of the superintendent, subject to the said rules, be punished by lower and coarser diet, the iron mask or gag, solitary confinement in a cell or the dungeon, or by stripes. Under such orders and subject to the said rules, the superintendent may, when a convict is charged with an offence, for which he is to be tried under chapter two hundred and fourteen or two hundred and fifteen, confine him in a cell or the dungeon until such trial.

The board, in its discretion, may allow a convict, on his discharge, not exceeding thirty dollars, and, if he needs it, a suit of coarse clothing.

The surgeon to the penitentiary shall visit the penitentiary once at least every day, and oftener, when there are cases of sickness requiring it, or when he is called on to attend by the superintendent. Before leaving the city of *Richmond* at any time, he shall notify the superintendent of his intention, and the time he expects to be absent, and what physician may be called on to officiate for him, in his absence.

The surgeon shall render to the convicts all surgical and medical aid which may be requisite.

The room now kept for that purpose, shall continue to be used as a hospital. A sick convict shall be kept in it, when the surgeon so prescribes. There shall be a book in which shall be entered the name of each convict, put in the hospital, and the time that he goes in and comes out of it.

One of the directors, in such order as the board may direct, shall once a week visit the hospital with the superintendent; and the two shall make a report of the treatment and condition of the sick. The annual report of the board shall show the condition of the health of the convicts. It shall state the number in the hospital every month from each ward, the disease of each person put in the hospital, and the number of deaths in each ward.

The governor, members of the council, and of the general assembly, ministers of the gospel for performing religious service, and the officers and others having duties or business therein, may go into the interior of the penitentiary. Any other person, who shall obtain a permit to do so from the governor, may also visit the same, between the hours of nine in the morning and noon of any day, except Saturday or Sunday. There shall be no conversation between a visitor and a convict, unless special license therefor be given by the governor or superintendent.

A majority of the directors shall be a quorum for business of the board.

The board may apply the means of the institution to repair and enlarge the shops, and increase the number of cells when required. They shall cause to be done in the penitentiary, any work which can be done therein, towards effecting the improvement or repairs mentioned in the twentieth section. They shall direct the manufacturing operations, and have the goods manufactured and work done at the penitentiary, (except as otherwise provided,) delivered weekly to the general agent, to be disposed of by him, at such prices as may be mentioned in duplicate invoices thereof; one of which shall be delivered to the agent, and the other, with the agent's receipt thereon, shall be preserved at the penitentiary by the clerk. And they shall cause a proper set of books to be kept by the clerk, have a general supervision and control in the management of the penitentiary and penitentiary store, and over the officers thereof, and see that the rules for their government prescribed by law or by the governor, are observed by the officers.

## REDRESS FOR MALICIOUS PROSECUTIONS. -

Although the law naturally inclines to favor those who exert themselves to give effect to its criminal provisions, it will not allow its forms to be made the engine of oppressing the innocent without giving them an opportunity of redress. 1 Chit. Cr. L. 10; 3 Bla. C. 126, n. 14. And, therefore, to restrain the savage spirit with which appeals were anciently prosecuted, the 13 Edw. 1, c. 12, directed, that if the appellee were acquitted, the appellor should suffer a year's imprisonment and pay a fine to the king, besides the satisfaction to the party whose life he by the prosecution attempted to destroy; and if the appellor were incapable of paying it, his abettors should be liable to do it for him, and to suffer imprisonment in their own persons. 4 Bla. Com. 316. These severe penalties, and the restitution of goods being given on an indictment, soon rendered this proceeding rather a matter of curiosity than of practice. *Ib.* The ancient remedy for the malicious prosecution of an indictment was either a writ of conspiracy or an action on the case in the nature of a conspiracy, or an indictment, when several parties united in the evil design. 1 Saund. 230, n. 4; Cro. Car. 239; Cro. Eliz. 701; 2 Sel. N. P. 1053. And, at the present day, the latter proceeding is sometimes resorted to, where the circumstances are of a very dark coloring. 2 Burr. 993; 1 Bla. Rep. 368; 4 Wentw. 96; Staundf P. C. b. 2, c. 23. But an action on the case, (see *Clark v. Haines*, 2 Rand. 440,) for a malicious prosecution is now the more usual, as it is the easier and more effectual remedy: 2 Sel. N. P. 1050. Over the old writ of conspiracy it has great advantages; for the latter could only be brought where the life of the plaintiff had been in danger, (1 Saund. 230, n. 4; Fitz. N. B. 116; 1 Ld. Raym. 379;) and where he had been "lawfully acquitted," which intended such a discharge as would be a good bar to any subsequent proceeding, (Bro. Abr. Conspiracy, 23; Gilb. Cas. L. & E. 199; 1 Sel. N. P. 1054;) but the modern remedy by action on the case lies, wherever there has been a malicious prosecution of any criminal charge without probable cause, and which has occasioned any damage to the person, character, or property of the plaintiff. 10 Mod. 148, 214; 12 Mod. 208; Gilb. Cas. L. & E. 185, 202; see precedent and notes, 2 Chit. Pl. 612, 4th ed. So it lies where the indictment has been thrown out by the grand jury, (2 Rol. Rep. 188; Cro. Jac. 490,) where it has been preferred before an improper tribunal, (1 Rol. Abr. 112,) and where the discharge has arisen from a defect in the proceedings. 4 T. R. 247; 2 Sel. N. P. 1055. Besides, the writ of conspiracy could only be granted where more than one was accused of conspiring, (Fitz. N. B. 116; 1 Saund. 230, n. a.; Carth. 417,) and all the old cases of malicious prosecution called writs of conspiracy, (see Cro. Car. 239; Cro. Eliz. 701,) are no more than mere actions on the case which were always valid against one alone. Fitz. N. B. 116; Carth. 417; 1 Saund. 230, a. In the action for a malicious prosecution, the damage sustained by the plaintiff is the ground of the proceeding, and not any secret motives by which the guilt of the defendant may be increased, (Carth. 416; Bul. N. P. 14;) and, therefore, though the words "per conspiracyem per eos per habitam" be introduced, they will be mere surplusage and can in no way affect the right of the party injured to recover. 1 Saund. 230, n. a. Thus, where these words are inserted, in a declaration against two persons, and one of them only appears, proceedings may be carried on against one alone. Bro. Ab. Conspiracy, 38; 1 Ld. Raym. 397. So if all the defendants are acquitted but one, he may be found guilty and judgment given against him. 2 Inst. 562; Cro. Car. 236; Sir Wm. Jones, 94; 1 Rol. Abr. 111, 112; 2 Show. 50; 6 Mod. 169; 1 Saund. 230, n. a.

It seems to have been formerly thought that no action could be maintained where the acquittal arose from some technical objection, and no guilt was imputed by the indictment nor any imprisonment endured; but it is now settled that, in such case, the mere fact of the plaintiff's having been put to expense by the proceedings is a sufficient ground to entitle him to redress. 1 Ld. Raym. 374; Carth. 416; 2 Stra. 691; 1 Salk. 13; 4 T. R. 247; Gilb. Cas. L. & E. 185; 10 Mod. 148, 214. And an action lies for the malicious prosecution of a bad indictment for perjury. 5 B. & A. 634; 1 Dow. & Ry. 266. So an action lies for maliciously obtaining or executing a search warrant for smuggled goods, though none such are found. 1 T. R. 535, n.; 1 Dow. & Ry. 97; 2 Chit. Rep. 304. And a man may recover in an action for a malicious prosecution of his wife, of which he has paid the expenses. Rep. Temp. Hardw. 54; 2 Stra. 977.

But though actions for malicious prosecution are thus allowed, they are by no means encouraged by the courts. 1 Salk. 15. In order to support them, there must have been want of probable cause for the prosecution—malice express or implied—and an injury sustained by the plaintiff either in his person by imprisonment, his reputation by scandal, or his property expense. 2 Sel. N. P. 1056, 1057.

There must have been no *probable ground* of prosecution. 3 Dow's Rep. 160, 180, 181, 182, 187. It is a mixed proposition of law and fact whether there was probable cause, and whether the circumstances alleged to show it probable, are true, and existed as matter of fact: but whether or not, supposing them to be true, they amount to a probable cause is question of law. 1 T. R. 520, 534; Bul. N. P. 14; 4 Burr. 1974; 2 B. & C. 693; 4 Dow. & Ry. 107; 1 Carr. Rep. 138, 204; 1 Gow. C. N. P. 20. *Morris v. Corson*, 7 Cowen, 284; *M' Cormick v. Sessions*, 7 Cowen, 717; *Ulmer v. Leland*, 1 Greenl. 135.

*North Carolina*.—In an action for a malicious prosecution, the dismissal or a State's warrant by the magistrate, who tried it, is *prima facie* evidence of the want of probable cause, and throws upon the prosecutor the burthen of proving that there was probable cause. *Johnson v. Martin*, 2 Murphy, 248; *Secor v. Babcock*, 2 Johns. 203; see *Findley v. Buchanan*, 1 Blackf. (Ind.) 12.

*Massachusetts*.—A conviction of the plaintiff before a justice of the peace, having jurisdiction, is conclusive evidence of probable cause. *Whitney v. Peckham*, 15 Mass. 243. But see *Burt v. Place*, 4 Wend. 598. See further on this head, *Maddox v. Jackson*, 4 Munf. 462; *Cotton v. James*, 1 Barn. & Adol. 128; *Pierce v. Thompson*, 6 Pick. 193.

As to the question of probable cause—how far one of law, and how far one of fact, see *M' Cormick v. Sessions*, 7 Cow. 717; *Ulmer v. Leland*, 1 Greenl. 135; *Leggett v. Blount*, 2 Taylor, 123; *Munns v. Dupont*, 3 Wash. C. C. 31; *Colman v. Wolcott*, 1 Connecticut, 285; *Kelton v. Bevins*, Cook, 90; *Crabtree v. Horton*, 4 Munf. 59; *Maddox v. Jackson*, id. 462; 2 Stark. Ev. (5th Am. ed.) 493 and n. (K.)

It is not necessary that there should have been any legal grounds for the action; for it will suffice to excuse the prosecutor if it appear, from the circumstances of the case, that he was not actuated by improper motives, but by a sincere belief that the party accused was guilty, and an anxiety to bring him to justice. Cro. Jac. 193. In an action against a magistrate for a malicious conviction, it is not sufficient to show that the plaintiff was innocent of the offence of which he was convicted, but he must also show, from what passed before the magistrate, that there was a want of probable cause. 1 Marsh. 110; 5 Taunt. 580, S. C. But it is no answer to this action that the defendant was encouraged in what he did by the opinion of counsel, if the statement of facts was incorrect or the opinion ill founded. 5 Taunt. 277; 2 B. & C. 693; 4 Dow. & Ry. 107; 1 Carr. Rep. 204; see 4 Serg. & R. 23. Whether the opinion of the prosecuting officer in favor of the legality of the prosecution be evidence of probable cause, *Quara*. *Thompson v. Mussey*, 3 Greenl. 305.

A great restraint on this kind of action is, that it cannot be supported in evidence on the trial, without producing the record or a copy of the record of acquittal. 14 East, 392; Burr. 1971; 3 Bla. Com. 126. And in case of *felony* this can only be obtained by *special order*, (2 Taylor v. Cooper, 2 Const. Ct. 208. But where the bill has been thrown out by the grand jury, the party is entitled to a copy without the judge's order. Id.) upon motion made *in open court*, which will not be granted if there was the least foundation for preferring the indictment; for it would be a great discouragement to public justice, if prosecutors were liable to be sued whenever the defendant was acquitted. Kel. Pref. iii.; 1 Ld. Raym. 253; Carth. 421. If, however, the officer gave the copy without such authority, it will be available in evidence, though the officer will be punishable for his contempt. 14 East, 392; see also 5 M. & Ry. 118.

But this does not apply to indictments for *misdeemeanors*, which it is thought probably not so important to encourage; for the defendant, when set at liberty, is entitled, as a matter of course, to a copy of the record. 1 Bla. Rep. 285. See *Minns v. Burtz*, 2 Const. Ct. 308. And the order need not, at any time, be produced in order to introduce the record as evidence; and, therefore, where two persons were jointly indicted for felony, and a copy of the record was granted to one of them only, which was produced on a trial for malicious prose-



cution at the suit of the other, the plaintiff obtained a verdict which the court refused to set aside. 2 Stra. 1122.

When it becomes necessary, in order to support the action, that the plaintiff should be put in possession of the examinations before the justices, and also of the warrant on which he was apprehended, he may apply to the court on affidavit of demand and refusal, and obtain a rule calling on the magistrate and the constable respectively to show cause why they should not be inspected and copies taken, and the originals produced on the trial. On this, a rule will be made ordering the inspection, and commanding the respective parties to produce the originals in evidence on the trial. Barnes, 468, 469; 1 Stra. 126, 127; Tidd's Prac. 852, 8th ed.

In a late case in an action for a malicious prosecution for an assault before a magistrate, the magistrate proved that the depositions taken before him were reduced into writing, and that he delivered them at the court of Quarter Sessions to the clerk of the peace or his deputy; the clerk of the peace stated that a bill of indictment for the assault was preferred, and that the grand jury returned ignoramus, and that it was usual in such case to throw away or destroy the depositions, and that he had searched among his papers and could not find them: it was held, that parol evidence of their contents was admissible, and it was not necessary to call the deputy clerk of the peace to show that the original depositions were not in his possession, inasmuch as it was his duty, if he had received them, to have delivered them to his principal, and not being in his custody, it was to be presumed they were lost or destroyed. 2 B. & C. 494; 3 Dow. & Ry. 669.

Besides this necessity of obtaining a copy of the record of the acquittal, it has been holden, that if sufficient evidence were produced on the trial, on the behalf of the crown, to make the jury hesitate and consult together for a time what verdict they should deliver, no action can be supported. 3 Esp. Rep. 7, 8. And the defendant will be at liberty, after proving circumstances of suspicion against the plaintiff, to adduce evidence of his general bad character, in order to show that there was probable cause for suspecting him to be guilty. 2 Esp. Rep. 720; Phil. on Ev. 72. In an action for maliciously procuring plaintiff to be arrested on a charge of larceny, the defendant cannot give evidence to show that the plaintiff's character was suspicious, and that his house had been searched on previous occasions. 2 Stark. C. N. P. 69; and see Cro. Jac. 193; 3 Dow. & Ry. 160. The defendant may also give in evidence, what he as prosecutor swore on the trial of the indictment. *Scott v. Wilson*, Cooke, 315; *Moody v. Pender*, 2 Hayw. 29; see *Guarrant v. Tinder*, Gilmer, 36.

And it is said that no action can be maintained for the malicious prosecution of a criminal information, (*Heyward v. Outhbert*, 4 McCord, 354;) because the proceeding is never allowed without a previous application to the court founded upon affidavits, and an opportunity afforded to the party accused to show cause against it; and, therefore, after it has been allowed, it must be presumed that there was *prima facie* ground for prosecuting it, as there manifestly was for allowing it. 2 Woodes. 564; and see further as to the evidence in actions for malicious prosecutions, Stark. on Ev. Malicious Prosecutions.

Besides the want of probable cause, *malice* must also be shown, either express or apparent from the proceedings. See *Warner v. Bruen*, 4 Rogers' Rec. 92; *Kelton v. Bevins*, Cooke, 90; *Somner v. Will*, 4 Serg. & Rawle, 19, 23; *Kerr v. Workman*, Addis. 270; *Turner v. Walker*, 3 Gill & Johns. 377.

Whether a suit was brought maliciously, and for the purpose of vexing and oppressing the defendant, is a question for the jury under all the circumstances of the case. *Roy v. Law*, 1 Peters' Rep. 210. And, therefore, in an action for a malicious prosecution it will not be sufficient to show, in addition to the record of acquittal, that after the indictment was ready for trial, the prosecutor was called and did not appear, on which an immediate acquittal was directed without further proof of express malice, or at least of circumstances showing an entire want of all probable cause on which the proceedings rested. 9 East, 361. And it is said, that wherever the grand jury find the bill of indictment, express malice must be shown on the part of the individual indicting; though it will be otherwise if the facts necessarily lie within the knowledge of the original prosecutor, for then he must prove that he had reasonable grounds of suspicion, or the plaintiff will be entitled to recover. 1 Id. Raym.

381. Bul. N. P. 14. 9 East, 362, n. b. 2 Selw. N. P. 1050, n. 1. There seems also to be a material distinction between malicious prosecutions and malicious convictions; in the former, if it be shown that there was no probable cause whatever, malice must be inferred, because the prosecutor has sworn to the truth of a charge manifestly unfounded. But in actions for malicious convictions on penal statutes, the question of probable cause does not depend on the actual guilt or innocence of the party, but of the testimony given before the magistrate; and, therefore, to support the latter action, the depositions must be given in evidence. 1 Marsh. 220. And even where the indictment has been thrown out by the grand jury, if it were only for a trifling misdemeanor, some evidence however small, must be offered of a malevolent design. 1 Marsh. 12. 5 Taunt. 187. Sed Vide 4 B. & C. 24. It has also been laid down, that where a defendant has been acquitted on the trial, he need not, in the first instance, show express malice in the party by whom he was indicted, in order to support an action for a malicious prosecution; but where the indictment is quashed for informality, an express malice must, in the first instance, be shown by the plaintiff. Willes, 520.

In general, both malice and the want of probable cause, either express or implied, must appear, to entitle the plaintiff to recover. Bul. N. P. 14. 4 Burr. 1974. See *Kelton v. Beutins*, Cooke, 90; *Munns v. Dupont*, 3 Wash. C. C. R. 31; *Marshal v. Bussard*, Gilmer, 9; *Bell v. Graham*, 1 Nott & M'Cord, 278; *Lindsay v. Larned*, 17 Mass. R. 190; *Vanduzor v. Lindermand*, 10 Johns. R. 106.

It is certain that malice will not suffice if there were any apparent cause for the proceedings. Bul. N. P. 14. And though malignity may, in some cases, be fairly inferred from the want of grounds to support the proceedings, (*Bennet v. Black*, 1 Stewart, 39,) the latter can never be collected from the most positive proof of the former. 1 T. R. 545. So that, in every case the plaintiff must give evidence, however slight, that no grounds existed for the proceedings, before the defendant can be called upon to answer. 2 Selw. N. P. 1056, n. (2). The question whether he has succeeded in doing this, is partly of law and partly of fact; whether the circumstances alleged on either side are true or false, is a matter of fact to be left to the jury; whether if true, they prove a reasonable ground of prosecution, or the reverse, is an inference of law on which the court alone can decide. 1 T. R. 445. Bul. N. P. 14. 2 Sel. N. P. 1056, n. (1.) Id. 1061.

*New York*.—No action will lie against a person in this state for suborning a witness to swear falsely in a cause in another state, whereby a judgment was given against the defendant in that state contrary to the truth and justice of the case. *Smith v. Lewis*, 3 Johns. Rep. 157.

*Connecticut*.—A person may be liable for prosecuting a suit commenced by him maliciously, and without probable cause, while an infant. *Sterling v. Adams, et al* 3 Day, 411.

The *damage*, as we have just seen, must either be to the person, by imprisonment; to the reputation, by scandal; to the property, by expense. With respect to the imprisonment, any momentary detention seems sufficient. But the plaintiff cannot recover damages for an imprisonment after a jail delivery, for it was his own fault to lie in the prison after. Bro. Damages, pl. 115. Sayer, Damages, 87. As to the scandal, it seems that any charge which would be a libel if not preferred in the course of legal proceeding, would be sufficient; but an indictment for a mere trespass, as an assault, &c., would not. See 12 Mod. 210. Gilb. L. & E. 202. 2 B. & C. 494. 3 Dow. & Ry. 669. Injury to the property, by expense, is a sufficient ground for supporting the action. Gilb. L. & E. 185, 202. 1 T. R. 518. Carth. 421. 14 East, 302. 305.

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1. The first part of the document is a list of names and addresses of the members of the committee.







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